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)

RECORD OF PROCEEDINGS

Farrer & Co.,
66 Lincoln's Inn Fields,
LONDON.
Solicitors for the Appellant.

Coward Chance & Co.,
St. Swithin's House,
Walbrook,
London, E.C.4.
Solicitors for the Respondent.

In the Privy Council

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ON APPEAL from the High Court of Australia

Between

AUSTRALIAN CONSOLIDATED PRESS LIMITED - - - Appellant (Defendant)

and

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

TRANSCRIPT RECORD OF PROCEEDINGS

INDEX OF REFERENCE

PART I

PART II — EXHIBITS

PLAINTIFF'S EXHIBITS

DOCUMENTS NOT INCLUDED IN RECORD
IN THE SUPREME COURT OF NEW SOUTH WALES

No.	Description of Document	Date
	PLAINTIFF'S EXHIBITS	
1.	"C" Letter from Plaintiff to Editor of "Bulletin"	8th November, 1962
	"F" Extract from "Sunday Telegraph" (early edition)	10th February, 1963
	"G" "Sun-Herald" (early edition) (extract only produced)	10th February, 1963
	"H" (1) Letter from Defendant's Solicitor to Plaintiff's Solicitors	20th February, 1963
	(2) Letter from Plaintiff's Solicitors to Defendant's Solicitors	22nd February, 1963
	(3) Letter from Defendant's Solicitors to Plaintiff's Solicitors	25th February, 1963
	"J" Extract from Hansard Report of Proceedings in the House of Representatives	29th November, 1962
	"K" Extract from "Brisbane Telegraph"	30th November, 1962
	"L" Extract from "Sunday Mirror"	2nd December, 1962
	"M" Copy of original article published in Exhibit "B"	
2.	DEFENDANT'S EXHIBITS	
	"1" (A) Extract from "The Age"	16th July, 1962
	(B) Extract from "Sunday Mirror"	22nd July, 1962
	(C) Extract from "Daily Telegraph"	30th November, 1962
	(D) Extract from "Daily Telegraph"	8th February, 1963
	"2" (A) Extract from "Sun-Herald"	10th February, 1959
	(B) Extract from "Sydney Morning Herald"	21st February, 1960
	(C) Extract from "Sun"	29th February, 1960
	(D) Extract from "News Weekly"	22nd February, 1961
	(E) Extract from "Century"	12th January, 1962
	(F) Extract from "Daily Mirror"	8th May, 1962
	(G) Extract from "Sydney Morning Herald"	9th May, 1962
	(H) Extract from "Daily Mirror"	10th August, 1962
	(J) Extract from "Daily Mirror"	13th September, 1962
	(K) Extract from "Sun-Herald"	7th October, 1962
	(L) Extract from "Sydney Morning Herald"	17th October, 1962
	(M) Extract from "News Weekly"	17th October, 1962
	"3" (A) Extract from "Sydney Morning Herald"	21st March, 1962
	(B) Extract from "Daily Telegraph"	7th May, 1962
	(C) Extract from "Daily Telegraph"	17th May, 1962
	(D) Extract from "Sydney Morning Herald"	18th May, 1962
	(E) Extract from "Daily Telegraph"	18th May, 1962

No.	Description of Document	Date
	(F) Extract from "Sydney Morning Herald"	19th May, 1962
	(G) Extract from "Daily Telegraph"	7th August, 1962
	(H) Extract from "Tribune"	31st October, 1962
	(J) Extract from "Daily Telegraph"	10th October, 1962
	(K) Extract from "Sydney Morning Herald"	10th October, 1962
"4"	(A) Extract from "Sydney Morning Herald"	8th February, 1963
	(B) Extract from "Daily Telegraph"	9th February, 1963
	(C) Extract from "Sydney Morning Herald"	9th February, 1963
"5"	Extract from Hansard Report of Proceedings in the House of Representatives	5th April, 1960
"6"	Extract from Hansard Report of Proceedings in the House of Representatives	25th October, 1962
"7"	(A) Extract from "Sydney Morning Herald"	1st April, 1960
	(B) Extract from "Sydney Morning Herald"	6th April, 1960
	(C) Extract from "Sydney Mirror"	22nd May, 1960
	(D) Extract from "Sydney Morning Herald"	12th October, 1960
	(E) Extract from "Sydney Morning Herald"	13th October, 1960
	(F) Extract from "Daily Telegraph"	21st April, 1961
	(G) Extract from "Daily Telegraph"	1st May, 1961
	(H) Extract from "Daily Telegraph"	8th May, 1961
	(J) Extract from "Daily Telegraph"	26th May, 1961
	(K) Extract from "Sydney Morning Herald"	16th August, 1961
	(L) Extract from "Bulletin"	25th November, 1961
	(M) Extract from "Sunday Mirror"	3rd December, 1961
	(N) Extract from "Sydney Morning Herald"	13th January, 1962
	(O) Extract from "Daily Telegraph"	15th January, 1962
	(P) Extract from "Daily Telegraph"	12th February, 1962
	(Q) Extract from "Daily Telegraph"	30th March, 1962
	(R) Extract from "Bulletin"	12th May, 1962
	(S) Extract from "Bulletin"	19th May, 1962
	(T) Extract from "Daily Telegraph"	26th May, 1962
	(U) Extract from "Sydney Morning Herald"	4th June, 1962
	(V) Extract from "Daily Telegraph"	5th June, 1962
	(W) Extract from "Sydney Morning Herald"	6th July, 1962
	(X) Extract from "Sydney Morning Herald"	15th August, 1962
	(Y) Extract from "Daily Telegraph"	13th August, 1962
	(Z) Extract from "Daily Telegraph"	8th October, 1962
	(AA) Extract from "Bulletin"	13th October, 1962

In the Supreme Court of New South Wales.

No. 1
Issues for Trial.

9th August, 1963.

No. 1

Issues for Trial

WRIT Issued 14th February, 1963.

DECLARATION Dated 26th April, 1963.

SYDNEY TO WRIT: THOMAS UREN by Bruce William Ward his attorney sues AUSTRALIAN CONSOLIDATED PRESS LIMITED a company duly incorporated and liable to be sued in and by its said corporate name and style for that before and at the time of the grievances hereinafter alleged the defendant published a newspaper called the "Daily Telegraph" with a large and extensive circulation and in particular an issue of the "Daily Telegraph" dated the 8th December, 1961, WHEREUPON the defendant by itself its servants and agents falsely and maliciously published of and concerning the plaintiff in the aforesaid issue of the "Daily Telegraph" dated the 8th December, 1961, the words following, that is to say:— "Who is behind Mr. Calwell in the Federal House? A divided, warring rag-tag and bob-tail outfit ranging from Eddie Ward and Les Haylen through to Dan Curtin and Tom Uren (thereby meaning the plaintiff). This is a team (thereby meaning the plaintiff and others) which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country," the defendant meaning thereby that the plaintiff was a person unworthy of the confidence and support of the electors and unfit to be a member of parliament WHEREBY the plaintiff was held up to public hatred ridicule contempt and obloquy and was injured in his credit reputation and circumstances and was otherwise greatly damnified.

2. And the plaintiff also sues the defendant being such a company as aforesaid for that the defendant at all material times published a newspaper called "The Bulletin" with a large and extensive circulation and in particular an issue of "The Bulletin" dated the 3rd November, 1962, WHEREUPON the defendant by itself its servants and agents falsely and maliciously published of and concerning the plaintiff in the aforesaid issue of "The Bulletin" dated the 3rd November, 1962, the words following that is to say:— "Leftwinger Tom Uren (Labor N.S.W.) (thereby meaning the plaintiff) still stub-

In the Supreme Court of New South Wales.

No. 1
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(Continued)

9th August, 1963.

bornly adhered to the line that Moscow and Peking controlled Communist Parties in non-Communist countries assiduously peddle mainly through peace movements. He (thereby meaning the plaintiff) described suggestions for greater defence expenditure as "so much hysteria". But even Uren (thereby meaning the plaintiff) was susceptible to the prevailing climate". the defendant meaning thereby that the plaintiff was disloyal and recreant to the defence needs of Australia and was unworthy of the trust and support of the electors and unfit to be a member of the House of Representatives WHEREBY the plaintiff suffered the damage in the first count hereof mentioned.

3. And the plaintiff also sues the defendant being such a company as aforesaid for that at all material times the defendant published a newspaper called the "Sunday Telegraph" with a large and extensive circulation and in particular an issue bearing date the 10th February, 1963, and the plaintiff was a member of the Australian Labor Party and a Member of the House of Representatives in the Federal Parliament and the plaintiff had directed questions in the House of Representatives about the proposed United States radio base in Western Australia to the Prime Minister and the Defence Minister WHEREUPON the defendant by itself its servants and agents falsely and maliciously published of and concerning the plaintiff in the aforesaid issue of the "Sunday Telegraph" the words following that is to say:— "SPY USED LABOR MEN (thereby meaning the plaintiff and others) AS PAWNS?

From a Special Reporter Canberra, Sat. — Allegations are likely to be made in Federal Parliament that some Labor M.P.s (thereby meaning the plaintiff and others) were used as "pawns" by Russian spy Ivan Skripov to try to get defence secrets.

It will be claimed that Skripov persuaded the unsuspecting Labor men (thereby meaning the plaintiff and others) to ask questions in Parliament about defence establishments in Australia.

Labor M.P.s (thereby meaning the plaintiff and others) are said to have asked for information about

the new secret £40 million U.S. radio communications base at Learmonth, Western Australia.

The American Navy will use this base to help keep track of its Polaris-equipped nuclear submarines operating in the Indian and Pacific oceans. The Labor M.Ps' (thereby meaning the plaintiff's and others') questions were directed in the House of Representatives to Prime Minister Menzies and Defence Minister Townley" the defendant meaning thereby that the plaintiff was a "pawn" and a person lacking in a due sense of loyalty and responsibility and judgment and was capable of being used by the representative of a foreign power for an improper and disloyal purpose and was not a fit and proper person to be a member of parliament and was unworthy of the trust and support of the electors WHEREBY the plaintiff suffered the damage in the first count hereof mentioned.

4. And the plaintiff also sues the defendant being such a company as aforesaid for that at all material times the defendant published a newspaper called the "Sunday Telegraph" with a large and extensive circulation and in particular an issue bearing date the 10th February, 1963, and the plaintiff was a member of the Australian Labor Party and a Member of the House of Representtives in the Federal Parliament and the plaintiff had directed questions in the House of Representatives about the proposed United States radio base in Western Australia to the Prime Minister and the Defence Minister WHEREUPON the defendant by itself its servants and agents falsely and maliciously published of and concerning the plaintiff in the aforesaid issue of the "Sunday Telegraph" the words following that is to say:— "DID RUSSIAN SPY DUPE ALP MEN?" (thereby meaning the plaintiff and others).

From a Special Reporter. CANBERRA, Sat.— Allegations are likely to be made in Federal Parliament that some Labor M.P's (thereby meaning the plaintiff and others) were used as "pawns" by Russian spy Ivan Skripov to try to get defence secrets.

It will be claimed that Skripov persuaded the unsuspecting Labor men (thereby meaning the plaintiff and others) to ask questions in Parliament about defence establishments in Australia.

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(Continued)

9th August, 1963.

Labor M.Ps. (thereby meaning the plaintiff and others) are said to have asked for information about the new secret £40 million U.S. radio communications base at Learmonth, Western Australia.

The American Navy will use this base to help keep track of its Polaris-equipped nuclear submarines operating in the Indian and Pacific oceans.

The Labor M.Ps' (Thereby meaning the plaintiff's and others') questions were directed in the House of Representatives to Prime Minister Menzies and Defence Minister Townley." The defendant meaning thereby that the plaintiff was a dupe and a "pawn" and a person lacking in a due sense of loyalty and responsibility and judgment and was capable of being used by the representative of a foreign power for an improper and disloyal purpose and was not a fit and proper person to be a member of parliament and was unworthy of the trust and support of the electors WHEREBY the plaintiff suffered the damage in the first count hereof mentioned.

PLEA Dated 22nd July, 1963.

The defendant by FREDERICK WILLIAM MILLAR its attorney says that it is not guilty.

2. And for a second plea the defendant says that the matter complained of was 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 matter complained of consisted of comment, the comment was fair.

3. And for a third plea the defendant says that the matter complained of was published for the purpose of the public discussion of subjects of public interest, the public discusson of which was for the public benefit, and that insofar as the matter complained of consisted of comment, the comment was fair.

4. And for a fourth plea as to so much of the first count of the amended declaration as alleges that the matter complained of therein meant that the plaintiff was a person unworthy of the confidence and support of the electors and unfit to be a member of parliament denies that the matter complained of bears or is capable of bearing the said meanings or any of them as their natural and ordinary meaning.

5. And for a fifth plea the defendant as to so much of the second count of the amended declaration as alleges that the matter complained of therein meant that the plaintiff was disloyal and recreant to the defence needs of Australia and was unworthy of the trust and support of the electors and unfit to be a member of the House of Representatives

denies that the matter complained of bears or is capable of bearing the said meanings or any of them as their natural and ordinary meaning.

6. And for a sixth plea the defendant as to so much of the third and fourth counts of the amended declaration as alleges that at all material times the plaintiff was a member of the Australian Labor Party and a Member of the House of Representatives in the Federal Parliament and the plaintiff had directed questions in the House of Representatives about the proposed United States radio base in Western Australia to the Prime Minister and the Defence Minister denies the said allegations and each and every one of them.

7. And for a seventh plea the defendant as to so much of the third count of the amended declaration as alleges that the matter complained of therein meant that the plaintiff was a "pawn" and a person lacking in a due sense of loyalty and responsibility and judgment and was capable of beng used by the representative of a foreign power for an improper and disloyal purpose and was not a fit and proper person to be a member of parliament and was unworthy of the trust and support of the electors denies that the matter complained of bears or is capable of bearing the said meanings or any of them as their natural and ordinary meaning.

8. And for an eighth plea the defendant as to so much of the fourth count of the amended declaration as alleges that the matter complained of therein meant that the plaintiff was a dupe and a "pawn" and a person lacking in a due sense of loyalty and responsibility and judgment and was capable of being used by the representative of a foreign power for an improper and disloyal purpose and was not a fit and proper person to be a member of parliament and was unworthy of the trust and support of the electors denies that the matter complained of bears or is capable of bearing the said meanings or any of them as their natural and ordinary meaning.

REPLICATION dated 6th August, 1963. The plaintiff joins issue on the Pleas of the defendant.

DATED this 9th day of August, 1963.

Solicitor for the Plaintiff,
2 Ash Street,
SYDNEY.

In the Supreme Court of New South Wales.

No. 2. Amended Replication.

25th Feb., 1964.

No. 2

Amended Replication

The twenty fifth day of February in the year of Our Lord one thousand nine hundred and sixty-four.

1. The Plaintiff joins issue on the Pleas of the Defendant.

2. And for a second replication the Plaintiff says that the matter complained of was not published in good faith.

Attorney for the Plaintiff,
2 Ash Street,
SYDNEY.

No. 3

In the Supreme Court of New South Wales.

No. 3.
Rejoinder to Amended Replication.

3rd March, 1964.

Rejoinder to Amended Replication

Tuesday the third day of March in the year of Our Lord One thousand nine hundred and sixty four

AUSTRALIAN CONSOLIDATED PRESS LIMITED ats. U R E N

The defendant by FREDERICK WILLIAM MILLAR its attorney joins issue upon the Plaintiff's second amended Replication.

(Sgd.) F. W. Millar
Attorney for the Defendant

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In the Supreme Court of New South Wales.

No. 4. Particulars of Declaration and Pleas.

27th Feb., 1964.

No. 4

Particulars of Declaration and Pleas

FIRST COUNT.

DECLARATION.

Particulars sought —

Will you please inform us whether such innuendoes are pleaded as innuendoes in the strict sense — that is, to attribute to the words a secondary meaning understood by persons with knowledge of some extrinsic facts or circumstances not stated in the matter complained of in each count in which the innuendoes are laid.

If the innuendoes are pleaded for this purpose, and not merely as the pleader's interpretation of the natural meaning of the words, Counsel has advised us that our client is entitled to the following particulars in relation to each of the four counts —

(1) Upon what extrinsic facts or circumstances does the plaintiff rely as giving the words complained of the secondary meanings alleged?

(2) To what person or persons having knowledge of any such extrinsic facts or circumstances are such words alleged to have been published?

Particulars supplied —

In each count of the amended Declaration we rely on the natural meaning of the words complained of to support the innuendo.

PLEAS.

Subjects of Public Interest —

(1) The general election for a Federal Government held in December, 1961.

(2) The worth of the opposing political parties seeking election as the Federal Government.

(2A) The control of the Federal Parliamentary Labour Party by the A.L.P. Federal Conference and Federal Executive.

(3) The merits of their election promises.

(4) The candidates of these opposing political parties.

(5) The merits and de-merits of those candidates.

(6) Their capacity to govern.

Facts relied upon to show that such discussion was for the Public Benefit.

(1) A number of political parties sought election as the Federal Government.

(2) Opposing claims were made by each party as to its worth as a prospective Federal Government, and as to the worth of its candidates to be members of the Federal Goverment.

(3) The nature and scope of the constitution, rules and organisation of the Australian Labour Party.

Further Particulars Requested —

To what particular rules are you referring?

Particulars supplied —

We refer to the Federal Constitution and Rules of the Australian Labour Party.

SECOND COUNT.

DECLARATION.

Particulars sought —

Will you please inform us whether such innuendoes are pleaded as innuendoes in the strict sense — that is, to attribute to the words a secondary meaning understood by persons with knowledge of some extrinsic facts or circumstances not stated in the matter complained of in each count in which the innuendoes are laid.

If the innuendoes are pleaded for this purpose, and not merely as the pleader's interpretation of the natural meaning of the words, Counsel has advised us that our client is entitled to the following particulars in relation to each of the four counts —

(1) Upon what extrinsic facts or circumstances does the plaintiff rely as giving the words complained of the secondary meanings alleged?

(2) To what person or persons having knowledge of any such extrinsic facts or circumstances are such words alleged to have been published?

Particulars supplied —

In each count of the amended Declaration we rely on the natural meaning of the words complained of to support the innuendo.

PLEAS.

Subjects of Public Interest —

(1) The defence of the Commonwealth.
(2) The defence estimates presented to the Federal Parliament in or about October, 1962.
(3) The world-wide conflict between Communism and non-Communism.
(4) The blockade of Cuba by the United States of America.
(5) The attack on India by Chinese forces.
(6) The emergence of Indonesia as a military power.
(7) The attitudes of the Federal Opposition to the subjects abovementioned.
(8) The apparent split within the Federal Opposition as to such attitudes.
(9) The attitudes of the individual members of the Federal Opposition to such subjects.

Facts relied upon to show that such discussion was for the public benefit.

(1) A conflict existed between Communist-governed countries and countries not governed by Communists.

In the Supreme Court of New South Wales.

(2) The Federal Government had power to make laws with respect to the defence of the Commonwealth.

(3) Cuba had recently been blockaded by American forces to

In the Supreme Court of New South Wales.

No. 4. Particulars of Declaration and Pleas. *(Continued)*

27th Feb., 1964.

(iv) The "Age" newspaper published on the 11th February, 1963.

(v) Speeches by Mr. D. Erwin M.H.R. and by Mr. W. C. Wentworth M.H.R. in the House of Representatives during 1962.

(6) Alleged espionage activities of members of the political and diplomatic representatives of the U.S.S.R. in Australia had been discovered.

(7) The Federal Government had declared that one Ivan Skripov, First Secretary of the U.S.S.R. Embassy in Australia, was persona non grata because of alleged espionage activities, and had ordered him to leave Australia.

(8) The views of different members of the Federal Opposition on the matters abovementioned were divergent one from the other.

(9) It was the aim of the Opposition to bring down the Government so that its members could gain office.

Filed 27th February, 1964

(6) The political and diplomatic relations between the Commonwealth and the Union of Soviet Socialist Republics.

(7) The alleged espionage activities of members of the political and diplomatic representatives of the U.S.S.R. in Australia.

(7A) The possibility of questions in the Federal Parliament being inspired by such representatives of the U.S.S.R.

(8) The declaration by the Federal Government that one Ivan Skripov, First Secretary of the U.S.S.R. Embassy in Australia, was persona non grata because of alleged espionage activities and his subsequent expulsion from Australia.

(9) The attitudes of the Federal Opposition to the subjects abovementioned.

(10) The apparent split within the Federal Opposition as to such attitudes.

(11) The attitudes of the individual members of the Federal Opposition to such subjects.

Facts relied upon to show that such discussion was for the public benefit.

(1) A conflict existed between Communist-governed countries and countries not governed by Communists.

(2) The Federal Government had power to make laws with respect to external affairs and with respect to the defence of the Commonwealth.

(3) Political and diplomatic relations existed between the Commonwealth and the United States of America.

(4) The U.S.A. were negotiating with the Federal Government for permission to establish a radio communications base in Western Australia.

(5) Political and diplomatic relations existed between the Commonwealth and Union of Soviet Socialist Republics.

(5A) Allegations had been made that questions in the Federal Parliament could have been inspired by such representatives of the U.S.S.R.

Further Particulars Requested —

By whom, to whom, when and where were the allegations referred to in (5A) made?

Particulars Supplied —

(i) The "Age" newspaper published on the 16th July, 1962.

(ii) The "Sunday Mirror" newspaper published on the 22nd July, 1962.

(iii) The "Daily Telegraph" newspaper published on the 30th November, 1962.

In the Supreme Court of New South Wales.

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No. 4.
Particulars of Declaration and Pleas.
(Continued)

—

27th Feb., 1964.

(iv) The "Age" newspaper published on the 11th February, 1963.

(v) Speeches by Mr. D. Erwin M.H.R. and by Mr. W. C. Wentworth M.H.R. in the House of Representatives during 1962.

(6) Alleged espionage activities of members of the political and diplomatic representatives of the U.S.S.R. in Australia had been discovered.

(7) The Federal Government had declared that one Ivan Skripov, First Secretary of the U.S.S.R. Embassy in Australia, was persona non grata because of alleged espionage activities, and had ordered him to leave Australia.

(8) The views of different members of the Federal Opposition on the matters abovementioned were divergent one from the other.

(9) It was the aim of the Opposition to bring down the Government so that its members could gain office.

Filed 27th February, 1964

In the Supreme Court of New South Wales.

No. 5.
Particulars of Amended Replication.

25th Feb., 1964.

No. 5

Particulars of Amended Replication

LACK OF GOOD FAITH

ALL COUNTS

1. The manner and extent of the publication exceeded the occasion.
2. The defamatory matter was irrelevant to the occasion.
3. The allegations were false either to the knowledge of the defendant or were made recklessly without regard to their truth or falsity.
4. Such of the matter deemed to be comment was unfair.
5. Defendant did not believe the matter to be true.
6. The publication was calculated to injure the plaintiff's reputation and thereby the party of which he was a member.
7. The matters raised on the opening address and particularised on pp. 24-25 of the transcript.
8. Failure to correct or apologise.
9. Failure to check the matter published with the plaintiff himself.
10. Such matters as may arise during the trial evidencing ill-will.

ADDITIONAL (2ND COUNT)

1. Ill-will evidenced by publication of the matter set out in the 1st count.
2. Failure to correct, apologise or publish reply.
3. Admission that the matter as published differed from that submitted by the writer (Alan Reid).
4. Failure to check the matter published with Hansard.
5. Knowledge of defendant's representatives at Parliament that published matter did not accurately set out plaintiff's speech.
6. Publication of matter known to be false.

ADDITIONAL (3RD & 4TH COUNTS)

1. Ill-will evidenced by publication of the matter set out in the 1st and 2nd counts.
2. Persistence in denying that defamatory matter referred to plaintiff.
3. Defamatory matter published recklessly without proper inquiry as to its truth.
4. It is open to the jury to infer the defamatory matter was taken from another newspaper, the "Sun-Herald."

DATED this 25th day of February, 1964.

In the Supreme Court of New South Wales.

No. 6.
Request for Further and Better Particulars of Amended Replication.

28th Feb., 1964.

No. 6

Request for Further and Better Particulars of Amended Replication

ALL COUNTS

1. We assume that the plaintiff's allegation here is that the manner and extent of the publication of each of the matters complained of by the plaintiff exceeded what is reasonably sufficient for the occasion of qualified protection claimed by the defendant.

If our assumption is correct, please specify in relation to each of the matters complained of in what way it is alleged by the plaintiff that the publication thereof exceeds what is reasonably sufficient for the occasion of qualified protection claimed by the defendant in its second plea, as to

(a) the manner, and
(b) the extent, of that publication.

2. We assume that the plaintiff's allegation here is that each of the matters complained of was irrelevant to the matters the existence of which might excuse the publication in good faith of that matter.

If our assumption is correct, please specify

(a) as to which of
  (i) the seven subjects of public interest of which particulars have already been supplied and filed in Court by the defendant in relation to the first count, and
  (ii) the public discussion of each of those subjects is alleged by the plaintiff that the matter complained of in the first count is irrelevant;
(b) as to which of
  (i) the nine subjects of public interest of which particulars have already been supplied and filed in Court by the defendant in relation to the second count, and
  (ii) the public discussion of each of those subjects is alleged by the plaintiff that the matter complained of in the second count is irrelevant; and
(c) as to which of
  (i) the twelve subjects of public interest of which particulars have already been supplied and filed in Court by the defendant in relation to the third and fourth counts, and
  (ii) the public discussion of each of those subjects is alleged by the plaintiff that the matters complained of in each of the third and fourth counts is irrelevant.

3. (i) Please specify in relation to each of the matters complained of by the plaintiff which allegation or allegations is or are alleged by the plaintiff

(a) to be false to the knowledge of the defendant,

(b) To have been made recklessly by the defendant without regard to its or their truth or falsity.

(ii) Upon what facts and circumstances does the plaintiff rely to support his allegation that the defendant

(a) had knowledge of such falsity,

(b) made such allegation or allegations recklessly without regard to its or their truth or falsity.

4. We note that his Honour Mr. Justice Collins ordered that this particular be struck out. (See transcript p. 57).

5. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify

(a) each allegation in each of the matters complained of by the plaintiff of which the defendant is alleged not to believe in the truth, and

(b) the facts and circumstances upon which the plaintiff relies to support his allegation.

6. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify whether, by the use of the word "calculated" he intends to convey the sense of

(a) by construction, or

(b) by intention.

If (b), upon what facts and circumstances does the plaintiff rely to support his allegation that the defendant intended to injure the plaintiff's reputation?

7. We note your advice given on Wednesday last and confirmed by the plaintiff's Counsel to his Honour that the reference to "pages 24-25 of the transcript" should read "pages 24-31 of the transcript."

Please specify whether the conjunctive "and" has been used in order to show that the matters which were raised in the plaintiff's opening address on this issue, and upon which he relies are

(i) limited to, or

(ii) merely inclusive of

the matters referred to on pages 24-31 of the transcript.

(a) If (i), please specify the facts and circumstances upon which the plaintiff relies to support his allegations that

(i) the defendant deliberately attempted to blacken the plaintiff, in relation to the publication of the matters complained of in

(A) the first count,

(B) the second count, and

(C) the third and fourth counts;

(ii) the matter complained of in the first count indicated

In the Supreme Court of New South Wales.

No. 6.
Request for Further and Better Particulars of Amended Replication.
(Continued)

28th Feb., 1964.

that the defendant had an attitude of ill will or improper motive towards the plaintiff;

(iii) the defendant tried to destroy
(A) the plaintiff, and
(B) thereby what the plaintiff stands for;

(iv) that the defendant was "out after" the plaintiff;

(v) the defendant wanted to destroy the plaintiff by character assassination;

(vi) the defendant made "very wicked suggestions" of the plaintiff;

(vii) the defendant sought to destroy and undermine the reputation of "Labor" men; and

(viii) the defendant blackened and destroyed the plaintiff to prevent his objective of prevailing and winning the fight for the things he wants to achieve.

(b) If (ii), please supply the further particulars requested above, and reduce to a similar form the matters in the plaintiff's opening address upon which he relies on this issue in addition to those referred to on pages 24-31 of the transcript.

8. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify in relation to the matter complained of by him in each count

(a) the date on which any application was made by or on behalf of the plaintiff to the defendant for the publication of any correction or apology,

(b) the person on behalf of the defendant to whom it was made,

(c) the person by whom it was made,

(d) the form in which the application was made, and

(e) the terms of the correction or apology sought.

9 and 10. The defendant does not concede these particulars are relevant to the issue of lack of good faith.

ADDITIONAL (SECOND COUNT)

1. Please specify the facts and circumstances upon which the plaintiff relies to support his allegation that the publication by the defendant of the matter complained of in the first count is evidence of ill-will towards the plaintiff in relation to the publication by it of the matter complained of in the second count.

2. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify in relation to the matter complained of by him in this count

(a) the date on which any application was made by or on behalf of the plaintiff to the defendant for the publication of any correction, apology or reply,

(b) the person on behalf of the defendant to whom it was made,

(c) the person by whom it was made,

(d) the form in which the application was made, and

(e) the terms of the correction, apology or reply sought.

3. We note that his Honour Mr. Justice Collins ordered that this particular be struck out (see p. 57 of transcript).

4. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify the references in Hansard (giving Volume and Page numbers) with which it is alleged by the plaintiff the defendant should have checked the matter complained of in the second count.

5. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify

(a) the name of the representative of the defendant to whom this knowledge is imputed;

(b) the facts and circumstances upon which the plaintiff relies to support his allegation that such representative had that knowledge;

(c) the speech of the plaintiff to which reference is made; and

(d) the inaccuracies contained in the matter complained of alleged to set out such speech.

6. (i) Please specify in relation to the matter complained of in this count which allegation or allegations is or are alleged by the plaintiff to be false to the knowledge of the defendant.

(ii) Upon what facts and circumstances does the plaintiff rely to support his allegation that the defendant had knowledge of such falsity?

ADDITIONAL (THIRD AND FOURTH COUNTS)

1. Please specify the facts and circumstances upon which the plaintiff relies to support his allegation that the publication by the defendant of the matters complained of in the first and second counts is evidence of ill will towards the plaintiff in relation to the alleged publication by it of the matter complained of in each of the third and fourth counts.

2. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify

(a) the dates on which the plaintiff alleges that the defendant has made such denials,

(b) the person making such denials on behalf of the defendant, and

(c) the terms of such denials.

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—

No. 6.
Request for Further and Better Particulars of Amended Replication.
(Continued)

—

28th Feb., 1964.

3. Without conceding the relevance of this particular to the issue of lack of good faith, the defendant requires the plaintiff to specify

(a) which allegation or allegations is or are alleged by the plaintiff to have been published by the defendant without proper inquiry as to its or their truth, and

(b) the facts and circumstances upon which the plaintiff relies to support his allegation that the defendant made such allegation or allegations without proper inquiry as to its or their truth.

4. Upon what facts and circumstances does the plaintiff rely to support any inference that the matter complained of by the plaintiff in these counts was taken from another newspaper, the "Sun-Herald"? 10

DATED the twenty-eighth day of February, 1964.

F. W. Millar

Solicitor for the Defendant

In the Supreme Court of New South Wales.

No. 7.
Further and Better Particulars of Amended Replication.

2nd March, 1964.

No. 7

Further and Better Particulars of Amended Replication

LACK OF GOOD FAITH

7. The matters summarised on pp. 24-31 of the transcript.

8. 1st Count: No specific application was made.

2nd Count: (a) 7th or 8th November, 1962
(b) Mr. Alan Reid.
(c) Plaintiff
(d) Transcript p. 43.
(e) Exhibit "C".

3rd Count: (a) 18th February, 1963.
(b) Mr. Briggs (Defendant's Solicitor).
(c) Mr. Ward (Plaintiff's Solicitor).
(d) and (e) No particular form or terms demanded.

2nd Count: 4. Speech made by Plaintiff on the Defence Estimates, 25th October, 1962.

DATED this 2nd day of March, 1964.

In the Supreme Court of New South Wales.

—

No. 8.
Summing up of His Honour Mr. Justice Collins.

—

10th March, 1964.

No. 8

Summing Up of His Honour Mr. Justice Collins

HIS HONOUR: Gentlemen of the jury, there was passed in this State in the year 1958 an Act of Parliament called the Defamation Act. This Act has constantly been referred to in the course of this case and you will find me constantly referring to it in the course of this summing up.

That Act governs the law of defamation in this State and its provisions apply to the trial of this action. That Act provides the unlawful publication of defamatory matter is an actionable wrong. The plaintiff in this case, Mr. Thomas Uren, who is a Member of the House of Representatives in the Federal Parliament and who has been a Member since 1958, brings this action against the defendant, Australian Consolidated Press Limited, claiming that he has had inflicted upon him by the defendant the actionable wrong known as defamation.

When a plaintiff seeks redress from a defendant for a wrong that he claims the defendant has inflicted upon him he commences his action by issuing a writ. That writ contains very little information and need not particularise the cause of action. The defendant then files a document known as an appearance, meaning he intends to defend the matter, that he does not intend the matter to go by default. The next step is for the plaintiff to file a document known as a declaration and you have heard that document referred to throughout this case. It sets out in precise language the claim that the plaintiff makes. If he has more than one cause of action he sets out those separate causes in what might be called separate paragraphs and they are technically known as counts. The plaintiff in this case says that he was the victim of an actionable wrong inflicted on him by the defendant in respect of four publications. The first is an article in the Daily Telegraph of 8th December 1961. In his first count he sets out his cause of action based upon that article and as you have to consider this matter count by count it is to the article of 8th December 1961 that the first count relates.

He claims also that he was defamed in an article in the Bulletin of the 3rd November 1962 and that is the basis of the second count. He claims, further, that he was defamed in articles in successive editions of the Sunday Telegraph of 10th February, 1963, and the third and fourth counts of the declaration relate to those articles.

I am going to suggest to you, gentlemen, that you treat, as you found learned counsel treated and I will treat, the third and fourth counts together. Sometimes repetition of what is said to be a libel is a very important factor. But is this a case of repetition? How many people in the community of a Sunday morning, unless some earth-shaking event has taken place, buy two editions of the Sunday

Telegraph? So I suggest to you that you will give separate consideration to the first count, separate consideration to the second count because the matters are not closely related and separate consideration to the third and fourth counts together.

Before examining the issues in this case I think it important that I define what our respective functions are. I am the judge of the law. All legal questions that arise in the course of this case have to be decided by me. It is also my function to instruct you, as I will proceed to do, on what legal principles apply in a case such as this and you will accept the principles as I give them to you. In other words, you are bound by my directions on matters of law. You will accept the principles as I give them to you and you will apply them to the facts as you find them.

You, gentlemen, and you alone are the judges of the facts of the case. All questions of fact are to be decided by you. That applies in any action in this Court. The Jury Act specifically provides all issues of fact in the Supreme Court shall be decided by a jury. In an action such as this it has been considered, you may say traditionally, that questions of fact in a defamation action are peculiarly fit to be decided by a jury. In England trial by jury in many civil actions is virtually extinct, but in England there is still trial by jury in defamation actions. The reason perhaps is this: juries live in the community, they know the community, they know the world in which we live probably more intimately than the members of the somewhat cloistered profession of the law. They have had experience of life, they have an understanding and a knowledge of human nature and human behaviour. They know the standards that apply in the community and they have also a fund of common sense. All those attributes you are urged to bring to your assistance in arriving at the correct judgment in this case and those attributes are peculiarly called for in an action such as defamation. So you have to decide all the disputed questions of fact.

There are facts in this case in which the dispute is very marked. On certain aspects of the case completely contradictory versions of the facts have been given to you. It is for you to resolve those disputes. Sometimes the dispute is not on facts which are in conflict, the dispute is rather to the interpretation of undisputed facts. I will give you an illustration immediately. In connection with the Bulletin article you will have to take up in the one hand, as it were, as part of the material which you consider, the speech that the plaintiff made in the House just before the publication of that article and then you will have to take up that article itself in the Bulletin and compare them. It is claimed by Mr. Evatt for the plaintiff that that article is a distortion of the theme of Mr. Uren's speech. On the other hand, Mr. Larkins says that that article, which did not purport to be a report of the

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plaintiff's speech but to set out its theme, is a reasonably accurate summation or distillation of the essence of the plaintiff's speech. Now, there is a case where your judgment is on a matter of interpretation and so facts that are in dispute, the inference properly to be drawn from facts, the interpretation to be given on questions of fact all come within your province. You and you alone are the judges of the facts.

I am entitled to express my opinion on any question of fact that has to be decided by you. I have no intention of expressing any views on what I may call the ultimate question of fact in this case, and that is who is entitled to a verdict. Nor have I any intention of expressing my view on any question of fact which depends on credibility. As you know, there are some questions of credibility as between witnesses involved in this case It may be that I will express a view on subsidiary questions of fact but my only motive for doing so will be for your assistance and perhaps I might add for the sake of brevity. However, when I do you must always keep firmly in mind that it is your jurisdiction to try the facts of a case, it is for you to come to a judgment on every question of fact and if you do not agree with anything I say on any question of fact you are duty-bound to ignore what I say. The parties are entitled to your judgment as a matter of law; they are entitled to your judgment on the facts of the case.

I hope that you will not read into anything I say any view of mine on the ultimate result of this case, nor will you read into anything I say that I chose as between one witness against the other. I have no intention of doing that and if you read such a meaning into anything I say I can assure you you will be mistaken.

The distinction in functions between you and me can best be illustrated by reference to evidence. It is for me to rule whether evidence tendered by one party or the other as material for you to consider is, as a matter of law, admissible in evidence. Whether evidence is admissible or not is a pure question of law. As you know, I have been called on many times in this case to rule on the admissibility of evidence. If I rule that evidence tendered which has been objected to is admissible my contact with it ceases. It then becomes a matter for your consideration. What evidence is to be accepted, what evidence is to be rejected, what weight is to be given to the evidence, what importance it bears in the case are all questions of fact for you to decide. I realise I have been a little emphatic in those directions but they are of paramount importance and I hope I have not used language that can be misunderstood.

Another matter deals with the onus of proof in a civil action. On certain matters in this case the onus of proof, or the burden of proof as the Act describes it, falls on one party; on certain other matters it falls on the other party. On whatever party it lies that party does not have to produce positive proof or proof beyond a reasonable doubt. The

party carrying the onus will discharge it if you are satisfied on the evidence that you accept that what is asserted is true on a balance of probabilities. That is to say, that it is more probably true than not.

In the course of this summing-up I may use various expressions, I may say you are to be satisfied or it is for one party to establish a fact or an issue, or it is for a party to prove some matter. Whenever I use any of those phrases or words you will understand that the meaning to be given to those words is the meaning I have just directed you, establish on a balance of probabilities, proof on a balance of probabilities, satisfy you that the matter being debated is more probably true than not. Well, those are preliminary observations and I will now get somewhat closer perhaps to the issues in the case.

The plaintiff claims he has been the victim of an actionable wrong and that the wrongdoer is the defendant. He says that that wrong was the unlawful publication of defamatory matter. I will take the precaution of telling you, gentlemen, that publication of defamatory matter is communication of that matter by the defendant to a person other than the person defamed. It is claimed that the defamatory matter was continued in newspaper articles, the newspaper having a wide circulation, or published in a magazine, which we all know, the Bulletin, and there is no doubt, of course, if the matter was defamatory then persons other than the plaintiff would read it. It is not a disputed fact that the defendant is what is called the publisher of those periodicals.

The next thing is was the matter published defamatory? I will now read you the definition of what is defamatory and defamatory matter from the Defamation Act: "Any imputation concerning any person . . . by which the reputation of that person is likely to be injured . . . or by which other persons are likely to be induced to shun or avoid or ridicule or despise him, is called defamatory, and the matter of the imputation is called defamatory matter". Reputation, of course, is not character. I am certainly not seeking to lay down any precise definition but character I suppose concerns a person's inherent qualities. By reputation is meant the esteem in which a person is held, the goodwill entertained towards him or the confidence reposed in him by other persons and it is at the very forefront of this case that the plaintiff says that each of these matters that you have to consider were defamatory of him because their publication was likely to injure his reputation. That is at the very forefront of the case.

Whether matter is or is not defamatory is a question of fact. Whether a matter alleged to be defamatory is or is not capable of bearing defamatory meaning is a question of law. Let me tell you, gentlemen, in this very case the Appeal Court of this State, the Full Court, has ruled in relation to the first and second counts that the matters are capable of defamatory meaning, with which ruling may I

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say I respectfully agree. It is not suggested that the matters referred to in the third and fourth count are not capable of a defamatory meaning. But it is for you to examine each of these matters and say whether in fact each is defamatory of the plaintiff, that is, that the reputation of the plaintiff is likely to be injured by their publication.

(Luncheon adjournment.)

AT 2.00 P.M.

Gentlemen, I have practically finished dealing with the question of what is or what is not defamatory. The standard to be applied always is what would the words mean to the ordinary reasonable man who peruses them; what would the ordinary intelligent person, a person not trained in the austere techniques or niceties of legal interpretation, understand these words to mean.

You will remember the definition I read to you, that the imputation must be concerned with the person who claims to be defamed. That is to say, the plaintiff must identify himself with the person or persons being defamed. No question arises in the first two counts because Mr. Uren is mentioned by name in those first two articles. But in the third count a question arises whether or not he would be understood by an ordinary reasonable man who knows the facts and knows Mr. Uren as being the person who is referred to in the article. Well, gentlemen, it is a matter of question of fact for you. Mr. Uren says that if you take up that article his identity is readily ascertainable because the article refers to Labor M.P.'s, and he is and was at the relevant time a Labor M.P. It is said in the article that Skripov persuaded unsuspecting Labor M.P.'s to ask questions in Parliament about the defence establishment in Australia, and a further clue to the identity can be ascertained from the statement "The Labor M.P.'s questions were directed in the House of Representatives to Prime Minister Menzies and Defence Minister Townley". It is for you to be satisfied by the plaintiff on the evidence that he was a person referred to in that article. He claims he is the only one that all the clues to identity actually fit. He must, therefore, identify himself as the person defamed and the test is whether a reasonable person who knew the plaintiff and knew the facts would understand that the matter complained of referred to Mr. Uren.

You have also heard the evidence of Mr. Ferguson. Mr. Ferguson gave evidence after the plaintiff left the box and told you he had known Mr. Uren for years, that he has associated with Mr. Uren and that he knew that Mr. Uren had asked questions about this Western Australian installation of the Prime Minister and Mr. Townley and that he took those words and understood those words to refer to the plaintiff. As I say, it is a question of fact for you. I do point out that Mr. Ferguson was not cross-examined.

If you are satisfied in relation to each of these matters that the words were defamatory in the way I have indicated and defamatory of the plaintiff then the plaintiff is, prima facie, entitled to a verdict. He has discharged the onus of proof that lies on him of satisfying you that he was the person referred to and that the matter was defamatory of him.

You then pass to a defence that has been raised in this case to all the articles. After the declaration the defendant files a document which is referred to as the Pleas and there he sets out his matters of defence. They may be purely defensive; he may be, by a plea, merely putting the plaintiff to the proof of the matters that he is required to prove. He also may set up a substantive or positive defence and in this case that is what the defendant has done. He has pleaded: "And for a second plea the defendant says that the matter complained of was 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 matter complained of consisted of comment, the comment was fair".

That, gentlemen, is a defence that was unknown to the law before 1958 and it is a statutory defence introduced into the law by the Defamation Act of that year and it is contained in a section which is headed "Qualified Protection". That section provides "It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith . . . (h) in the course of the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair". That section must be understood in the light of an earlier section which provides "It is unlawful to publish defamatory matter unless the publication is protected, or justified, or excused by law".

So the defendant takes this stand: the defendant, through its learned Counsel, Mr. Larkins, says that even if you find that the matters published were defamatory of the plaintiff there was a lawful excuse for the publication, and the defendant raises those matters that I read to you in his plea. I think I should read the section in its context, this is s. 17(h) of the Defamation Act, and it provides: "It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith in the course of the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair".

The law is if the defendant satisfies you of the matters alleged in its plea good faith is presumed, and in order to attack the validity

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of the plea it is for the plaintiff to show absence of good faith. Now, I will enlarge on that in a moment, I just want to get the matters into perspective. So it is, in each of these cases — by each of these cases I mean the separate cases contained in the counts — if the defendant satisfies you that they were published in the course of discussion of some matter of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair, he succeeds in his defence unless thereafter the plaintiff satisfies you that the matters were not published in good faith.

Now let us have a look at the elements that go to make up that defence. In order to succeed in the defence the defendant has to establish the presence of each of those elements. He has to satisfy you that truly the matter published was published in the circumstances which I have read to you now twice. There is a question of law involved. Whether a subject is one of public interest is a question of law for me to decide. You will remember that there were quite a number of subjects advanced as being subjects of public interest, including the Commonwealth election, the defence of Australia, the activities of Russian diplomats in Australia. I ruled those and other matters to be matters of public interest. But in doing so I made no finding of fact in this case at all. I would have given that ruling in any appropriate context without hesitation. It almost goes without saying at the time of an election that the policies of the parties and their respective worth are matters of public interest. Or indeed, if Russian diplomats are misbehaving in this country in a way which leads to them being declared personae non gratae obviously they would be matters of public interest. But it is for you to decide all the questions of fact that arise. The first one is was there a discussion of a subject that I have ruled to be a matter of public interest. Gentlemen, the word "discussion" is an ordinary English word and it is no part of my task to interpret ordinary English to you. I do not know if you have noticed that if a word is used frequently sometimes you start to doubt what its meaning really is. So I took the trouble of refreshing myself on what the dictionary meaning of "discussion" is and you might be pleased if I refresh your recollection. This is not an exhaustive definition. "Discussion" is an examination or investigation of a matter by argument for or against, or argument or debate with a view to eliciting truth or to establish a point or a disquisition in which a subject matter is treated from different sides. That is what the dictionary says, there it is, I have just refreshed your recollection. I am somewhat surprised I must admit to find there is a sort of controversial idea in the definition of discussion. I would have thought you and I could discuss the weather and agree it was very hot, or you and I could discuss the exploits of some test cricketer and agree that his was a very brilliant innings. But be that as it may, I suppose the real point is that it takes more than one to make a discussion and a mere statement even in public by a newspaper or

anybody else on a certain subject does not make that subject necessarily a matter of discussion.

The first thing that the defendant has to show is that there was a discussion of a subject that I have ruled to be one of public interest. Of course before you come to the defence you would have found the matter to be defamatory. If you find it not to be that is the end of things, you do not have to inquire into the defence. That goes without saying. The next is "Was the defamatory matter published in the course of that discussion?" That brings you to a consideration of whether at the time the defamatory matter was published there was a discussion going on — that it was, as I said earlier, a current discussion; and that the matter complained of was published in the course of that discussion.

Then the next question is "Was the public discussion of that subject for the public benefit?" Now, we all know what the word "public" means. Public is used in contrast to the word "private". You can have a private discussion; you can have a private libel for that matter. Could you say that the public discussion of the subject was for the benefit of the public, generally speaking? I only take time on this question of what is meant by the word "public" because of some of the statements that have been made in the course of the case. If I may give an illustration: on the first Tuesday in November the form of the horses starting in the Melbourne Cup is a matter of public interest. It does not mean that every member of the public has to be interested. No doubt there are many members of the public who are not interested, but can it be said in ordinary common sense that a discussion is a public discussion and that the public discussion of that subject is for the benefit of the public, generally speaking.

It is for you to consider in this particular case whether the defendant has satisfied you on each of those matters. If you are satisfied, then the plaintiff in this case has replied by saying that the publication of the defamatory matter was not made in good faith. The Act provides this: "A publication is said to be made in good faith if the matter published is relevant to matters the existence of which may excuse the publication in good faith of the defamatory matter". Now, gentlemen, I do agree that is a mouthful of words and I will come back to it. It continues "if the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion, and if the person by whom it is made is not actuated by ill will to the person defamed or by any other improper motive, and does not believe the defamatory matter to be untrue". The Act further provides "When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging the absence".

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Let me make it clear. If you are not satisfied that the defendant has established the defence I have already referred to you do not have to consider the matter of good faith at all. It must show every element of that defence to be present and you only come to considering whether the plaintiff has shown absence of good faith if the defendant first makes out that plea. Now that throws light on some phrases in this section I have just read to you: "If it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith." In the frame work of this case and in the context of this case that is a mere reference back to the terms of s. 17(h). If the defendant has made out the defence that I read to you then the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith and it is only if you find that defence made out, as I am probably repeating too often, that you come to consider whether the plaintiff has shown absence of good faith.

On the assumption, therefore, that you find that the defendant has made out that plea, your next task is to consider whether the plaintiff has shown absence of good faith. The onus is on him; it is for him to negative one of the elements which go up to make good faith. He has to persuade you of the absence of one of those elements. It is sufficient if he only establishes absence of one of them. The first matter that I have described as being a mouthful of words again there is a reference back to the defence under s. 17(h): "If the matter published is relevant", and all these following words mean, in the context of this case, if the defendant has made out its defence, "the matters the existence of which may excuse the publication in good faith of defamatory matter". So one requirement for the plaintiff, if he is called upon to show absence of good faith, is that the matter published was not relevant to the discussion of the nature described earlier: "Discussion of matter of public interest, the public discussion of which was for the public benefit". Mr. Evatt here claims in each case that the matter complained of, the defamatory matter, is not relevant to the discussion which Mr. Larkins claims was taking place.

The next matter is "If the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion". Gentlemen, that might puzzle you, because, as I think I said during the course of some argument, the extent of the publication in a newspaper is dictated by its circulation. But you must understand that these provisions that I am reading to you can and do apply to private publications. The extent of a publication, for instance, may not exceed the occasion if it was sent to the person to whom it was published in a sealed envelope, but the extent of the publication may exceed the occasion, if it was sent in a postcard for everyone to read, or by telegram. But when we are dealing with the manner of publication of a newspaper article, that, in my opinion, involves consideration of matters such as the layout of the article, the headlines, whether or not

posters have been used to draw attention to it, whether the stratagems of type have been applied, whether heavy type has been used, for that matter whether stratagems of language have been applied, whether the prominence, the manner and the layout of the publication, exceeds what is reasonably sufficient for the occasion. Of course, in the framework of this case you are not dealing with this matter until you have found that there was a public discussion of matters for the public interest and for the public benefit and it may be difficult to consider in such a case that in dealing with public matters of that description any type of layout or emphasis will exceed the occasion. However, it is a question of fact entirely for you.

The next matter is that the defendant was actuated by ill-will to the plaintiff. Gentlemen, the defendant is a company. Of course a company is a legal entity but it has no corporeal existence and when you speak of the mind of a company, whether a company has ill-will, in one sense you are indulging in metaphorical language. But a company can be found by a jury to possess ill-will, or goodwill for that matter and that is because a company acts through its employees and if you are required to inquire into the state of mind of a company then the state of mind of a writer or an editor in the course of his employment with the company is imputed to the company. It is claimed here very vehemently by Mr. Evatt that you will find that the defendant on each occasion was actuated by ill-will to the plaintiff.

The next thing is, has the plaintiff shown the defendant did believe the matters of fact published to be untrue? You are again inquiring into a state of mind. That might seem a difficult task on the face of it, inquiring into the state of anyone's mind. It is almost impossible to get direct evidence of the state of mind of another human being unless of course there is an admission by him as to his state of mind. But the law does not shirk from inquiring into proof of a state of mind. In criminal law in some cases it is necessary to establish what a person's knowledge was. That is always a relevant circumstance in the crime of receiving stolen property; or what a man's intention was and that, as you must know, is very relevant in many crimes, such as wounding with intent to murder.

I am sorry to bring in criminal illustrations because, as I pointed out earlier, this is not a criminal case. Here, the state of mind to be inquired into is the question of belief, and it is for the plaintiff to satisfy you that the defendant did believe the matter published to be untrue. Let me give you this direction at this stage: it is for the plaintiff affirmatively to satisfy you of disbelief in the truth of the matters. It is not sufficient for the plaintiff to establish that the defendant, for instance, had no belief one way or the other, or that it was in this state of mind that it was quite careless as to whether the matters were untrue or not, or even reckless as to whether the matters

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were untrue. He has to affirmatively satisfy you that it is more probable than not that the defendant, or persons for whom the defendant is liable, did in fact believe the matter to be untrue.

I am quite conscious that I have overlooked something, and I am very sorry that I have to go back to a different subject. I omitted one element from the defendant's plea. The defendant has to show, as I told you earlier, that so far as the defamatory matter consists of comment, that comment was fair. Well, here we are again dealing with words, but I do not think it can be said that the word "comment" or the words "fair comment" are just to be understood in the ordinary sense. Perhaps they can. A statement made may either be a statement of fact or comment. And by contrasting the word "comment" with the phrase "statement of fact" I have gone a good way towards defining what it means. Generally speaking, comment is equated to an expression of opinion. And sometimes it is quite difficult to come to a decision whether a statement is a statement of fact or an expression of opinion. Sometimes, of course, it is quite easy if the facts are given. Then what is fact and what is comment may not be difficult of solution.

An illustration: if I say "Jones stole from his last employer, therefore, he is not worthy to be employed in a position of trust", the first of those statements would obviously be a statement of fact, and the second obviously a statement of opinion. But if there is a phrase which ordinarily would be taken as an expression of opinion, but no facts are given to support it, it may be inferred that it was intended to be a statement of fact. For instance if you left out the reference to "stealing from a previous employer" and merely say "Jones is unworthy to be employed in a position of trust", there is the difficulty in saying whether that is a statement of fact or an expression of opinion. Of course, sometimes although the facts are not stated they are so notorious to the speaker and those to whom they are addressed that it is quite obvious that the statement there examined is an expression of opinion. Another example: suppose in the latter part of last year an English newspaper published "Mr. Profumo is not a worthy Minister." I should apprehend that nobody would have any trouble in deciding that that was a comment, an expression of opinion, a comment on the notorious facts of his behaviour in the previous months.

Whether words constitute a statement of fact or a comment is a question of fact for you to decide. I have not continually referred to the provisions of the Act, but let me say this to you, that any questions that I deal with, which I do not say is a question of law, you can assume to be a statement of fact. The question is: what is a fair comment? And I can do no better than to paraphrase part of a judgment by a former Chief Justice of this Court on this very question. It says, dealing with evidence of fair comment:

"To establish that a comment was unfair is not necessarily

(I interpolate 'necessarily') supplied by the mere fact that the defendant has expressed himself in ironical, bitter, or even extravagant language. The test whether comment is capable of being regarded as unfair is not whether reasonable men might disagree with it, but whether they may reasonably regard the opinion as one that no fair-minded man could have formed or expressed".

Here, of course, in the present case, we are dealing with public affairs. The plaintiff is a public man; the defendant publishes newspapers with a large circulation. They are both obviously interested in public questions and political matters.

Many people apparently have very strong views on these matters. And although you might express your views in strong language — it becomes a question of degree — the real test is: was the comment one that no fair-minded man would have made or expressed? An "extravagance" that it does not become so extravagant that no fair-minded man would indulge in it. Extravagance of language does not necessarily show that the comment is unfair. It is a matter, again, of fact for you.

Those are, in broad terms, the principles of law that apply to this case. If I left the matter there, this would not be a summing-up at all. There is more to a summing-up — it has been said on many occasions — than merely stating the principles of law. A summing-up should not only state the principles of law (it should state them as clearly as possible) but it should also contain a dissertation on how these principles apply to the particular facts of the case, and that I shortly propose to do. But before I do so, let me make these observations. This has been a long case; there is an immense amount of material before you in the form of exhibits. Those exhibits have been closely examined by learned counsel, and I do not intend to refer to them. I do not intend to examine the evidence in any detail at all. You must have received a great deal of assistance from the closely reasoned arguments that have been addressed to you by learned counsel. Learned counsel did not restrict themselves; they both regarded this case as one of importance, and, therefore, there has been a complete examination, not only of the evidence, but they have gone into much detail in the arguments they have put before you. I do not intend to follow in their footsteps. You have — if you permit me to say so — throughout this long case, exhibited a keen and intelligent interest both in the evidence and in the addresses of learned counsel.

One other matter: as I said to you earlier, not only was there a conflict on the facts but there was quite a divergence in the interpretation of admitted facts that learned counsel put before you. Very much of this case depends on what your view is of the arguments that

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have been put to you, and I do not intend to paraphrase those arguments. I will necessarily make passing reference to them, but I do not intend to seek to enlarge on more than is necessary, the various matters submitted to you by Mr. Larkins from the point of view of the defendant, or the various matters submitted to you by Mr. Evatt, from the point of view of the plaintiff. And so you will find that although I have to make reference to the facts, to make reference to the circumstances, I will be very brief, I hope, in so doing.

In order that you may follow the rest of the summing-up more carefully, I have had questions typed out, which will now be handed to you. I won't read these questions to you now; I will direct that a copy of them be included in the summing-up at this point. (Copies of following questions handed to jury).

FIRST COUNT

(1) Has the plaintiff established that the matter published was defamatory of him?

(2) If the answer to question (1) is yes — has the defendant established each of the following matters:
   (a) That there was a discussion of a subject that has been ruled to be a matter of public interest;
   (b) That the matter was published in the course of that discussion;
   (c) That the public discussion of that subject was for the public benefit;
   (d) That so far as the defamatory matter consists of comment, that comment was fair.

(3) If the defendant has established each of the matters set out in question (2), has the plaintiff established any of the following matters:
   (a) That the matter published was not relevant to a discussion of the nature described in question (2);
   (b) That the manner of the publication exceeded what was reasonably sufficient for the occasion;
   (c) That the defendant was actuated by ill-will to the plaintiff;
   (d) That the defendant did believe the matter to be untrue.

SECOND COUNT

(1) Has the plaintiff established that the matter published was defamatory of him?

(2) If the answer to question (1) is yes — has the defendant established each of the following matters:
   (a) That there was a discussion of a subject that has been ruled to be a matter of public interest;

(b) That the matter was published in the course of that discussion;
(c) That the public discussion of that subject was for the public benefit;
(d) That, so far as the defamatory matter consists of comment, that comment was fair;

(3) If the defendant has established each of the matters set out in question (2), has the plaintiff established any of the following matters:
(a) That the matter published was not relevant to a discussion of the nature described in question (2);
(b) That the defendant was actuated by ill-will to the plaintiff;
(c) That the defendant believed the matter to be untrue.

THIRD AND FOURTH COUNTS

(1) Has the plaintiff established:
(a) That the matter published referred to him;
(b) That the matter was defamatory.

(2) If the answer to both these questions is yes, has the defendant established:
(a) That there was a discussion of a subject that has been ruled to be a matter of public interest;
(b) That the matter was published in the course of that discussion;
(c) That the public discussion of that subject was for the public benefit.

(3) If the defendant has established each of the matters set out in (2), has the plaintiff established any of the following matters:
(a) That the matter published was not relevant to a discussion of the nature described in question (2);
(b) That the manner of the publication exceeded what was reasonably sufficient for the occasion;
(c) That the defendant was actuated by ill-will to the plaintiff;
(d) That the defendant did believe the matter to be untrue.

You can regard these questions as the skeleton of this summing-up. I think you will find that, except with regard to a matter with which I must conclude this summing-up namely the question of damages that that in fact sets out the matters for you to consider, and it will be helpful to you, I trust, to take up when you retire to consider your verdict.

Now, you may make one of two uses of those qestions when you

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retire. When you return to give your verdict, you may give it in the form of answers to those questions — my learned Associate will ask you; on the first count, how do you find, for the plaintiff or the defendant? And you may say "We find the answer to question (1) Yes or No as the case may be; the answer to question 2(a) Yes or No as the case may be. Or you may — and you are quite entitled to do this, and there are reasons why you should (there are reasons for and against this) — use those questions as a guide, not publish your answers to them but merely state in accordance with the way those questions run, what your verdict is under the various counts whether it be for the plaintiff or for the defendant.

Now, let us examine the first questions under the first count and proceed through them.

> "(1) Has the plaintiff established that the matter published was defamatory of him?"

The words complained of are:

> "A divided, warring rag-tag and bob-tail outfit ranging from Eddie Ward and Les Haylen through to Dan Curtin and Tom Uren.
>
> "This is a team which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country".

Of course, Mr. Uren is the plaintiff here, and only Mr. Uren. He has not brought this action, for instance, as a representative of those four gentlemen who are named there, and the "team" so described is not the plaintiff — it is Mr. Uren. In those circumstances, you might consider that the adjectives "divided" and "warring" apply to the "team" and do not apply to Mr. Uren. It is only in a very metaphorical sense that you could say a man was "divided" or was "warring". Mr. Uren does claim that he is specifically stated as one of four persons at least, to whom the description "rag-tag" and "bob-tail" applies. It is for you to say whether those words are defamatory of the plaintiff.

He also claims that, as he has been specifically named, he is put forward as an example; that the words are defamatory because they imply a complete lack of capacity to him; that he is one of those persons — the article says — "who would have difficulty running a raffle for a duck in a hotel on a Saturday afternoon". Well, you have heard the arguments of learned counsel — I do not intend to enlarge upon them.

We go on now to question (2):

> "If the answer to question (1) is yes — has the defendant established each of the following matters."

You will notice there is a cryptic or a short way of saying that on

this matter the onus is on the defendant, and the defendant has to establish "each of the following matters".

"That there was a discussion of a subject that has been ruled to be a matter of public interest";

I think I have ruled, in relation to the first question, that the following subjects were matters of public interest, at least on the very eve of a Federal election for a Federal Government, held in December 1961:

"The general election of a Federal Government;
The worth of the opposing political parties seeking election as the Federal Government;
The merits and demerits of those candidates and their capacity to govern".

As I said earlier, at this time, obviously, they were matters of public interest, and the first question is "Was there a discussion of those matters"? and you might have very little difficulty in answering question (2)(a) "Yes".

"(2) (b) That the matter was published in the course of that discussion".

Before entirely leaving the first question, you will remember that there was an agreement that at that time — and what else could you expect, at least since nomination day — those matters I have referred to were subjects of discussion.

Was this matter published in the course of that discussion?

You see what it is; it is an editorial on the front page of the Telegraph on the very eve — literally on the eve of the Federal election, and you may have little difficulty in answering that question "Yes", that it was published in the course of that discussion.

The next question is:

"(c) That the public discussion on that subject was for the public benefit;"

You may think the public discussion of the things I have referred to, on an election eve, is for the public benefit, and that it is a good thing if the electors are enlightened about those various subjects.

Then you come to (d):

"(d) That so far as the defamatory matter consists of comment, that comment was fair;"

Is the description of Mr. Uren as being "rag-tag and bob-tail" comment or a statement of fact? Are they saying that he is "rag-tag and bob-tail" or that "he, with others, make up a team of which each one is rag-tag and bob-tail" or is that an expression of opinion? If it is a comment, is that a fair comment? I won't keep on going back to the directions I gave you earlier; you will bear those in mind. Is it mere

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extravagant language, which you would expect in the circumstances — if it is comment, of course — or is it an unfair comment?

What about the rest of it:

"This is a team which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country".

Is that a statement of fact, or is that a comment? Is it a comment on the preceding words, assuming you take those to be a statement of fact? Or is it, as Mr. Evatt opened, when he said — although it is quite proper to say that he has since retreated from this position — that they are blunt statements of fact? If they are comments, it is for you to say whether those comments were fair.

Then you may or you may not pass to the third question. I am sorry to keep on emphasising this. You do not pass to the third question — as that question is prefaced "If the defendant has established each of the matters set out in question (2) — if the defendant has not established each of those matters you do not have to consider the third question at all.

"(3) . . . has the plaintiff established the truth of any of the following matters:

(a) That the matter published was not relevant to a discussion of the nature described in question (2)".

Well, you have heard the arguments of learned counsel. The discussion was about the elections and the worth of the parties. All these questions are questions of fact. You must not be guided by me if you do not agree with me. You might think that the answer to that question is "No", that you cannot say that the matter published was not relevant to the discussion. Assuming the answer to that question is "No", then you come to (b):

"(b) Has the plaintiff established that the manner of the publication exceeded what was reasonably sufficient for the occasion"?

You will remember these questions were more or less drafted before learned counsel had made their addresses. I did not have the benefit of addresses at that stage. I weighed, as you know, overnight, the advantages and disadvantages of drafting questions at that stage. I thought the advantages outweighed the disadvantages, the disadvantages being that I had not, as I said, the benefit of hearing the arguments of learned counsel. Well, what is it that Mr. Evatt says shows that the manner of the publication exceeded what was reasonably sufficient for the occasion? The only matter I can gather from what he says is that the matter was published on page 1 instead of some other page. I am quite dubious whether I should have left that question to you or not, and perhaps the matter might be argued at the end of the summing-up. Perhaps it will not be. But wouldn't people read editorials,

whether on page 1 or page 2? I think page 2 is the usual page for an editorial. It is a matter for you, of course.

You see, when you come to this stage, it must be assumed that you have answered all the questions in question (2) in favour of the defendant. And would you say that putting an editorial dealing with an election on page 1 rather than some other page, on the eve of an election, was a sufficient basis on which to make a finding that the manner of the publication exceeded the occasion, and so destroy the defence? Whether or not I take that question from you, I do suggest— though it may be a matter for you — that the answer to it also is "No".

Now, we come to (3) (c):

"(c) That the defendant was actuated by ill-will to the plaintiff;"

There is an old saying: beware of failing to see the wood for the trees. This is a convenient way of approaching the problem, by the question being divided into these parts, but the danger is, of course, that if you concentrate too much on the parts, you will lose sight of the problem as a whole. What that leads me to is this, that the same evidence that may establish question (c) may also establish question (d). If a person publishes defamatory matter about another, believing it to be untrue, of course that would lead you very easily to a finding that that person had ill-will towards the person about whom he published it. However, we will deal with that separately, but I want you to keep that consideration in mind.

The plaintiff is entitled to ask you to consider whether there is not intrinsic evidence, by reason of the language in the words used: whether or not, because of the language used, there is ill-will shown on the face of it, that is one matter.

Now the other matter that led me to make the observation about failing to see the wood for the trees is this, that ~~the~~ plaintiff is entitled to show that the defendant had ill-will because he had made a practice of publishing defamatory statements about him, that there was a campaign by the defendant against him or that — to use Mr. Evatt's phrase — this first article was one of a series.

Now, it is true, as a naked proposition, that you do not show that I had ill-will against my Associate on 1st January last year by showing I had ill-will on the 1st January this year. But if there has been no reason for a change and you affirmatively find that I had ill-will towards my Associate on 1st January this year, you may, in all the circumstances of the particular case, assume that that enmity existed at the earlier point of time. And so if you find — and here again you are not confined by reason of this question to examining only this article in order to find the presence of ill-will — you may look at all the facts and circumstances of the case.

Well, again, you have heard the arguments of learned counsel, and it is for you to say whether the plaintiff has established ill-will

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in the publication of the first article, having regard to those matters I have just put to you.

The last one is:

"(d) Has the plaintiff established that the defendant did believe the matter to be untrue"?

Again I say there is a difficulty in my mind, and I will hear arguments from learned counsel afterwards. These questions were prepared before the addresses.

The author and publisher of that editorial, we are told, was Mr. McNicol, who is not available as a witness because he is overseas. How does one go about establishing that any person did believe an utterance that he had made to be untrue? One step, I suppose, is to show, you may think, that the matter was in fact untrue; and the second, that the circumstances are such that belief in the untruth can be inferred. But we have no evidence, it appears to me, of what Mr. McNicol's belief about this matter was; that if these different statements in this article were statements of fact they were untrue — that he did believe that what he was writing about Mr. Uren was untrue. It is not disputed that they were in fact untrue. You will remember that Mr. Larkins, in his first questions to the plaintiff, put an assurance in an interrogative form that the defendant did not allege these articles to be true. But I have difficulty in seeing on what evidence you would find that, on the assumption that they are untrue, Mr. McNicol believed them to be untrue — to make an affirmative finding. However, that is a matter for you. I may say that never again will I have to, as it were, express doubt as to whether the questions are appropriate and proper to be left to you. It is only on this first count — the publication made in December, 1961 — which Mr. Evatt asks you to treat as a serious matter, and which Mr. Larkins asks you to treat as a mere make-weight, the suggestion being that if the other articles had not followed, Mr. Uren would not have brought this action. I express no opinion on any of these arguments; it is a matter for you to consider.

Then we come to the Bulletin article, that is,

"Leftwinger Tom Uren (Labor N.S.W.) still stubbornly adhered to the line that Moscow and Peking controlled Communist parties in non-Communist countries assiduously peddle mainly through peace movements. He described suggestions for greater defence expenditure as so much hysteria. But even Uren was susceptible to the prevailing climate".

Would an ordinary, reasonable person reading those words hold that, in all the circumstances of the case including the position held by the plaintiff — a Labor member of Parliament at the time of this publication — that Mr. Uren's reputation would be likely to be injured by it? It is not claimed that there is any esoteric or hidden meaning

in these words, but in the circumstances it is true that to say of Mr. Uren that he "stubbornly adheres to the line that Moscow and Peking Communist parties assiduously peddle mainly through peace movements" is defamatory to Mr. Uren? And it is also claimed that it is defamatory of him to say that he "described suggestions for greater defence expenditure as so much hysteria".

Well, again it is a question of fact for you. I do not intend to take up your time on it. If the answer to that question is "Yes" — was there a discussion on those subjects I dealt with — well, the article itself and its context shows that, with the subject being discussed the defence of Australia and the defence estimates being before Parliament, that there was a world-wide conflict between Communism, there was a blockage of Cuba by the United States, there was an attack by India on Chinese forces, the emergence of Indonesia as a military power, the attitude of the Federal Opposition to the subject mentioned. And indeed, the text of Mr. Uren's speech is before you as an exhibit. You consider that when you are considering this article. Some of those are very wide subjects and I really do not think you have to throw your net so wide that you have to consider each of them.

Let us bring it down to what, in my opinion, is a precise subject, the attitude of the Federal Opposition to the subject mentioned, that is the defence of Australia. Was there a discussion on that subject? Well, you have before you quite a lot of photostats of newspapers and speeches in Parliament, and the defendant asks you to say that there was a discussion on that subject; and he also asks you to say that the matter complained of was published in the course of that discussion, and that the public discussion of that subject was a matter for the public benefit. Well, those questions are matters for you, but I suggest to you that you will have very little trouble in answering those "Yes".

But when we come to the fourth one, that is, (2) (d), we come to a matter which has attracted a lot of attention by learned counsel in this case:

> "(2) (d) That, so far as the defamatory matter consists of comment, that comment was fair;"

What is comment and what is fact is a matter for you to say, but it is open to you to take this view, that the words "he described suggestions for greater defence expenditure as so much hysteria", is a statement of fact, that the paper is there stating what the very essence of the theme is — a word used earlier — of Mr. Uren's speech.

Then in the earlier part comment, that the plaintiff stubbornly adhered to the line described? I won't read it all. Is that a comment or the statement of fact, that he had made a speech the essence of which was that greater defence expenditure was so much hysteria — well, again you must ask yourselves, if you find it is comment, was

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it, in all circumstances — and you have the text of Mr. Uren's speech before you — unfair? There was evidence on this matter by Mr. Uren and Dr. Cairns on the one hand, and Mr. Bennetts and Mr. Reid on the other. I told you that I was not going into any question of credibility. Great importance has been put on those conversations, and whether you agree with the arguments put to you by learned counsel is a matter for you. There is a question that you will have to decide. It has been so closely examined by learned counsel that I intend to pass from it.

If you find all those matters in the defendant's favour, if you answer all the questions yes, then you come to the question of whether the plaintiff has shown absence of good faith. Of course, if you do not find in the defendant's favour again you do not come to question (3) at all. The first matter is "Has the plaintiff established any of the following matters" and the first one is "That the matter published was not relevant to a discussion of the nature described". Well, that is a discussion with all the other qualifications which I am quite sure you are tired of hearing, on the attitude of the Federal Opposition to the defence of Australia and perhaps other matters; it is a matter for you. Was this material relevant to that discussion? Mr. Evatt suggested to you it was not relevant, that it formed no part of the discussion at all. I earlier told you that I had refreshed my recollection from a dictionary of an ordinary word. I think at this stage we might refresh our recollection on what the word "relevant" means. Again I tell you it is an ordinary English word and it means it pertains to, but you may think this is a fair description: that a matter is relevant to a matter in question if it so nearly touches the matter in question that it ought to be regarded as a proper thing to be taken into consideration; that the matter is so attached to the main matter that it is a matter you ought to take into consideration as being relevant to the main matter.

I do not intend to do more than what I hope to make a practice of doing, of refreshing your memory on the arguments of learned counsel, Mr Larkins puts to you that the matter published about Mr. Uren is the very heart of the matter being discussed. Mr. Evatt puts to you that on a true understanding of all the circumstances of the case you could not describe the matters published as being relevant to the subject being discussed.

"That the defendant was actuated by ill-will to the plaintiff" is the next question. Here I do not think Mr. Evatt will mind me saying he devoted more attention to this second matter than to the others. I must not be taken as implying that he thought it was the most important but he seemed to devote most time to it. Perhaps there was more evidence on this subject. He asks you to find intrinsically there was ill-will. He asks you to find there was ill-will because the plaintiff asked for a correction and the correction was not forthcoming, even

though Mr. Reid may be understood as agreeing it should have been forthcoming. He asks you to say there was ill-will because his statement, if it is a comment, that he in his speech adhered to a line that has its origin in Moscow and Peking is such an unfair comment that it shows ill-will.

Now I have stated those headings and because I do not devote as much time to what Mr. Larkins submitted it does not mean I am choosing between Mr. Evatt's and Mr. Larkins' arguments. This is one of the matters on which I prefer to keep a completely detached outlook, it is a matter for you to decide. Mr. Larkins asks you to say there was no distortion, that the comment, if it was a comment, is not unfair and it is certainly not so unfair as to show ill-will. He asks you to say that the letter was not handed to Mr. Reid. He also asks you to say that you would not assume ill-will from all the circumstances of the case. Mr. Evatt also relies on what I think was the last exhibit in the case as showing that even if there was no ill-will in Mr. Reid, in the circumstances you will infer ill-will because explanatory matter concerning the speech was excised from the article as written by Mr. Reid before it was published. Mr. Larkins asks you to say that that is a mere matter of sub-editing and the excision is of no signficance and that no ill-will can be inferred from its absence from the printed article. Again I am quite detached from those arguments. It is a matter for you to say.

I scarcely need enlarge on (3)(c). Some of the matters that Mr. Evatt points to as showing ill-will he asks you to say also establish as a matter of probability that the defendant believed the matters there to be untrue. As I said to you earlier, so much of this depends on which argument you accept, so much depends whether you accept Mr. Larkins' argument that by taking up the speech on one hand and the report on the other that there is no distortion as claimed, that there is no falsification, there is no reason for you to infer that when that article was published the company through its publisher and writer believed the matter to be untrue. That is another question from which I hold myself detached.

Now we go to the third and fourth counts. Has the plaintiff established that the matter referred to him? I have dealt with that. Secondly, was the matter defamatory? Well, gentlemen, it is a matter for you but you might have very little difficulty in saying that the suggestion that a Member of Parliament was duped or made a pawn by a Russian spy and persuaded to ask questions on defence establishments is beyond question a defamatory matter.

Assuming now you have answered the questions (1)(a) and (b) in the affirmative, has the defendant established that there was a discussion of a subject that has been ruled to be a matter of public interest? Well, there are a number of subjects there. Again they covered a very

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wide range; the defence of Australia, the world-wide conflict with Communism, a battle between Communism and non-Communism. You may think you can narrow the matters down to whether there was a discussion of the alleged espionage activities of political and diplomatic representatives of the U.S.S.R. in Australia and even further narrow it down, the possibility of questions in Federal Parliament being inspired by representatives of the U.S.S.R. Mr. Larkins asks you to say both those subjects were being discussed at the time. You may come to a different decision as to each of those subjects. I have narrowed it down but you might not agree with my narrowing it down, but it does not seem to me you need go into those very wide subjects that I previously alluded to. Was there a discussion of the espionage activities of these diplomats at the time, was there a discussion on the possibility of questions in the Federal Parliament being inspired by these representatives at the time — that is, at the time of the publication? Mr. Larkins asks you to say there was. He has tendered a number of photostats of newspaper reports and speeches in Parliament. You will remember particularly the speech of Mr. Erwin and he asks you to say that there was a discussion about the possibility of questions being inspired by those people. I am cutting the verbiage short: Mr. Evatt says although the finding is open that at the time of the publication there was a discussion about the activities of these spies, there were headlines in the newspaper — I think the expression is the story had only broken — a couple of days before, that there was no discussion, however, on the subject of the inspired questions. He asks you to say if there ever was a discussion it had died. It had died with the articles pouring ridicule on Mr. Erwin in the papers some months before. Mr. Larkins, as I say, asks you to find on the evidence that these discussions were still alive. Again it is a matter for you to decide.

Then (2)(b), that the matter was published in the course of that discussion, Mr. Evatt asks you to say that the defamatory matter here complained of was not published in the course of the first subject, the espionage activities, but it was an entirely separate matter, dragged in, I think his expression was, by the hair of its head, into the discussion that was going on about espionage activity. Mr. Larkins asks you to find it was in the course of that discussion these words were published.

As for (c) it appears to me if the subjects were alive and germane then the public discussion of them was clearly for the public benefit. That is, however, a matter for you.

Again if the defendant has established each of the matters set out, has the plaintiff established any of the following: that the matter published was not relevant to the discussion, the nature of which is described. If there was a discussion about espionage activities of political and diplomatic representatives of Russia in Australia, Mr. Evatt submits with force, with what I might say was great emphasis, that this story, this matter complained of, was not relevant to the

discussion. His arguments you may say are the same on this matter as his arguments on whether that matter was published in the course of the discussion and I think I can say, for the sake of brevity, that Mr. Larkins' arguments are the same also.

"That the manner of the publication exceeded what was reasonably sufficient for the occasion", this is a question that takes the whole of the circumstances of the case into account and depends so much on what your finding on these matters is. If this was an irrelevant matter then would the publication with the front page statement drawing attention to p.4 and the fact that there were heavy headlines and the fact that the matter complained of as being defamatory, that the essence of it was in the heavy headlines and the way the paper was set out, did the manner of publication exceed the occasion? If you asked me what was meant by the occasion I would say everything, everything about the case. Again it is a matter for you to decide.

Then you come to the question of ill-will. I think it now unnecessary even to refer you to argument. You will remember the arguments of learned counsel whether ill-will has or has not been shown to be present, the onus of course being on the plaintiff.

The last one is, did the defendant believe the matter to be untrue? Mr. Evatt's approach is this; the matter was in fact untrue he said and by reason of the material that was at Mr. Moyes' disposal you should infer that he did on the probabilities believe it to be untrue. He here relies on the circumstances that this matter was first published in the early edition of the Sun-Herald but not in the Telegraph. He asks you to say when his client stated that the matter was stolen from the Sun-Herald by Mr. Moyes that is evidence that Mr. Moyes did not believe it to be true. Well you may or may not agree with that. So much time was devoted to it. I have told you before mere absence of belief or reckless indifference to the truth or falsity of the matters is not sufficient. But the matter that Mr. Evatt asks you to base your finding on above all is this: he said the story is so fantastic that Mr. Moyes could not have believed otherwise that it was untrue, that you will find on the probabilities in all the circumstances of the case that the defendant did believe the matter to be untrue. Mr. Larkins says those are statements which are easy to make but which you will not readily accept. He said you will not be satisfied, as you are required to be, that Mr. Moyes or the defendant did believe the matter to be untrue. He says you will not be satisfied that the plaintiff has shown that Mr. Moyes believed the matter to be untrue and he points to a number of circumstances. He points to the discussion that had gone on before. It started in the Melbourne Age. Then it was taken up in Parliament by Mr. Erwin and he says that you will place aside the suggestion that the material was taken from the Herald and place no importance to it, that Mr. Moyes checked with Canberra, omitted matters that the Herald had published because of the advice he received

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from the Canberra correspondent, that he not only checked Hansard as to what allegations had been made in Parliament but that he also obtained from the files the earlier story that was published in the Telegraph just after Mr. Erwin had made his speech and he took a good deal of the material that goes to make up this publication from that. Gentlemen, again it is a matter for you, it is a matter entirely for you and again it is one of those matters on which I hold myself completely detached.

If the plaintiff is entitled to a verdict on any of the counts in the declaration, then it is for you to assess what damages should be awarded. It is an open question whether I should take your verdict and then, if the verdict should be for the plaintiff on more than one count — always remembering the third and fourth is one — whether I should not ask you to award damages in one sum for the . . .

MR. LARKINS: It might help Your Honour if I say this: I expressed a view from the Bar table the other day, and it seems to me, on some investigations, as a matter of practice and authority, that I would agree with what my learned friend says, that if damages are to be awarded, they should be awarded in respect to each count.

HIS HONOUR: I would have thought so. I have made some research, myself. I think it is the position in England that you accept verdicts on each count, indeed, one of the Lords in the House of Lords suggested that if there was an innuendo you should take a verdict of damages on the count and the innuendo . . .

MR. LARKINS: It was said by one of Your Honour's brothers.

HIS HONOUR: The contrary was argued before me in another defamation case, and both counsel agreed that I should take the verdict in the form of one sum. A common law verdict is taken on separate counts; and, secondly, taking these as three separate libels, they are, to a large extent, unrelated.

I will take from you a separate verdict of damages on each count in which you find for the plaintiff, assuming you find a verdict for him on more than one, and assuming of course, that you find for him at all. The assessment of damages does not depend on any legal rule; every case must depend on its own facts. Sometimes only a small — what might be described as contemptuous — amount of damages is given in defamation cases. Sometimes, very large verdicts indeed are given. And where any particular one fits into that scale is a matter so much for a jury, on their findings, on the view they have formed of the case and on the circumstances of the case as they find them to exist. The matter of damages is peculiarly a matter for you; it is peculiarly, as the books say, the peculiar province of the jury. The books go on to say, "Who in assessing them will be governed by all

the circumstances of the particular case." You are entitled to take into consideration the conduct of the plaintiff and his position of standing. Nothing has been said adverse to the conduct of the plaintiff in connexion with this matter. But you are entitled to take into account his position and standing. You are entitled to take into account that he is a Member of the House of Representatives, a public man. You are entitled to take into account the nature of the libel, the very nature of the defamatory matter, and ask yourselves: What injury would that be to his reputation? And the mode and extent of the publication. Well, that need hardly be referred to in this case. The extent of the publication, certainly as far as the first and third counts are concerned, is that they are published in a leading newspaper with a large circulation. I do not think we have any evidence about the Bulletin, but you know that the Bulletin was published in this city, in its present form, for a number of years, and you may think that its circulation at least makes it worthwhile for the defendant to continue its publication.

You may take into account, too, in relation to the second count, failure to publish the correction. Mr. Evatt has claimed in this case that an apology was asked for and refused, but I can see no evidence of that at all. The only reference to an apology was in the defendant company's solicitor's letter. And you may take into account the whole conduct of the defendant from the time the libel was published down to the moment of your verdict. Sometimes, of course, the conduct of the case itself may aggravate the damages — the conduct of counsel in persisting with a plea that, for instance, the matters are true, where they are shown not to be true or, where no attempt has been made to prove the truth of them. But that does not apply in this case. There is no question about it. Mr. Larkins has made it clear, from start to finish, that he was not alleging that the defamatory matters — if you find them to be such — were true. And he has adopted throughout the case, you may think, a purely defensive role. His attitude was that the matters published were untrue but in the interests of freedom of the press he was entitled to rely on the benefits of the statutory protection, the qualified protection it gave. And he said he was here merely to assert that. He did not take the offensive against the plaintiff at all. Those are matters I could enlarge upon. Mr. Larkins, on the question of damages, did not take up much time at all. He said he was not here — I hope I am quoting him closely — really on the question of damages; he was here to maintain a stand that the defendant had taken, that these matters were published on occasions of qualified protection.

The plaintiff is entitled to compensation at your hands for the damage that has been done to his reputation. He is entitled to compensation, and that compensation to be awarded may be increased if you find that the publications were made with ill-will to the plaintiff, were made as part of a campaign. The damages may be aggravated

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

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

I have no doubt that learned counsel will make submissions to me and it may well be that I will have to amend or perhaps deal with fresh matters, but subject to that, that is the conclusion of my summing-up.

(At this stage further hearing adjourned to 10.00 a.m. on Wednesday, 11th March, 1964.)

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MR. EVATT: I respectfully maintain that it is the defendant's duty to make his submissions first, because the plaintiff carries the general onus and, therefore, in the light of the submissions he makes after the summing-up, I submit I have the last reply.

HIS HONOUR: I will give you an opportunity to reply, but there may be something in what you say, particularly on matters in relation to the first count. I am more than half inclined to agree on reflection, that the defendant should lead. What do you say, Mr. Larkins?

MR. LARKINS: It is a matter for Your Honour.

HIS HONOUR: There are two matters that I ask counsel to deal with, they are questions (3) (b) and (3) (d) under the first count. I think the onus would be on you, Mr. Larkins, if you do not mind. I do not want to make a ruling on this matter. If you do not mind leading, I would ask you to do so. You might want to make submissions about it.

MR. LARKINS: No, I am quite content.

HIS HONOUR: You do not ask me to withdraw question (3) (b) from the jury under Count 1?

MR. LARKINS: No.

HIS HONOUR: (3) (d)?

MR. LARKINS: No.

HIS HONOUR: Nor do you ask me to withdraw (3) (d)?

MR. LARKINS: Yes, I am content with the observations Your Honour made.

HIS HONOUR: I probably think that they are, in the ultimate analysis, questions of fact for the jury and that I cannot say there is no evidence to support either of those questions — or an affirmative answer to either of those questions.

MR. LARKINS: There are three matters in the summing-up that I would ask Your Honour to enlarge upon. The first relates to the second count, Question (3)(b), the question of whether the defendant was actuated by ill-will. Your Honour said that one of the matters relied upon by my learned friend was asking for a correction. That would only be on the assumption that the jury found that knowledge that the correction was asked for was within the possession of the defendant. We would submit that does not go to the question of ill-will. It might be a matter proper to be taken into consideration on the question of damages. I refer Your Honour to Loveday v. Sun Newspapers (59 C.L.R. 503). There are other authorities. This is a judgment of the then Chief Justice Sir John Latham, at p. 513. "It was further argued . . . . raised". And although that is dealing with a defence of qualified privilege, Your Honour will recall that in my

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address I said I would ask Your Honour for a direction that anything which took place at a later date, assuming it to have taken place, would not be relevant to the state of mind, at the time of publication, of the defendant. That is what I had in mind when I told the jury that I would, in due course, ask Your Honour for such a direction.

This was at the stage where Your Honour was dealing with the matters my learned friend relied on and matters that were relied on, on that aspect.

The next matter is really two matters involved in one.

Your Honour said on several occasions that the defendant had not disputed the untruth of the defamatory matter, and Your Honour spoke, on several occasions, of the assumption that the allegations were untrue. It would be our submission that a concession of falsity, as a matter of ordinary English, would not be inferred by a statement that the truth was not asserted. We have always stated here that the truth was not asserted, but we do submit that it does not follow from that, that there is a concession of falsity. So far as our defences are concerned, once the protected occasion is established, a presumption in our favour is one in which truth or falsity is irrelevant, and the only matter which is raised by the plaintiff is a belief in the untruth.

I concede — I think Your Honour put it — that so far as the plaintiff seeking to attack the presumption, might seek to assert the falsity as a preliminary step to establish the belief — we would submit that a statement that we "do not concede the truth" is not a concession of falsity. Then Your Honour referred to this and said that there was a presumption of falsity arising.

HIS HONOUR: I have not dealt with that matter.

MR. LARKINS: But Your Honour talked about a presumption of falsity.

HIS HONOUR: Not in that context.

MR. LARKINS: We submit that that was really based on law of England. This presumption of falsity arose from the fact that falsity can be pleaded in England. There is a suggestion in the A.L.J.s (Vol. 37 Pt. 6, 182) where the learned author deals with what he describes as competing views. We submit there is no concession of falsity and there is no presumption of falsity under the law of N.S.W. as at present established.

HIS HONOUR: Not within the context of a case where the only substantive plea is under s.17(h). I won't make it any wider than that.

MR. LARKINS: That is sufficient for the purposes of this case.

Your Honour will recall that at the end of my learned friend's address, and before Your Honour commenced summing-up, I drew your Honour's attention to the fact that counsel for the plaintiff had addressed on the basis that there was a prejudice toward the Labour party.

HIS HONOUR: The jury will know that I never dealt with that. I have always put it on the basis of personal ill-will to the plaintiff; and, indeed, I have left no other improper motive. I am quoting from the Act.

MR. LARKINS: I do appreciate that; it is clear now from the way in which Your Honour has summed up. I did not want to debate this matter before Your Honour summed up, but on many occasions in his closing address, counsel for the plaintiff referred to this matter, and I would ask Your Honour, as well as leaving no question of other improper motives, to direct the jury that they should disregard the statements made to that effect by counsel for the plaintiff.

Those are the only matters.

MR. EVATT: The first submission I make is this: 17(h) as a defence is not available to the press. Your Honour recalls I did make that submission in dealing with the tendering of newspapers. They cannot make their own occasion but I do put that now in the light of what was said in Skelton v. Jones about not taking points at the trial.

HIS HONOUR: The Privy Council certainly made it a very rigid and powerful rule.

MR. EVATT: I will not develop that, I will simply say that among other reasons, without development, that a soliloquy is not a discussion.

HIS HONOUR: I think in effect I said that. I think I said it takes more than one to make a discussion and takes probably many more than two to make a public discussion.

MR. EVATT: A defamed person when he gets the newspaper cannot sing out in a voice so loud it will reach everyone who is reading the newspaper. That is the basis.

HIS HONOUR: I think I covered that. A soliloquy is not a discussion; I do not think anyone would disagree with that.

MR. EVATT: Secondly, on the same topic, in this case 17(h) has not been shown in all the circumstances to be available to the defendant in any of the counts. Assuming, but not admitting, that 17(h) could in certain circumstances be available to the press, then it is not in this case. Developing both those thoughts, 17(h) does not allow a newspaper to nominate a variety of subjects and to claim in Court that it is discussing a variety of subjects and to use that circumstance to publish defamatory matter.

HIS HONOUR: I think they are obviously questions of fact which I hope I have sufficiently covered.

MR. EVATT: I do put that as a matter of law. Still on the same topic, 17(h) is only available to media of discussion of which a newspaper is not one. One might contemplate a debate in which there is the cut and thrust, the pro and the con. I am not trying to suggest Your Honour's construction of the word "discussion" is wrong, but discussion cannot be divorced from public discussion.

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This is a public discussion and what I put is that 17(h) is not intended to cast a protection on newspaper at all. 17(h) is only available to media of discussion of which a newspaper from its very nature could not be one. 17(h) contemplates, say, a debate in which the cut and thrust may strengthen or weaken as the arguments are advanced but it must be a discussion, it must be a genuine discussion; it must be an examination in detail, favourable and unfavourable considerations being advanced. I submit that could not apply to a newspaper, and secondly it could not apply to any of the counts of this case.

I submit 17(h) is not available for still another reason, that those who hear the public discussion contemplated by 17(h) hear both sides for or against, or the pro and con., a situation which cannot happen with a newspaper. Even if they publish a reply, supposing they do that a day or two later, it may not be seen by those who read the earlier matter. That is why I do submit it is a very important matter.

Now I come to still another matter of importance. I submit a public discussion within 17(h) must be of some, and I do stress the word, some specific subject. The Act itself says "some subject". The importance of this submission is that a very wide variety of subjects upon which my friend seeks to rely here, I think in the case of one count seven, and in the case of another count nine, and the jury will know I am putting this merely to illustrate my argument: supposing two members of the jury thought that subject A might be a matter of discussion and might in fact be being discussed and the other ten exclude the other suggested subjects. You could have a minority viewpoint of the jury on each and every subject and a majority viewpoint against each and every subject and there could be a complete diversion of opinion, a complete absence of unanimity, or even a majority view of the jury as to the variety of subjects. You would get the most confused situation.

HIS HONOUR: That has happened in the High Court.

MR. EVATT: I am not foolish as to argue that a subject, and I submit really the only legitimate subject that could be advanced in the first count, would be the election. But I submit the way it is presented defeats the claim because if a newspaper is excluded from 17(h) of course this does not arise. Even if the newspaper were to come into 17(h), what public discussion is there when a paper takes the stand that one party is pure white and the other party is sheer black?

HIS HONOUR: In Kornhauser's case was not 17(h) relied on as a defence?

MR. EVATT: Yes, it was.

HIS HONOUR: Kornhauser has been before the Full Court and certainly none of these submissions you are making were upheld by the Full Court.

MR. EVATT: That went on a very clear and definite defamatory matter and it would be hard to fit a consideration of that particular matter into these circumstances. Now I come to think of it I think they

also relied on still another portion of 17, an earlier portion of 17 as well. However, I am not suggesting this was not discussed. That is the way I put it, my friend must be made to elect. If Your Honour looks at the construction of s.17—

HIS HONOUR: I cannot maintain at this stage of this case an argument that 17(h) is not applicable. I would have thought that would have been a matter for demurrer. You could have replied that the matter alleged was published in a newspaper and that would have brought the matter before the Full Court on demurrer. But to argue this at this stage of the trial is too much. You have the benefit of your submissions and you are fully protected.

MR. EVATT: I also submit that "in the course of" is not supported by any evidence in this case. That arises directly and indirectly out of the submissions I have made.

HIS HONOUR: Does this submission stand or fall with the earlier submissions?

MR. EVATT: No, it would obviously be supported if 17(h) was not available to a newspaper but the further submission relative to "in the course of" is this: it must be shown by evidence to be in the course of the discussion of some subject of public interest. It is very hard to clearly draw a dividing line between "in the course of" and "relevant". If it is not relevant I should think it would not be in the course of.

HIS HONOUR: There is a clear distinction.

MR. EVATT: I am putting as a matter of law there is no evidence to support "in the course of" and no evidence to support the claim of public benefit, which is also an important element in (h). Indeed, it has got to be a discussion which is for the public benefit.

I turn now to a matter of very considerable gravity and it is this: I think it will be admitted I did raise this point in the replications. I refer now to the question of comment, where comment is made then that comment must be fair. Whether it is a statement of fact or whether it is a statement of comment, that is opinion, I think Your Honour has put it, perhaps not in these precise words, that is a matter for the jury to decide as a matter of fact.

HIS HONOUR: There is no doubt that I put that to the jury.

MR. EVATT: That seems to be so clearly and emphatically laid down in Skelton v. Jones as to not need elaboration.

HIS HONOUR: I am asking you to put to me things that I have put wrongly, not to reiterate what I have put.

MR. EVATT: I do submit Your Honour was a little unkind to use the word "retreat".

HIS HONOUR: I have lost the thread of what you are putting, I am afraid.

MR. EVATT: My friend said a passage in my opening address indicated I was not suggesting there was comment. What I am saying is that the basis of fair comment, namely fact, if the facts are false then fair comment cannot arise.

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HIS HONOUR: I have ruled on that.

MR. EVATT: What I am putting is this, in the third and fourth counts at least the headlines are capable of being found by the jury as a matter of fact to be comment.

HIS HONOUR: I do not agree with that. Did I say you retreated?

MR. EVATT: Your Honour did but in that nice kindly way.

HIS HONOUR: I withdraw the word "retreat" and substitute "a strategic withdrawal".

MR. EVATT: I would ask Your Honour to put "a counter attack". But seriously, this is tremendously important.

HIS HONOUR: I realise the importance of it and I note, might I say, the force of your argument. I still think that 17(h), within the context of the case in which 17(h) is practically the only issue, altered the law fundamentally as to what is to be understood by comment and no longer need it be based on facts truly stated.

MR. EVATT: I argue that it is wrong. I submit to Your Honour as a matter of law in the third and fourth counts there is material which the jury could find as a matter of fact amounts to comment and I refer particularly to the headlines.

HIS HONOUR: They are the most clear statements of fact to be found in the article.

MR. EVATT: Could I just put this submission; the comment must be based on fact clearly stated or, secondly, on facts that are implied, but in either event, on the third and fourth counts, it would require proof that the plaintiff in this context was in fact approached to ask questions and on that I would submit there is no evidence here at all to support that material. There must at least be an element of proof, an approach to Labour M.P.s, or some ulterior purpose, and nothing like that is proved in this case. I rely on Kemsley v. Foote (52 A.C. 345) and Fleming at 548 —

HIS HONOUR: These common law authorities are not applicable to 17(h) —

MR. EVATT: That raises a matter of very great significance. If I cannot dissuade Your Honour from that point of view might I respectfully submit to the contrary and have myself completely protected? I had intended to read from Bailey's case.

HIS HONOUR: I have read that. I say all that law has gone now because of the enactment of 17(h).

MR. EVATT: What I had intended to say also was to let us take the second count, the Bulletin matter. That clearly in its opening lines says it is reporting the proceedings in Parliament. It says it is going to report in that argument the debate on the defence estimate. A newspaper is protected if it fairly reports those proceedings under s. 14; if it fairly reports the proceedings of Parliament and reports them in good faith it is protected. It is also protected by 15. It can publish a fair

comment of (a) and (a) is the proceedings of Parliament. So it has two protections, it has got the absolute protection if it publishes in good faith a fair report and it is not deprived of its opportunity of commenting under 15. But it must be fair comment and as I say, it must be a fair report of what took place in Parliament. I submit that is not a limited right, it is a very considerable right given to the press, or anybody for that matter, but it cannot sidestep so to speak, 14 and 15 and come back to 17 and say it is in the course of a public discussion.

HIS HONOUR: I think that is bound up in your earlier submissions and I will not give any directions.

MR. EVATT: I had large extracts from Bailey v. Truth to read so I will not now do so.

The next point is relevance and my submission is this, that none of the matters complained of in the four counts could be held to be, or regarded as, relevant to any public discussion contemplated by s.17(h). I rely on Salmond (13 Ed. 381). "Newspapers . . . is of public interest".

HIS HONOUR: The words are at common law, and I pointed out consistently throughout this case that s.17(h) is not a child of the Common Law, but a statutory defence introduced in this State in 1958.

MR. EVATT: I would ask Your Honour to add that you cannot go down some side lane in the guise of discussing an allegation and hit a man over the head —

HIS HONOUR: I have left that question to the jury. You are overlooking the fundamental provision of the Act, s. 19, "Where defamatory matter . . . question of fact".

MR. EVATT: I realize it is for the jury, but what I am asking Your Honour to direct the jury, as a matter of law, is this: Take the Bulletin article, "Left Winger . . . Communist line". That could not be relevant to a discussion on the estimates if it is false and defamatory. That is the basis of that submission. Your Honour is leaving now the manner and extent?

HIS HONOUR: Manner, not extent.

MR. EVATT: The manner in the first count?

HIS HONOUR: In the first, third and fourth counts; not the second.

MR. EVATT: I would submit it should be left in the second. I think we did have some preliminary discussion, but whether we did or did not, could I protect myself by making that submission to Your Honour?

HIS HONOUR: Yes.

MR. EVATT: On the subject of ill-will, which is the next one, and which is in all of them, I submit, this answers my friend's submission on Loveday's case, that clearly they can take, in the case of the second count, the failure of the paper to publish the correction if they find the correction was handed to —

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HIS HONOUR: A question of fact arises here, and I want you to help me on it. Mr. Uren says he gave the letter to Reid. Did Mr. Reid say the letter got to the Bulletin, not through his hands?

MR. EVATT: He said he thought it was posted. He said he rang his editor or his associate editor and was querying when it would appear, but on the assumption that the jury find that letter was sent to the Bulletin either way, then its failure to publish it can be considered under the general heading of ill-will, in all the circumstances, because here what he is complaining about is an aspersion cast on him that he "adopted the Moscow and Peking line". That is what he is complaining about. He is complaining of it indirectly because he concedes what he did say in this speech, but he says "Your conclusion is false and I asked you to publish it". For Your Honour to hold, as a matter of law, that that could not be considered under the heading of ill-will, would be, I submit, going counter to what I think we have regarded as a very definite part of the law of defamation for many years. It is a factor they can take into consideration. It is a factor about which they can say "In publishing what they did publish, if they are claiming that that was in the course of a public discussion and it was published in good faith, then when the person defamed writes them a letter telling them that their basic description of him as being a person who adheres "to the Peking line" is not true, it is false in fact, then your failure to publish that" —

Your Honour said, with respect, that it was not asking for an apology, but doesn't that strengthen my position? Isn't it more malicious to refuse to correct? A paper might take the stand "We won't apologize to anyone. That is asking us to go too far. We will publish a correction". They would not even do that, and I submit that factor in this case, among other things that have arisen in the case, could be considered under the heading of ill-will.

As regards the third and fourth counts, what I rely on there is the letters in which conversations between the solicitors are set out, and there they said they were considering an apology, but they did not admit that the article in the Sunday Telegraph referred to Mr. Uren — or, rather, they went further than that — they said there was nothing in the Sunday Telegraph that they could discover, relating to my client. At the time this was first debated, Your Honour said: "That would not show ill-will because they are saying, by that 'We cannot find anything in the paper'." But after Your Honour had indicated that point of view, the editor came to this Court, that is, Mr. Moyes, and clearly admitted in cross-examination that the article did in fact refer to the plaintiff. That is in the evidence.

HIS HONOUR: I remember it very well. One is the evidence of the editor and the other is the letter from the solicitor, and it may well be that the editor knew what he was referring to but the solicitor did not, when he wrote the letter.

MR. EVATT: I ask Your Honour to leave it to the jury, as Your Honour had done, in connexion with all the evidence, as a factor—on other matters of ill-will.

HIS HONOUR: No other matters have been raised by Mr. Larkins, except that one matter. I made it quite clear to the jury that I was not going into the detail of the evidence, and I recalled to them counsel's addresses.

MR. EVATT: He took exception to my submissions to the jury that the Telegraph, Consolidated Press, had an anti-Labour policy. That is the evidence of Mr. Uren. (P.74 of transcript). And I submit, too, the jury could use their own knowledge of that. They are citizens of Sydney, and the Telegraph has been a newspaper in Sydney for as long as I can remember, and it leads to this submission that if the jury find —

HIS HONOUR: That is Mowlds v. Fergusson, the way of seeking to dis-credit a political doctrine — Is there any other authority except what Sir Frederick Jordan said in that case?

MR. EVATT: Fleming, p. 542, gives—

HIS HONOUR: But Fleming is only quoting Sir Frederick Jordan.

MR. EVATT: According to Spencer Bowyer — I am on much firmer ground than having to point to a variety of motives. If the purpose of discussion is gone outside of, then that is evidence of ill-will. I can give Your Honour authority for that.

HIS HONOUR: I do not need it.

MR. EVATT: "Any motive whatsoever . . . attaches". In other words, if the jury find a motive external to the purpose for which the matter is published, then they can find ill-will.

HIS HONOUR: With respect to the author of that book, I think that proposition is so wide that I would not follow it. It has got to be an improper motive under the Act. That is common law; we are dealing with s.17(h).

MR. EVATT: I submit the common law principles in these cases are envisaged by the draughtsman of this Act. I submit, on ill-will, that there are matters that Your Honour did not expressly mention, which I ask Your Honour to mention.

HIS HONOUR: No, I won't do that. I will just put in broad outline, your submissions, and Mr. Larkins' submissions.

MR. EVATT: The last matter is this, that seeing that the defendant company had its representative in Parliament and heard the debates, the subject of the second, third and fourth counts, that in the light of the material set out in those counts, I would submit that they would know — they can only know through their representatives — that the matter they were publishing in those counts were false. If they know it to be false, then they believe it to be false.

In the Supreme Court of New South Wales.

No. 10.
Judgment on Application and Further Directions.

11th March, 1964.

No. 10

Judgment on Application and Further Directions

HIS HONOUR: I have left those matters to the jury already. Mr. Larkins asks me to withdraw a passage of my summing-up in which, when discussing question 3(b) under the second count, I said that the failure to publish the letter, if it were received by the Bulletin, could be accepted by the jury as some evidence that the defendant was actuated by ill-will. I left it that it was a factor they could consider. At the time I was dealing with this subject of ill-will, I pointed out to the jury that danger of concentrating on the parts of the question and losing sight of the whole, and it was in that context that I gave the jury a direction that if they found there was a practice of ill-will by the defendant against the plaintiff in the article, they were entitled to take that matter into consideration.

Mr. Larkins complains that the directions I gave on this specific matter is in conflict with the statement of Sir John Latham in Loveday v. Sun Newspapers Limited (59 C.L.R. 503 at 513). I do not, of course, for a moment, question the correctness of what Sir John Latham said there, but I do not think it applies in this case. If the third count stood alone, then there would be more force in Mr. Larkins' argument, but here ill-will has been claimed by Mr. Evatt to embrace knowledge of these publications individually but as an overriding matter that is to be found in the whole of the circumstances of this case. I am of opinion that that failure to publish the correction is a matter for the jury to consider. They may find one way or the other, but I do not think I should withdraw my directions, which I have already given.

The second matter Mr Larkins refers to is that he points out that a concession that the truth of the matters complained of in the articles is not asserted, must not be so widely read as to embrace the idea that he concedes that the articles were false. Well, that, of course, is true. It is Mr. Larkins' concession, and I misinterpreted the concession. I think I should now directly address you and tell you that Mr. Larkins pointed out that his concession that the truth of the articles is not asserted, is not to be interpreted as conceding that the articles were false, and that you must bear in mind, and any impression I gave to the contrary must be expunged from your minds.

The third matter Mr. Larkins referred to is not one I put to the jury.

Mr. Evatt has made some very interesting and important observations on the basis that s.17(h) of the Defamation Act cannot apply to a newspaper. I can only say I overrule that submission. It is a matter that could have been tested, in any event, on demurrer. I would not be prepared to now give that direction. Mr. Evatt has argued further matters, on which I have already ruled. He is duty bound to see that he is fully protected. The subject matter broadly,

I think, is that fair comment cannot be put as a matter of justification unless the facts on which the comment is based are established to be true by the person relying on fair comment. That is the position at common law, undoubtedly, but I think I already said that s.17(h) is a statutory defence and departs radically from the common law in so far as fair comment is concerned. Indeed, although the words are the same fair comment, I think the meaning of the phrases as used in the Act and as used at common law, differ radically, and it is for that reason that I again rule that the submission is not firmly based.

Mr. Evatt has asked me to put as an element of improper motive, that it is open to the jury to find that the articles were published with a view to destroying the Labour Party. I think this submission is far too wide and has no relevance to the issues the jury have to try.

Is there any other matter, gentlemen?

MR. EVATT: Did Your Honour come to a final decision as to how damages will be given?

HIS HONOUR: Yes. Gentlemen: You will remember that yesterday, when I was summing up, I expressed doubt whether I would leave two questions to you, and they were questions 3(b) and (d). Mr. Larkins does not ask me to take those questions from you and, therefore, they are there for your consideration in the light of my discussion of them in the summing up.

When you return to Court, my Associate will ask you: Have you agreed upon a verdict? Then he will say: Under the first count, how do you find, for the plaintiff or for the defendant? And you will give your verdict, either by saying "For the plaintiff" or "for the defendant", or if you wish, by reading the answers to the question. But before passing to the second count, he will ask you, "If you find for the plaintiff, "What damages"? If you find for the plaintiff you will fix the amount of damages appropriate to the first count. The same procedure will take place on the second count, and you will be asked what is your judgment and the amount of damages appropriate to the second count, if you find for the plaintiff. He will then ask you the same questions in regard to the third and fourth counts, treating them as one count. If you find for the plaintiff, he will ask you what damages you find under the third and fourth counts. You can write, if you like, just before the third and fourth counts, and at the end of the paper "What damages?" But I remind you to bring in separate damages under the first, second, third and fourth counts, if you find for the plaintiff on those counts.

MR. EVATT: The jury is not obliged to answer those individual questions.

HIS HONOUR: You can answer those questions if you find it convenient. You are not bound to. You may prefer to treat it as a guide in arriving at a general verdict.

I now ask you to please retire and consider your verdict.

In the Supreme Court of New South Wales.

No. 10.
Judgment on Application and Further Directions. *(Continued)*

11th March, 1964.

(At 10.55 a.m. the Jury retired to consider its verdict).

AT 3.00 P.M.

HIS HONOUR: Four hours have elapsed. I can accept a majority verdict, but it may be that the jury has not had sufficient time to consider the matter. Four hours is the minimum not the maximum. I thought I would get your views on this, as to whether I should acquaint them as to the law and tell them that I am able to take a majority verdict of nine or more.

MR. EVATT: In the Practice, a question arises as to whether the parties should be asked whether they agree to a majority verdict. "Discussions in respect of . . . the jury".

HIS HONOUR: I think that is where a question arises as to whether the parties are asked if they will agree to a majority verdict. You do not want me to do that, do you?

MR. EVATT: I thought, as this was a somewhat involved case —

MR. LARKINS: There is a footnote to 49 W.N. I have not that authority here.

MR. EVATT: I thought we may leave it for another hour or two. There are three counts and if they are for the plaintiff, there are three amounts of damages.

HIS HONOUR: Do you oppose the suggestion that I should tell them what is the law?

MR. EVATT: I suggest nothing should be done for another hour or an hour and a half.

MR. LARKINS: I think it is a matter for Your Honour's discretion, whether Your Honour should ask them if they have arrived at a verdict by a majority. I would have thought it proper for Your Honour at this stage to ascertain from the foreman the state of affairs. It may well be that they assume it has to be unanimous. I would have thought that the compliance with the section would be that Your Honour would ask them whether they had agreed and then, if they have not agreed, ask them if three-fourths have agreed because, I think that if three-fourths of them have agreed, Your Honour is bound to take their verdict.

MR. EVATT: As it is an unusually involved case, I suggest the bare minimum is not quite enough and that perhaps, in an hour and a half or two hours, Your Honour may send a message to them, as was done before lunch. They might be asked, at 4.30 or 5.00 p.m., whether they would be much longer. They would probably tell the Sheriff's Officer if they are divided or unable to come to a verdict.

HIS HONOUR: I do agree with Mr. Evatt when he says that there are complexities in this case. I will send for the jury at 4.00 p.m.

MR. LARKINS: I submit that if Your Honour chooses to send for them at 4.00 p.m., it is not a question, if I may say so, of instructing them about what the Act provides, but of Your Honour's asking them

firstly, whether they have agreed; secondly, if they have not, whether three-fourths of them have agreed, and if the answer to the second question were Yes, then Your Honour should take the verdict.

HIS HONOUR: I do not have to examine them on oath until six hours have expired. We will deal with each situation as it arises. I intend to ask them at 4.00 p.m., whether they have agreed upon a verdict. Then, if they say "No" I will ask them on their prospects of agreeing, and if they say there are none, I will tell them the law entitles me to take a verdict of three-fourths of them. I do not, at that stage, have to examine them on oath. I intend to do what I have said, at four o'clock. I do adhere to your submission, Mr. Evatt, that in view of the complexity of this case I should not do anything at the moment.

No. 11
Verdict of Jury

At 4.00 p.m. the Court was informed that the Jury would reach a verdict within the next quarter of an hour.

At 4.08 p.m. the Jury returned to Court with the following verdict:

First Count: For the plaintiff for £5,000;

Second Count: For the plaintiff for £10,000;

Third and Fourth Counts: For the plaintiff for £15,000.

Mr. Larkins applied for a stay of proceedings. Mr. Evatt asked that any stay that His Honour granted be granted on terms.

His Honour said that if it were merely a question of amount he would listen to Mr. Evatt's application with a great deal of attention, but as there were so many novel propositions of law in this case, the defendant was entitled to a stay and not on terms.

In the Supreme Court of New South Wales.

—

No. 12.
Notice of Motion for New Trial.

—

1st April, 1964.

No. 12

Notice of Motion for New Trial

TAKE NOTICE that in this action, which was heard before the Honourable 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 which last-mentioned date a verdict was returned in favour of the plaintiff in the sum of Five thousand pounds on the first count, Ten thousand pounds on the second count, and Fifteen thousand pounds on the third and fourth counts, a total of Thirty thousand pounds, the defendant intends to move this Honourable Court sitting in Banco on the first day on which its business permits after the expiration of sixteen days from the date hereof for the following orders:—

(1) That the verdict be set aside;
(2) That a new trial be had;
(3) That the defendant's costs of the trial be paid by the plaintiff in any event; and
(4) Such further or other order as to the Court may seem meet;

upon the following grounds:—

1. The trial miscarried.
2. His Honour was in error in refusing to discharge the jury on the several applications of the defendant.
3. His Honour was in error in refusing to adjourn the hearing on the several applications of the defendant.
4. The fair trial of the action was prejudiced by the introduction by counsel for the plaintiff of matters calculated to influence the jury improperly in arriving at a determination.
5. His Honour was in error in refusing the several requests of the defendant to warn the jury to disregard matters of prejudice introduced by counsel for the plaintiff.
6. His Honour was in error in omitting to warn the jury to disregard other matters of prejudice introduced by counsel for the plaintiff.
7. His Honour misdirected the jury.
8. His Honour did not fully direct the jury.
9. His Honour was in error in rejecting evidence tendered on behalf of the defendant.
10. His Honour was in error in admitting evidence tendered on behalf of the plaintiff.
11. The verdict was against the evidence and the weight of evidence.
12. The damages awarded were excessive.
13. His Honour was in error in refusing to discharge the jury on the ground that counsel for the plaintiff, although no such issue was raised on the pleadings, opened in very strong terms a case of absence of good faith.

14. His Honour's refusal was based on a misconception of the effect of the plaintiff's joinder of issue and of the majority decision in Motel Holdings Limited v. The Bulletin Newspaper Co. Pty. Limited 1963 S.R. 208.

15. His Honour was in error in refusing to discharge the jury on the ground that counsel for the plaintiff alleged in his opening that the matters complained of were false and would be proved to be false.

16. His Honour was in error in refusing to discharge the jury as a term of allowing the plaintiff's amendment to his replication.

17. His Honour was in error in refusing to discharge the jury on the cumulative basis of the grounds referred to in the three preceding grounds of appeal, aggravated by the submission of counsel for the plaintiff that it must have become very apparent that the defendant was endeavouring to delay the trial "by hook or by crook".

18. The refusal of an adequate adjournment following upon the amendment of the plaintiff's replication occasioned irreparable prejudice to the defendant.

19. The defendant was taken by surprise by the new, grave and important issues raised by the amended replication.

20. The terms upon which such amendment were allowed were oppressive, embarrassing and prejudicial to the defendant.

21. The forcing on of the trial in the light of the defendant's unreadiness to proceed occasioned irreparable prejudice to the defendant.

22. The further trial of the action on the pleadings as amended was prejudiced by his Honour's expression of opinion that notwithstanding the state of the pleadings it must have been "obvious to either party in this case that the true issue between the parties, unless the plaintiff was to be taken to concede it as a matter of reality, is whether or not the publications were made in good faith".

23. In spite of assurances from counsel for the defendant that the issues had been interpreted in light of the decision in Motel Holdings Limited v. The Bulletin Newspaper Co. Pty. Limited (Supra) and that its meaning was so clear that no issue of good faith could be raised, his Honour did not withdraw the observation set forth in the preceding ground of appeal.

24. The refusal of an adequate adjournment following upon such amendment denied the defendant the opportunity of a considered application for particulars of the amended replication.

25. His Honour was in error in not ordering the plaintiff to supply certain further and better particulars of the amended replication.

26. His Honour's refusal of an adequate adjournment following upon such amendment denied the defendant any appeal from his Honour's refusal to order the plaintiff to supply such further and better particulars.

In the Supreme Court of New South Wales.

No. 12.
Notice of Motion for New Trial. *(Continued)*

1st April, 1964.

27. The refusal of an adequate adjournment following upon such amendment denied the defendant sufficient opportunity for the preparation of the defence generally and in the light of such further particulars as were supplied.

28. The refusal of an adequate adjournment following upon such amendment denied the defendant the opportunity of considering the further particulars supplied until the sixth day of the trial.

29. The refusal of an adequate adjournment following upon such amendment denied the defendant sufficient opportunity for conferences with witnesses (including two then overseas) generally and in the light of such further particulars.

30. The refusal of an adequate adjournment following upon such amendment denied the defendant the opportunity of calling the author of the article complained of in the first count.

31. The refusal of an adequate adjournment following upon such amendment denied the defendant the opportunity of calling Mr. Shapel, one of the persons responsible for the article complained of in the third and fourth counts.

32. The refusal of an adequate adjournment following upon such amendment denied the defendant the opportunity of taking on commission the evidence of the witnesses overseas.

33. The refusal of an adequate adjournment following upon such amendment exposed the defendant not only to criticism for its failure to call those two witnesses (which criticism was, in due course, made) but to the possibility of acceptance by the jury of adverse inferences from such failure (which adverse inference they were, in due course, invited to draw).

34. The fair trial of the action was prejudiced by counsel for the plaintiff in his opening and closing addresses persistently claiming that it was the policy of the defendant to destroy the Labour Party.

35. The fair trial of the action was prejudiced by frequent allegations of a like nature being made in the closing address of counsel for the plaintiff notwithstanding his Honour's ruling that there was no evidence of any improper motive on the part of the defendant.

36. The fair trial of the action was prejudiced by the submission by counsel for the plaintiff in his closing address of other improper motives for the publication of the matter complained of in the third and fourth counts notwithstanding his Honour's aforesaid ruling.

37. The fair trial of the action was prejudiced by counsel for the plaintiff alleging three times in his opening address that the ordinary and natural meaning of the words complained of in the third and fourth counts was that the plaintiff was a traitor to his own country.

38. The fair trial of the action was prejudiced by the persistent claims by counsel for the plaintiff in the presence of the jury that the matter complained of in the third and fourth counts was capable of bearing such a meaning.

39. The fair trial of the action was prejudiced by counsel for the plaintiff interpolating during the closing address on behalf of the defendant further submissions that the words were capable of being understood to attribute treachery and conspiracy to the plaintiff notwithstanding his Honour's ruling that the words were not capable of such a meaning.

40. The fair trial of the action was prejudiced by the submission of counsel for the plaintiff in his closing address that the meanings then assigned by him were alternatives to those which his Honour had ruled the words were incapable of bearing.

41. The fair trial of the action was prejudiced by the submission by counsel for the plaintiff, in opposing an adjournment, that it must have become very apparent that the defendant was endeavouring to delay the trial "by hook or by crook".

42. The fair trial of the action was prejudiced by the criticism by counsel for the plaintiff of the defendant's failure to call two witnesses who were overseas notwithstanding that the defendant's inability so to do was a consequence of the refusal of an adjournment to the defendant following an amendment of the replication which raised for the first time the issues to which their evidence could have been relevant.

43. The fair trial of the action was prejudiced by the imputation by counsel for the plaintiff that the defendant had in its possession a statement from a witness whose evidence would not have been required to meet the issues upon which the matter went to trial.

44. The fair trial of the action was prejudiced by the gratuitous offer by counsel for the plaintiff to allow to be read on to the notes the relevant portions of such statement, there being neither evidence nor basis for any inference as to the existence of such a statement.

45. The fair trial of the action was prejudiced by the comment by counsel for the plaintiff that the acceptance by the defendant of such an offer would give it an advantage far above the calling of the witness.

46. The fair trial of the action was prejudiced by the comment by counsel for the plaintiff in his closing address on the defendant's failure to accept that offer.

47. The fair trial of the action was prejudiced by the unjustifiable imputation by counsel for the plaintiff that the defendant was aware that the evidence of an employee whom it had prior to the trial posted overseas as its London editor would be required to meet the issues as they stood at the time of such posting.

In the Supreme Court of New South Wales.

No. 12.
Notice of Motion for New Trial.
(Continued)

1st April, 1964.

48. The fair trial of the action was prejudiced by the unwarranted observations by counsel for the plaintiff that counsel for the defendant might in his cross-examination be trying to suggest that the plaintiff was either a communist or a communist sympathiser.

49. The fair trial of the action was prejudiced by claims by counsel for the plaintiff that there was an issue before the jury as to whether the plaintiff in asking questions in the House of Representatives about sensitive foreign policy issues was or was not inspired so to do by a Russian agent.

50. The fair trial of the action was prejudiced by claims by counsel for the plaintiff that there was an issue for the jury as to whether or not the plaintiff did in fact ask questions in the House of Representatives at the instigation of an official of the Russian Embassy.

51. The fair trial of the action was prejudiced by the unwarranted comment by counsel for the plaintiff that a question put by counsel for the defendant in his re-examination of the witness Reid was an attempt to establish the truth of the matter complained of in the second count of the declaration.

52. The fair trial of the action was prejudiced by the lengthy submissions by counsel for the plaintiff at the close of his Honour's summing up that the defence provided by Section 17(h) of the Defamation Act, 1958, was not available to a newspaper.

53. His Honour was in error in refusing to warn the jury that there was no evidence to support the prejudicial statements by counsel for the plaintiff that it was the policy of the defendant to destroy the Labor Party.

54. His Honour was in error in refusing to warn the jury that these prejudicial statements should be disregarded.

55. His Honour was in error in refusing to warn the jury that there was no warrant for the observations by counsel for the plaintiff that counsel for the defendant might in his cross-examination be trying to suggest that the plaintiff was either a communist or a communist sympathiser.

56. His Honour was in error in refusing to warn the jury that there was no issue before them as to whether the plaintiff in asking questions in the House of Representatives about sensitive foreign policy issues was or was not inspired so to do by a Russian agent.

57. His Honour was in error in refusing to warn the jury that no issue arose on the pleadings as to whether or not the plaintiff did in fact ask questions in the House of Representatives at the instigation of an official of the Russian Embassy.

58. His Honour was in error in omitting to warn the jury that they should disregard the allegations by counsel for the plaintiff in his opening address that the ordinary and natural meaning of the words complained of in the third and fourth counts was that the plaintiff was a traitor to his own country.

59. His Honour was in error in omitting to warn the jury that they should disregard the persistent claims by counsel for the plaintiff that the matters complained of in the third and fourth counts were capable of bearing such meaning.

60. His Honour was in error in omitting to warn the jury that they should disregard the further submissions of counsel for the plaintiff interpolated during the closing address on behalf of the defendant that the words were capable of being understood to attribute treachery and conspiracy to the plaintiff.

61. His Honour was in error in omitting to warn the jury that the meanings assigned by counsel for the plaintiff in his closing address to the words complained of in the third and fourth counts were not alternatives to the meaning his Honour had ruled they were incapable of bearing.

62. His Honour was in error in omitting to warn the jury that the bona fide absences overseas of two witnesses was not challenged in cross-examination and that the defendant's inability to call them arose out of the trial proceeding on the new and substantial issue raised by the amendment to the plaintiff's replication.

63. His Honour was in error in omitting to warn the jury that they should disregard the lengthy submissions by counsel for the plaintiff at the close of the summing up that the defence provided by Section 17(h) of the Defamation Act, 1958, was not available to a newspaper.

64. His Honour was in error in directing the jury that if they found the original of Exhibit C had been received by the defendant, the failure to publish it was evidence of ill-will.

65. His Honour was in error in refusing to direct the jury that there was no evidence that the defendant was affected by a particular prejudice towards the Australian Labor Party.

66. That his Honour was in error in refusing to direct the jury that the allegations by counsel for the plaintiff that the defendant was out to destroy the Labor Party were no evidence of ill-will towards the plaintiff.

67. His Honour was in error in refusing to direct the jury that the words complained of in the third and fourth counts could not bear the meaning that the plaintiff was induced to ask questions in the House of Representatives by a proved Russian spy.

68. His Honour was in error in rejecting questions of the plaintiff in cross-examination directed to rebutting the suggestions that the object of the defendant was to destroy the Labor Party.

69. His Honour's said ruling implicitly excluded the defendant from tendering evidence in its case to rebut this suggestion.

70. His Honour was in error in disallowing questions of the plaintiff in cross-examination directed to showing his understanding that it was no part of the defence that the matters published of him were true.

In the Supreme Court of New South Wales.

No. 12.
Notice of Motion for New Trial.
(Continued)

1st April, 1964.

71. His Honour was in error in disallowing questions of the plaintiff in cross-examination directed to testing his understanding of the protection attaching to his answers as a witness.

72. His Honour was in error in rejecting evidence tendered by the defendant directed to establishing public discussion of subjects of public interest, in the course of which discussion the article as a whole was published.

73. His Honour was in error in disallowing questions of the plaintiff in cross-examination directed to establishing the public discussion of the control of Federal Parliamentary Labour Party by the A.L.P. Federal Conference and Federal Executive.

74. His Honour was in error in admitting evidence from the plaintiff directed to proving the falsity of the matters complained of.

75. His Honour was in error in allowing cross-examination of the witness Moyes as to his present belief in the truth of the matters complained of in the third and fourth counts.

76. His Honour, by putting a question as to the contents of a document (m.f.i. (1)) tendered by the plaintiff and rejected, inferentially established a fact which was inadmissible.

77. His Honour was in error in directing the jury that it was open to them to award punitive or exemplary damages.

DATED this first day of April, 1964.

(Sgd.) Antony Larkins
Counsel for the Appellant-Defendant

TO the abovenamed plaintiff.

AND TO his solicitors, Messrs. Teece, Hodgson and Ward,
2 Ash Street,
SYDNEY.

NOTE: This Notice of Motion is filed by Frederick William Millar, care of Messrs. Allen, Allen and Hemsley of 55 Hunter Street, Sydney, Solicitors for the Defendant.

No. 13

In the Supreme Court of New South Wales.

No. 13. Reasons for Judgment of the Full Court (Herron C. J.).

4th May, 1965.

Reasons for Judgment of the Full Court of the Supreme Court of New South Wales

HERRON, C. J: This is a motion on behalf of the defendant for a new trial on all issues of an action at nisi prius tried before Collins, J. and a jury of twelve between 24th February and 11th March, 1964.

Alternatively, the appellant seeks a new trial limited to damages.

The respondent sued on four counts for damages for libel in three newspapers published by the appellant, the third and fourth counts being taken together. The jury returned verdicts of £5,000, £10,000 and £15,000 on these counts respectively.

There were in all seventy-seven grounds of appeal filed, only one being abandoned at the hearing, and a further ground was sought to be added at the hearing. As to this the point sought to be raised had no bearing on the trial or on this appeal and is of academic interest only. It ought not to be added by amendment. It is fortunately unnecessary to deal separately with each ground as many fell into well defined categories and may be dealt with together.

Before I set out the libels sued upon, a short history of the case is necessary. The respondent, aged 42, is a Member of the House of Representatives having since 1958 been Federal Member for Reid, an electorate situated in the western suburbs of Sydney. He is a member of the Australian Labor Party. He was represented at the trial by senior counsel, Mr. C. Evatt, Q.C. The respondent gave evidence that he enlisted in the A.I.F. at the age of 18 and served overseas during the second World War from 1941 to 1945. He was taken prisoner by the Japanese and worked on the Burma-Siam railway and was a prisoner-of-war in Japan and other places. After his discharge from the army he was employed in the retail trade and later owned his own mixed grocery business in his present electorate, where he has lived since about 1955. On Saturday, 9th December, 1961, a general election for the Federal Parliament was held. On the eve of this election, in the Friday edition of the Daily Telegraph newspaper, the appellant published a libellous article which was in the following terms:—

> "Who is behind Mr. Calwell in the Federal House? A divided warring rag-tag and bob-tail outfit ranging from Eddie Ward and Les Haylen through to Dan Curtin and Tom Uren. This is a team which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country."

I pause to mention that this newspaper, as the evidence shows, supports the Liberal or Government Party in the Commonwalth and not the Labor or Opposition party. I also pause to mention that this article falls more into the category of vulgar abuse than of a defamation. I pass over any obvious criticism which could be made of the policy of a newspaper which sees fit to refer to Members of the National Parlia-

In the Supreme Court of New South Wales.

No. 13.
Reasons for Judgment of the Full Court. (Herron C. J.). *(Continued)*

4th May, 1965.

ment in these terms. Possibly a mitigating circumstance is that it was an election eve comment. However, no complaint or protest was made by or on behalf of the respondent and no writ was issued until February 1963, and even then its issue was dictated by other events. On the day following the libel he was duly elected by a 17,000 majority of votes.

It was not until the declaration was filed in the present action on 26th April, 1963, the first count refers to it, that any identifiable complaint was made by the respondent of this libel.

As I view the count standing alone, admittedly in isolation and out of context with the rest of the case, the verdict of £5,000 seems extraordinarily high.

The writer — it was said to have been written by the Editor-in-Chief Mr. D. McNicoll — aimed his shaft primarily not at the respondent personally but at a faction or group of Members of Parliament of which the respondent was one. No evidence was given that by reason of the libel the respondent suffered any special damage, that any person thought less of him or that he suffered any social disadvantage. Compensatory damages were here restricted to the inference that arose as to damage to reputation from the publication per se, increased or aggravated by "mental anguish" on the part of the respondent, and spite or ill-will to be inferred, it was said, on the part of the appellant. The latter inference, if it is capable of being drawn, would have to arise by relation back to the article from subsequent events. However, I defer until later any decision.

The second count discloses that on the 3rd November, 1962, in The Bulletin, a weekly newspaper published by the appellant, there appeared the following passage:—

> "Leftwinger Tom Uren (Labor N.S.W.) still stubbornly adhered to the line that Moscow and Peking controlled Communist Parties in non-Communist countries assiduously peddle mainly through peace movements. He described suggestions for greater defence expenditure as 'so much hysteria.' But even Uren was susceptible to the prevailing climate."

The article of which this formed part was written by a Mr. Alan Reid, a journalist employed by the appellant as a political commentator. It was a small paragraph in a long article dealing with Labor Party changes in defence policy and with the part played in this by a Dr. Cairns, a Victorian Member of Parliament. In the context in which it appeared, and keeping in mind that it was a criticism of the respondent in his official role as a Member of Parliament, I can see difficulties in supporting the verdict of a jury that the matter was not protected by the lawful excuse provisions of the Defamation Act 1958, s. 17. No decision on this is called for in this appeal. The seriousness of the libel upon the mind of an average reasonable reader was at the hearing overstated, to say the least of it.

There was evidence, which the jury was entitled to accept, despite a denial by Mr. Reid, that the respondent handed to the latter a letter

addressed to the Editor of the Bulletin, dated 8th November, 1962. The letter, Exhibit "C," challenged the accuracy of Mr. Reid's article but did not in terms request that it be published or the article corrected, although the respondent said that Reid promised to publish it. The incident was claimed to supply evidence of ill-will and absence of good faith although its importance seems to have been overstated at the trial.

There was no other protest and no writ was issued until 14th February, 1963, after other events happened, and there is evidence (Exhibit "H") that, by his writ, the respondent intended to complain of later and different libels published on the 10th February, 1963, to which I will refer. The jury awarded the surprisingly, I am tempted to say fantastically, large sum of £10,000 in respect of the Bulletin article.

I turn to the combined third and fourth counts. During the last session of Parliament in 1962 questions were asked, some of them by the respondent, and debates took place in the House relating to important defence projects with especial reference to a radio communications base in Western Australia. During 1962 there had also been mention in the press and in Parliament of the activities of one Skripov, the First Secretary of the U.S.S.R., and his association with Members of Parliament. During the first week of February, 1963, the Attorney-General declared Skripov persona non grata and he was ordered to leave Australia. In the Sunday Telegraph of the 10th February, 1963, there appeared two articles, each published in different editions. The two articles were in the same terms but the headlines were different. The headlines of the first edition read:

"SPY USED LABOR MEN AS PAWNS?"

and in the second edition:

"DID RUSSIAN SPY DUPE ALP MEN?"

The articles were identical and were as follows:—

> "Canberra, Sat.—Allegations are likely to be made in Federal Parliament that some Labor M.P.s were used as 'pawns' by Russian spy Ivan Skripov to try to get defence secrets.
>
> It will be claimed that Skripov persuaded the unsuspecting Labor men to ask questions in Parliament about defence establishments in Australia.
>
> Labor M.P.s are said to have asked for information about the new secret £40 million U.S. radio communications base at Learmonth, Western Australia.
>
> The American Navy will use this base to help keep track of its Polaris-equipped nuclear submarines operating in the Indian and Pacific Oceans. The Labor M.P.s' questions were directed in the House of Representatives to Prime Minister Menzies and Defence Minister Townley."

These were serious libels and referred to the respondent although not by name.

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The defence raised to all counts was that all publications were within the qualified protection of s. 17(h) of the Defamation Act 1958. By its pleas the appellant undertook to prove that there was a discussion of a subject matter of public interest, that the libel was published in the course of that discussion, that the discussion was for the public benefit and as related to counts 1 and 2, so far as the articles consisted of comment, the comment was fair.

The jury were properly and adequately directed by the learned trial Judge as to these defences and the jury found against the appellant. It could be that their decision was based on a lack of conviction as to one or more of the ingredients in the pleas. It may also be that the jury, as well they might have done, found in the respondent's favour on the issue of want of good faith that the matter of the libels, particularly those covered by the third and fourth counts, was not relevant to the discussion relied on by the appellant, or that, as to the first and last counts, the articles exceeded what was reasonably sufficient for the occasion. It seems less likely that, having regard to all the evidence and to the fact that the three articles were written by different persons in three different newspapers, the jury found that the appellant was actuated by ill-will towards the plaintiff or that the matter was believed to be untrue. With respect to the second count, it seems difficult to understand the jury's verdict in the respondent's favour unless it found ill-will to be established. However, these issues were properly and adequately left to the jury for decision and it is impossible to hold that they were not entitled to have so found.

I have considered carefully the submissions made by Mr. Larkins, that on the issue of liability there has been a mis-trial and that a new trial generally should be ordered. Despite counsel's detailed arguments on this aspect, they have been fully examined by Walsh, J. in his judgment about to be published, I am unable to agree that such a result is warranted. Ultimately and at the conclusion of a long hearing and much debate, his Honour left the real issues on liability to the jury, these having the approval of counsel on both sides. His Honour's directions to the jury on these matters were given in an unexceptionable manner and the jury's verdict on these issues must, I think, be allowed to stand. In coming to this conclusion I have given careful consideration to the verdicts on the aspect of liability viewed in light of the evidence and the arguments relating to the second and third pleas. I do not think that the blemishes on the trial, to which I will have occasion later to refer, warrant a decision that there has, on the issues of liability, been a miscarriage of justice although they are such that they warrant a new trial on the issue of damages. Much mischief may flow from the grant of a new trial and it is a serious matter to order one. The respondent in all justice is entitled not lightly to be deprived of his verdict and without very solid grounds. It is only if justice demands it that a new trial should be ordered and this Court should see very plainly that there has been error or a miscarriage of justice: Balenzuela v. De Gail (101 C.L.R. 226 at 243).

As to the refusal of the learned trial Judge to discharge the jury or to adjourn the hearing following on the amendment of the replication, I need only say that these decisions, whilst judicial acts and consequently subject to review by a court of appeal, were matters prima facie entirely within his Honour's discretion. The appellant's application for an adjournment was not finally concluded against it and counsel did not, as his Honour's order invited, renew it. The learned trial Judge's conduct of the trial was attended by his characteristic fairness and judicial approach and being on the spot, he had an advantage denied to this Court in determining procedural questions. I would be very slow to interfere with his orders and I see no valid reason to do so here. If authority is needed it will be found in Henkley and South Leicestershire Permanent Benefit Building Society v. Freeman (1941 Ch. 32); Maxwell v. Keun (1928 1 K.B. 645); Yates' Settlement Trusts, In Re Yates, Yates v. Yates (1954 1 W.L.R. 564 per Evershed, M.R.); Jones v. S. R. Anthracite Collieries Ltd. (124 L.T. 462). I am content to adopt the detailed analysis made by Walsh, J. on this aspect of the appeal.

Despite warnings concerning new trials, I have come to the conclusion that a new trial must be ordered on the issue of damages. Both error and a miscarriage are established. The graduated scale of the three verdicts by a progressive addition of £5,000 in each indicates a lack of restraint and that the jury were carried away by extravagant impulses. They also appear to have applied a broad axe approach to the penal or punitive aspect of damages. Some misconception has crept into their deliberations. A mis-trial on the issue of damages I believe resulted, at least in part, from prejudice engendered by speeches of and statements by counsel for the plaintiff. Mr. Evatt, I regret to say, constantly and at times in face of rulings by the learned trial Judge, mis-stated the issues raised by the pleadings. Time and time again senior counsel conveyed to the jury by direct statements, or by implications from argument that they were either called upon or were at liberty to decide issues against the appellant which either were not relevant to the trial or which were the subject of rulings to the contrary by his Honour. I do not propose to refer to all these in detail for they have been adequately analysed by Walsh, J. and I concur. In his opening speech Mr. Evatt submitted that his client by the libels had been branded as a traitor to his country. Despite the limited nature of the issues raised by the pleas, there was no plea of justification, Mr. Evatt claimed from first to last that it was for the jury to say whether the respondent's conduct in the House was in fact inspired by a Russian agent or a Soviet official. Despite his Honour's ruling against this contention counsel repeated it in argument, and I am left with the conviction that he was covertly inviting the jury to give free rein to feelings of prejudice against the newspapers. Throughout he pitched his case in a key designed, I am persuaded, to prejudice the appellant. He seems not to have been content to submit his case upon the issues but consistently went beyond the limits of matters fairly arguable in

the case. His attitude was not, I regret to say, free from motives of personal aggrandisement. His identification of himself with his client's case led him to transgress the proper limits of advocacy, unjustifiably to attack opposing counsel's motives and to assert and repeat matters of which there was no evidence. He said to the jury:

> "Would I be standing up here on behalf of this man if in fact he had been put up by this Russian spy to ask these questions, and condoning it, suggesting it was other than treachery to our country?"

Time and again he charged the appellant with attempting to blacken and defame his client and asserted that its policy was by such means to destroy the Labor Party. There was no evidence to justify this latter statement and no question relating to such policy had been asked. Further, the allegation went beyond his Honour's considered ruling on matters involving good faith. Before the jury he taunted the appellant with its inability to establish the truth of the sinister treachery or collaboration and conspiracy type of behaviour by the respondent. It is possible that his Honour's definition of the real issues did not wholly dispel the prejudice thus created but my sympathies are with his Honour for he had to deal with a complex set of issues, over twenty-five in all, and he obviously felt he was not free to divert from his task to attempt to correct all the excesses of counsel's behaviour.

But the matter of damages does not end here. Counsel for the plaintiff insisted at the outset that the jury should award exemplary damages to make an example of the appellant and to mark their feelings as to the extent to which this type of journalism should be punished, and so on. This was repeated over and over by counsel in his closing address. He said that this is journalism of which you will "make an example", "stop it in its tracks" and like expressions many times repeated. I refer to pages 579 to 585 of the appeal book. His Honour directed the jury thus:

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

plaintiff, here, of the plaintiff's right to enjoy the reputation that he possesses.

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

In the recent case of Uren v. John Fairfax & Sons Ltd. I examined the principles relating to damages in defamation actions. I find it unnecessary to repeat those here. The correct approach is to be found in Rookes v. Barnard (1964, 2 W.L.R. 269) and McCarey v. Associated Newspapers Ltd. (1964 3 A11 E.R. 947). See also Broadway Approvals Ltd. v. Odhams Press Ltd. (Times Newspaper (27th March, 1965)). Applying those principles to the present case, with great respect to Collins, J., I see no evidence justifying the direction that punitive damages were open to the jury.

The respondent was entitled to substantial damages but the reality of the situation must be looked at and for the libels in this and John Fairfax Ltd.'s or "Sun-Herald's" case a total of £43,000 has been awarded. I adopt, with respect, the considerations applied to such a subject by Diplock, L.J. in McCarey's case and by Sellers, L.J. in Broadway Approvals Ltd. v. Odhams Press Ltd. (supra). I am of the opinion in the first place that there was an excessive award in each of the three verdicts, and in the second place that the jury must have accepted the invitation to add, and has improperly included in its awards, a large sum by way of penal damages. It is beyond dispute that the respondent was entitled to substantial compensatory damages. Most of the components are identical with those in the "Sun-Herald" case, the several libels being to the same effect and published on the same day, 10th February, 1963. I apply here what I said about the compensatory damages in that case. There is here the added factor of ill-will towards the respondent, upon which Collins J. fully directed the jury upon ss. 17 and 18 of the Act. Minds may differ as to whether there was any real evidence of this and I am prepared to assume that there was sufficient evidence to bear upon the issue of good faith. But on the evidence in this case this decision provides no justification for

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awarding punitive, exemplary or penal damages; it is a factor which, if proved, may aggravate the compensatory award. No purpose would be served by debating the matter at length or by analysing the many separate grounds of appeal on the issue of damages, for I believe a new trial is inevitable.

I propose, therefore, that the verdict be set aside and a new trial ordered limited to damages. The respondent will pay the costs of the motion but is to have a certificate under the Suitors' Fund Act. The costs of the first trial should, despite the arguments of the appellant to the contrary, follow the result of the new trial. 10

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WALSH, J: The appellant was the defendant in an action which was tried before Collins J. and a jury, the trial beginning on Monday 24th February and ending on Wednesday 11th March 1964. The declaration contained four counts in libel. The first was based upon portion of an editorial published in the Daily Telegraph on 8th December 1961, the day before a general Federal election, and the portion sued upon was in the following terms:

> "Who is behind Mr. Calwell in the Federal House? A divided, warring rag-tag and bob-tail outfit ranging from Eddie Ward and Les Haylen through to Dan Curtin and Tom Uren. This is a team which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country".

The second count related to portion of an article in The Bulletin of 3rd November 1962, which portion is as follows:

> "Leftwinger Tom Uren (Labor N.S.W.) still stubbornly adhered to the line that Moscow and Peking controlled Communist Parties in non-Communist countries assiduously peddle mainly through peace movements. He described suggestions for greater defence expenditure as 'so much hysteria'. But even Uren was susceptible to the prevailing climate."

The third and fourth counts were treated at the trial as proper to be considered together and as requiring but one verdict upon them, and they were based upon different editions of the Sunday Telegraph of 10th February 1963. Except for the heading the relevant matter in the different editions was in the same terms. As set out in the third count these were:

> "SPY USED LABOR MEN AS 'PAWNS'?"
>
> From a Special Reporter Canberra, Sat.—Allegations are likely to be made in Federal Parliament that some Labor M.P.s were used as 'pawns' by Russian spy Ivan Skripov to try to get defence secrets.
>
> It will be claimed that Skripov persuaded the unsuspecting Labor men to ask questions in Parliament about defence establishments in Australia.
>
> Labor M.P.s are said to have asked for information about the new secret £40 million U.S. radio communications base at Learmonth, Western Australia.
>
> The American Navy will use this base to help keep track of its Polaris-equipped nuclear submarines operating in the Indian and Pacific Oceans. The Labor M.Ps' questions were directed in the House of Representatives to Prime Minister Menzies and Defence Minister Townley.

The heading of the similar publication mentioned in the fourth count was:—

> "Did Russian Spy Dupe A.L.P. Men?"

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The defendant was a publisher of all three newspapers.

The pleas filed included a plea of not guilty and a plea based upon s. 17(h) of the Defamation Act 1958 which was as follows:

> "And for a second plea the defendant says that the matter complained of was 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 matter complained of consisted of comment, the comment was fair".

The third plea was in similar terms but the words "for the purpose of" replaced the words "in the course of" used in the second plea.

At the trial the defendant did not rely upon the third plea.

Five other pleas were filed, but I think it is not necessary to refer to these. The replication, filed on 6th August 1963, was a simple joinder of issue. The jury returned a verdict for the plaintiff for £5,000 on the first count, £10,000 on the second count, and £15,000 on the third and fourth counts.

The defendant has moved the Court for a new trial and for an order that the defendant's costs of the first trial be paid by the plaintiff in any event. In the Notice of Motion 77 grounds are taken and most of these have been argued. The defendant claims that the trial miscarried and that a new trial should be ordered and, alternatively, it claims that there should be a new trial as to damages.

At the date of the trial the plaintiff was 42 years of age and had been since November 1958 and still was, the Member for the electorate of Reid in the House of Representatives of the Federal Parliament. He had left school at an early age and had engaged in a number of employments before becoming a Member of Parliament. He had been manager of branch stores of Woolworths at Lithgow and at Merrylands for some years. Prior to this he had enlisted in the Army in 1939 and he went overseas in 1941 and was taken prisoner, and was a prisoner-of-war in Timor, Singapore, Burma and Japan. He became a member of the Australian Labor Party in 1952, and it was as the endorsed candidate of that party that he won his seat in 1958, and was re-elected at subsequent elections.

In his lengthy submissions, Mr. Larkins Q.C. for the appellant grouped his grounds into various divisions and sub-divisions, and it is convenient in dealing with his submissions to adhere fairly closely to his order of presentation of them. I take as the first subject matter for discussion the contentions that the defendant is entitled to a new trial because of refusals of the learned trial Judge to grant applications to discharge the jury and applications for adjournment of the trial. These applications were linked with each other and can best be considered together.

The first application for the discharge of the jury was made on the first day after counsel for the plaintiff concluded his opening address. It was based upon the submission that the absence of good faith had

not been raised as an issue on the pleadings but had been opened by counsel who had said many things which could be relevant only to that issue. As a branch of the same complaint it was asserted that, in the opening, matters had been put forward which related to the knowledge of the defendant as to the truth or falsity of the articles and that these matters could have no relevance in the case at any rate if good faith was not in issue. His Honour at this initial stage ruled only that the application to discharge the jury should be refused. He made some observations upon the point raised as to the pleadings, but did not then finally decide it and, indeed, he did not ever give a final ruling upon it as he regarded this as being unnecessary when the pleadings had been amended. His Honour made the suggestion that the plaintiff might seek to amend the replication. Counsel for the plaintiff indicated that he would make that application and that he would draft out the amended replication and supply particulars of it. The evidence of the plaintiff then began and he was in the witness box for half an hour and the case was adjourned to the following day.

The next morning the application to amend was made and was opposed. There was considerable further discussion of the question of law as to the effect of the pleadings. But his Honour thought that the application to amend should be considered upon the footing that an amendment was necessary. Counsel for the defendant then submitted that the application to amend should be by summons and, if granted, particulars should be fully dealt with before a trial on the amended issues was held. The trial should go over to enable these things to be done. This would mean that the jury would be discharged, so that these submissions amounted to a second application for its discharge. He claimed that the defendant was not in a position to meet adequately the new issue. As an illustration of the unreadiness of the defendant he said a witness was overseas. He said: "We claim to be severely embarrassed by the issue being raised at this stage." His Honour decided that he should grant the amendment. In the course of stating reasons for this his Honour expressed the opinion that it could scarcely be alleged that there was any real issue that the matters complained of were published in the course of a public discussion of subjects of public interest. He said also: "I would have thought it was obvious to either party in this case that the true issue between the parties, unless the plaintiff was to be taken to concede it as a matter of reality, is whether or not the publications were made in good faith." Further observations were later made to the effect that there should be a little real contest as to the matters of fact raised by the plea of s.17(h). When the decision was announced that the amendment would be allowed, Mr. Larkins was asked what terms should be imposed. He asked for "a reasonable adjournment" and that particulars be given, and to this his Honour assented. He asked what adjournment was sought. At this stage Mr. Larkins sought such an adjournment as would enable him to study the particulars and the new replication which should be supplied that morning, and asked that he should have leave to seek any further adjournment which might appear necessary. What he asked for at once was an adjournment to the

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following day, and this was granted. Some observations were made which it is now contended would convey to the jury that counsel was insisting in an obstructive manner upon this immediate adjournment and that the Judge was reluctantly granting it to him, and it is said that this was prejudicial to the defendant. It was at 11.15 a.m. on the second day that the trial was stood over to the next day.

On the third day Mr. Larkins applied for an adjournment for a month. This was refused and the case was ordered to proceed. His Honour said: "The fact that I refuse it does not mean that it may not be renewed at some later time." After this Mr. Larkins made two further applications. One was to discharge the jury, and if this should be refused the second was to have an adjournment until the following Monday. Both were refused and the trial proceeded then until Friday, when it was adjourned shortly before the ordinary luncheon adjournment until the following Monday. By this time the plaintiff's case had been closed. Fortuitously on the following Monday, because a juror's relative had died, the case was adjourned until the next day and then counsel for the defendant opened his case. The trial then went on to the Wednesday of the following week, when the verdict was given. After the Friday of the first week there was no further application to discharge the jury or for adjournment.

In this Court the question has been debated, as it was to some extent before the trial Judge, whether there was an issue raised and joined as to the absence of good faith on the pleadings as they stood before the amendment. This question has some bearing on the grounds of appeal now under consideration. If the defendant was right in taking up the attitude that it was not required by the pleadings to litigate this issue of good faith, there is more force in the argument that it should have obtained a long adjournment to meet a new situation created as a result of ~~the~~ amendment, than there is if the defendant was mistaken in going to Court, as it said it did, without expecting to have to meet this issue. Therefore I think it is proper to state my views as to the effect of the pleadings as they stood when the trial opened. This requires a discussion of the decision of this Court in Motel Holdings Limited v. The Bulletin Newspaper Company Limited (63 S.R. 208).

That case was a demurrer and the only matter which it decided directly was that the second, third and fourth pleas which had been filed in the action were good pleas. The second and third pleas relied upon and followed closely the language of paragraph (h) of s.17, and the fourth plea, following paragraph (c) of s.17, was that the matter complained of was published for the public good.

It is clear from the opening words of s.17 that in each of its various paragraphs it is providing a lawful excuse for the publication of defamatory matter if the publication is made in good faith. As I said in my dissenting judgment at P.217: "It is an essential element in the defence that there should be good faith." But although this is so that particular element may or may not be in actual dispute in a particular case. If it is in dispute, that is, if "any question arises"

whether a publication was or was not made in good faith, the burden of proof of the absence of good faith lies upon the party alleging its absence. See s.18. What has been stated in this paragraph is, I think, common ground in all the judgments in the Motel Holdings Case.

The point of departure between myself and the other members of the Court was that I thought, but they did not, that the conventional rules and practice of pleading require in this type of case that the defendant should make the allegation that the publication was in good faith. I accepted fully the validity of the principle cited by Sugerman J. at p.210 from Stephen, as a general principle, but thought it was not applicable in this case.

Leaving aside what was directly and explicitly decided, the question arises as to what may be regarded as implicit in the decision of the majority or as being a logical consequence of it.

The first point mentioned here is that in the declaration the words "falsely, maliciously, and unlawfully" were used. I think it is fair to say in relation to all three judgments that these words were regarded as irrelevant to the question which was before the Court, although some references were made to them and to the distinction (in pre-1958 law) between "malice in law" and "malice in fact" (see pages 209 and 218). However, at the trial now under consideration counsel and the trial Judge adverted to the question of the effect in the declaration of the words "falsely and maliciously." See transcript, pp. 70, 75-76, and 90-91. The suggestion is made that those words can be regarded, for purposes relevant to ss. 17 and 18, as an anticipatory averment of the absence of good faith, which resolves the whole question as to whether its absence was raised as an issue in the pleadings.

My view is that this suggestion must be rejected. In an expanded form the suggestion means that the declaration is asserting in advance that (if the defendant raises any excuse under s.17) the publication was not made in good faith (within the meaning of s.17) and so that that section cannot be available as a defence. If this is right, I do not see how a plea asserting, for example, that the matter was published for the public good, or any other matter under s.17, but not traversing the said assertion of the plaintiff and not containing any allegation of good faith can be an answer to the declaration so read. But in the Motel Holdings Case such pleas were held to be good pleas. It must, however, be pointed out that in that case the argument was not put that this was a reason for holding the pleas to be bad. Section 17 contains a detailed statement of the circumstances in which for its purposes "a publication is said to be in good faith." This statement does not use the term "malice." If the plaintiff's pleader wants to put in an anticipatory assertion of the absence of good faith, intended to be relevant to a s.17 defence, I think that he must do this either by reference to the details of what is set out in the final paragraph of s.17 or at least by using some such expression as "without good faith" or "in the absence of good faith." (See per Wallace J. 63 S.R. at 220). The mere use of such a word as "maliciously" cannot be read as a precise averment

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relevant to s.17. In the Motel Holdings Case Wallace J. at p.220 did not treat the declaration as having by anticipation asserted the absence of good faith. Nor did Sugerman J., as appears from p.212.

The next point is this: is it necessary that the plaintiff in his further pleading should in some manner show whether he is putting good faith in issue, or on the other hand is admitting the presence of good faith and is content to fight the case upon the questions of fact raised by the s.17 plea itself? I think it is necessary. The plaintiff is not obliged to litigate this issue if he does not wish to do so, as was pointed out by Sugerman J. at p.210. The basis of the whole judgment of Sugerman J. is that he who must prove must plead, whilst he who does not have to prove need not plead.

The only other matter which I think could be suggested against the view that the plaintiff should by his pleading indicate whether he does or does not raise this question is the last sentence on p.219 in the judgment of Wallace J. his Honour said:

> "I think the true view is that the question 'arises' as soon as the defendant pleads privilege because good faith by virtue of s.17 is then at once in issue."

It is a matter for his Honour rather than for me to say how this sentence should be understood, but I would take it to mean no more than when the defendant pleads privilege, good faith is then potentially in issue. I think his Honour meant to convey that s.18 should not be read, in spite of the phrases which his Honour thought clouded its construction, as having no bearing upon the pleading point and as being relevant only to what happened at the trial. As Sugerman J. said at p.211, while s.18 in its direct application governs only the burden of proof at the trial, this in turn regulates the course of pleading.

Finally, assuming the correctness of the view just stated, does the plaintiff put this question in issue by a simple joinder of issue or is a special replication required? The Motel Holdings Case does not decide this point, although Wallace J. seems at p.220 to be in favor of a special replication. My own opinion is that a special replication is necessary. The defendant's plea sets out matter which is prima facie a good defence, being a good answer to the whole action. As Sugerman J. said at p.213, he is not required to leap before coming to the stile or to anticipate the answer of his adversary. If then the plaintiff simply joins issue he is (so far as this plea is concerned) merely putting the defendant to the proof of what the defendant has alleged, that is of the matters which prima facie give him a good defence. In terms of s.88 (2) of the Common Law Procedure Act the joinder is a denial of the substance of the plea and it takes an issue thereon. It is of the same effect as if the plaintiff in his replication traversed specifically each statement contained in the plea. But as the plea contains no statement concerning the question of good faith, such a traverse would leave that question out of account and would say nothing concerning it.

As to the three applications for the discharge of the jury I make the following observations. As to the first of them, if the issues had in the

end been confined so that good faith was taken as admitted on the pleadings I think it is clear that a proper trial could not have been had before a jury which had heard the opening address. But they were not so confined. Once the pleadings were amended it could not be a valid objection to the continuance of the trial before that jury that matters had been opened which were relevant to the absence of good faith, and it was upon this ground that the first application to discharge had been based.

The second application to discharge the jury was merely incidental to the question of a long adjournment. The argument as to the third application relies upon various matters of prejudice to the defendant over the first three days of the trial. Some further references to these will be made later. At present it is enough to say that in my opinion these matters do not warrant this Court in holding that the trial Judge so wrongly exercised his discretion in relation to the discharge of the jury that upon this ground there should be a new trial. I reserve for later consideration the question whether the matters of prejudice alleged, either alone or in conjunction with other matters, require the conclusion that the trial miscarried.

As to the refusal of a lengthy adjournment there is much force, I think, in some of the submissions for the appellant upon this question. In the first place it is my opinion that the appellant was correct in law upon the point that the issue of good faith, which was an important one ranging over many matters, was not raised by the pleadings and it was only by an amendment that the plaintiff became entitled to litigate it. Secondly, whatever grounds the Judge may have had for being sceptical about the notion that the defendant had not, in fact, prepared itself to litigate this issue, senior counsel told the Court that the defendant was not ready to proceed upon it. I think it is consistent with this that some preparatory work had been done by the legal advisers upon matters relevant to this issue, but that nevertheless more may have been required to be done to enable the case for the defendant to be fully and effectively presented. In general, I think that a statement by counsel that his case is not ready should be accepted by the Court. This does not mean, of course, that every time this is stated and accepted an adjournment must be granted. This depends upon the whole of the circumstances, including the reasons why the party is not in fact ready. Thirdly, the plaintiff was obtaining the indulgence of an amendment and his Honour acknowledged this and stated that the defendant should have whatever reasonable adjournment was required to enable the defendant to meet a new case. Fourthly, if it appears that further time is reasonably required to enable a party to deal with a new issue, it will not always be enough to meet this need to invite him to make a further application later for an adjournment. If a party is not fully prepared for an issue, this must often hamper him not only when his own turn comes to call evidence but also in the conduct of his defence whilst the case for his opponent is being presented. In the present case the defendant was required to proceed when the plaintiff himself was in the witness box, and shortly afterwards counsel had to begin his cross-

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examination of the plaintiff. Therefore, I think it is not an immediate and obvious answer to the appellant's submission to say that he was given an invitation to make a later application, but did not avail himself of it.

But in spite of these considerations I am of opinion that this is not a case in which this Court is required to intervene upon this ground in the interests of justice and to order a new trial. Its power to do so in relation to the refusal of an adjournment is established by authority. It is enough to refer on this point to the recent decision of this Court in Collier-Garland (Properties) Pty. Limited v. Northern Transport Company Pty. Limited (82 W.N.) (Part 1 125), and cases cited therein. But the task of an appellant seeking a new trial on this ground is a difficult one. The appellate court will be slow to interfere with the discretion of the trial Judge upon such a question.

There were many circumstances in the case which had to be weighed up by the learned Judge. As he said, the hearing of the action had been expedited. When the application for a long adjournment of a month was made the case had already gone into its third day. On the previous day, whilst he did foreshadow a possible further application, counsel had not indicated that any very long adjournment would be required. The general nature of the allegations which the plaintiff would make had been known from the preceding Monday. I would hesitate to assert that the learned Judge, exercising his discretion at the trial, made the wrong decision in the circumstances. But even if I did have that opinion, that would not warrant interference by this Court unless it could be seen that in fact the defendant was deprived in a significant way of opportunities which otherwise it would have had to present its case. I think that the appellant could not hope to succeed on this ground unless it could show that in relation to some specific matter or matters it was restricted to its detriment in its conduct of the case. I think it is not enough to refer to two witnesses who were overseas. It would be necessary to satisfy this Court that because of their absence at that point of time the defendant was denied any opportunity to call them, and that if called they would have given evidence which this Court could hold was likely to have affected the result of the trial. I do not think that this has been shown. In relation to the general preparation of the case by means of interviews, the taking of proofs and the like, it would be necessary to show in what particular ways this would have enabled counsel more effectively to present a more complete and cogent case. As to the absent witnesses, one of them — Mr. McNicoll — was back in Sydney before the trial ended. There is nothing to show that he could not have been back earlier than he was if his evidence was thought to be really important. Mr. Larkins may have been justified in deciding, after Mr. McNicoll was known to have returned, that he should not then ask leave to re-open his case in order to call this witness. But if it is now asserted that the defendant was unjustly deprived of a fair trial then, so far as the assertion is based upon the absence of McNicoll, the appellant, I think, has an onus to

show clearly that his absence at the outset of the trial did not merely put the defendant at some tactical disadvantage, but resulted in the denial to the defendant of the right to present its evidence, and also that the evidence would have been of real importance in the case. He was the author of the editorial to which the first count related. It is asserted here by the appellant that the objective truth or falsity of what was published was not directly in issue and this, I think, is correct. Any question of truth or falsity came into the case only as a starting point in the plaintiff's task of proving, if he could, that the defendant believed the defamatory matter to be untrue. The onus upon this question was on the plaintiff. In the absence of McNicoll the plaintiff could not produce any direct evidence of his state of mind. This Court is not in a position to come to any clear conclusion as to the importance of any evidence which McNicoll may have given if called. But if his evidence was really regarded as of major importance, in all probability the defendant could have obtained the benefit of it by seeking, before its case was closed, a sufficient adjournment for that purpose.

The other overseas witness, Mr. Schapel, might have been called, if available, to corroborate the account given by Mr. Moyes of a telephone conversation which Moyes said he had with Schapel prior to the publication of the articles to which the third and fourth counts relate. The conversation had a bearing on the question of the belief of Moyes in the untruth of what was published. In the closing address for the plaintiff doubt was cast upon the truthfulness of Moyes in giving the evidence that he checked the matter by telephone with Schapel. But if Schapel had been called and had completely corroborated this evidence of Moyes and had made no damaging admissions, it is difficult to suppose that for this reason there would have been a different verdict. Furthermore, it seems likely that it would have been possible for the appellant to obtain the attendance of Schapel at the trial, although doubtless this would have meant considerable expense and inconvenience.

The next head of the appellant's argument is to assert that the trial miscarried because of prejudicial conduct on the part of counsel for the plaintiff. This head of complaint has been subdivided and I proceed to deal with the sub-heads under which it has been presented.

SUB-HEAD 1. It is contended that counsel made unwarranted and prejudicial assumptions of fact and comment in relation to witnesses who were unavailable. When the trial began Mr. McNicoll was in London. A little before this time Mr. Schapel had gone to London to take up a position. It is alleged that, having regard to the issues, the defendant would not reasonably have anticipated that the evidence of either of them would be relevant, although it might have been supposed that some inquiry had been made from the authors of all three articles on the question of the purpose with which they had been written, which might have been relevant to the third plea which at the trial was eventually not relied upon. It is urged that there was no basis

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for any inference that a statement would have been obtained from these two persons on matters relating to good faith, and there was no evidence that any such statements existed. It is complained that counsel for the plaintiff created prejudice by asserting the existence of such a statement, by making an offer to allow it to be received in evidence, by asserting that this would be an advantage to the defendant, and by criticising in the closing addresses the failure to accept this offer. It is further contended that any need for these two witnesses arose only from an indulgence granted to the plaintiff in allowing the amendment, and it was not right for counsel for the plaintiff to criticise the failure of the defendant to call them. Further, although the evidence as to their absence overseas was unchallenged and although there was no basis of fact for it, a serious implication was made that Mr. Schapel had been posted abroad at a time when it was known that his evidence would be required.

It is said that these were matters which could not be met by any assertions or protest by counsel for the defendant. The learned Judge should have taken steps to remove the prejudice created by them. It is conceded that in relation to some of these matters he was not asked by counsel to do anything. As to this, counsel for the appellant says firstly that previous requests to the Judge for special directions upon other matters had been refused, as well as application for discharge and for adjournment, and it was thought better not to risk further refusals which might only create further prejudice against the defendant. Secondly, the appellant says that it is entitled to rely upon such matters on appeal without having made any protest or request about them at the trial, and it relies on Wishart v. Mirror Newspapers Limited (63 S.R. 745). But what was said in that case by Brereton J. at p.752 is directed mainly to the question whether an aggrieved party is disentitled from complaining about prejudicial conduct because he has not elected to ask for the discharge of the jury. (See also what was said in Vozza v. Tooth & Company Limited (1963 N.S.W.R. 1675 at 1684.) Here I shall assume that the appellant is at no disadvantage in the raising of any of the points now under consideration merely because counsel did not ask again when some of these comments were made for the discharge of the jury. But I am of opinion that the failure to make a protest or to ask for any assistance from the learned Judge, about a matter does make it difficult for the appellant to object to it upon appeal. I do not say that such a failure will always cause the appellate Court to refuse to give effect to complaints of this character. It may be true, as is said in Vozza's case, that it is proper and desirable for the trial Judge to intervene at once to correct a prejudicial departure by counsel from the proper limits of advocacy. But this is a matter of degree. It is not the duty of the Judge to keep intervening whenever counsel says anything which might appear to be unsupported by evidence or otherwise unjustified, without any protest or submission from opposing counsel. It must depend upon the gravity of the offending statement and upon the circumstances. Con-

stant unsolicited interventions could do more harm than good to the proper conduct of the trial.

The matter of which complaint is made under this sub-head are not matters bearing directly on the facts in issue at the trial. They are assertions and comments in relation to evidence which might have been given particular witnesses. I do not think it necessary to examine each such assertion to state whether it was or was not within the bounds of permissible advocacy. It is sufficient to say that in my opinion, having regard to all the circumstances, these are not matters which warrant the granting of a new trial of the action.

SUB-HEAD 2. This relates to an imputation of misconduct at the trial said to have been made against counsel for the defendant. The complaint was relied upon both in relation to the earlier arguments as to the refusal to discharge the jury and also as a matter creating prejudice against the defendant in the minds of the jury, which was of a serious character, because in a libel action the conduct of the defendant at the trial is an important consideration. The course of the trial in its first three days has already been summarised. The incident of which complaint is made occurred on the third day, after Mr. Larkins has applied for an adjournment for a month. Counsel for the plaintiff said:

> "I think it is time for some plain speaking in this matter. I submit it must become very apparent now that by hook or crook the defendant is endeavouring to delay this trial."

A little later Mr. Larkins protested against what he called the offensive suggestion that this was an attempt by the defendant by hook or by crook to postpone the trial. His Honour, without any comment on the suggestion or the protest, refused the adjournment sought. Mr. Larkins applied again for a discharge of the jury, basing this upon this incident together with other grounds, but the trial was ordered to proceed.

In my opinion the statement by counsel for the plaintiff was unwarranted and improper. The expression "by hook or by crook" conveys an imputation of a readiness to resort to fair means or foul to achieve the object in view. But notwithstanding the arguments for the appellant upon this incident, in my opinion it did not require the discharge of the jury, nor do I think it requires a new trial to be ordered. I do not agree with the submission that because he did not rebuke counsel his Honour must have appeared to the jury to have concurred in the criticism of the defendant. I think this incident should be regarded merely as one to be borne in mind when later I come to an assessment of the course of the trial as a whole and to consider what order this Court should make.

SUB-HEAD 3. It is here submitted that the trial of the action was prejudiced by the lengthy statements made by counsel for the plaintiff, after the summing-up, that the defence under s.17 (h) was not as a matter of law available to a newspaper. It is said that this purported to be made as part of an application for further directions

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to the jury. It was developed as being a "very important" matter. It is urged that the point was not one which could validly be taken in this way and at this time. It should have been raised earlier by demurrer, or later by a motion for judgment. It is urged that the argument upon it was calculated to distract the jury from the issues which they had to try. The adverse effect upon the defendant was aggravated by his Honour's statement, in which he mentioned "some very interesting and important observations" made by counsel, and said he over-ruled that submission and that he "would not be prepared now to give that direction," and by his failure to rebuke counsel for making the submission. It is said that confusion would be created in the minds of the jury and the inference would be open that the plaintiff might be penalised, if serious attention was given to the defence, by reason of the failure of the plaintiff's legal advisers to raise the point earlier or to test it by demurrer.

I agree that the point should not have been raised and debated in this fashion, and one might wish that the learned Judge had cut short the discussion on it earlier than he did. But the making of the statement could not be regarded in my opinion as misconduct on the part of counsel for the plaintiff. As to the suggested effects on the minds of the jury, these are speculative and I do not find them convincing. The jury had been given detailed instructions and provided with numerous written questions relating to the question litigated under s.17(h). The suggestion that because of the discussion of the legal point they might disregard all these instructions and treat the questions as of no importance is unwarranted. Unless the contrary appears, I think the jury must be assumed to have listened to the directions and to have had sufficient intelligence to understand them and to have done its best to follow and apply them. Such an assumption supposes that the jury is exercising its judgment properly and is not led astray by prejudice improperly instilled into it. As will appear later, I am of opinion that the assumption cannot be safely made in this case. But that is because of other reasons. In this incident I see no real likelihood of the creation of any such prejudice.

SUB-HEAD 4. This relates to insinuations said to have been wrongly made concerning the object of questions asked by counsel for the defendant. Two matters are raised. The plaintiff was being cross-examined by a line of questioning designed to get him to admit that there had been public discussion of certain topics, in order to support the plea that the publication sued upon had been made in the course of the discussion of subjects of public interest. He was asked about public discussion upon the world-wide conflict between Communism and non-Communism. Then he was asked whether the independence of countries in South-East Asia was threatened as far back as 1954 by the policies of international Communism, and he was asked about the preamble to the South-East Asia Collective Defence Treaty Act and whether he agreed that Communist policies then represented a danger to the security of Asia and all the world. Then he was asked whether he would agree that as at 1954 the Communist policies were

a violation of the principles of the Charter of the United Nations. Then the following statements were made by counsel:

"MR. EVATT: My friend's first question here suggested they were not alleging any of these matters to be true. Now, is my friend, by a question of this nature, trying to suggest that the plaintiff is either a Communist or a Communist-sympathiser?
MR. LARKINS: My learned friend knows there is no such suggestion made."

Then a little later his Honour admitted the question and the following took place:

"MR. LARKINS: My friend just said that by my line of cross-examination I am trying to suggest that the plaintiff is a Communist.

HIS HONOUR: He said that was a possibility.

MR. EVATT: One of three possibilities.

MR. LARKINS: It is not a question of me taking exception of it, but I submit in this context, for my learned friend to make that statement from the Bar table in relation to my cross-examination is a matter of grave prejudice to the defendant, and I would ask Your Honour now to instruct the jury that there was no warrant for that comment.

HIS HONOUR: I won't do that at this stage. I won't interrupt your cross-examination. There is plenty of opportunity for me to give instructions to the jury later; it is generally done in the summing-up.

MR. LARKINS: I can only make my application.

HIS HONOUR: I have no doubt that in your address you will deal with the matter very adequately and very forcefully. I have already told the jury that the defendant does not rely on a defence that the matters stated in the publication were true."

It is now submitted that the question was incapable of being understood to convey any suggestion that the plaintiff was a Communist or a Communist sympathiser. It is said that the Judge should have told the jury that there was no substance in the insinuation that such a suggestion was being made. Later the plaintiff himself volunteered a complaint about being upset because of questions about Russia, and it is said he was encouraged to do this by the failure of the Judge on the earlier occasion to intervene. It is said that the insinuation was revived in the closing address for the plaintiff, and that it was hinted that this questioning showed a policy of the defendant, which had been alleged in the opening address, of pinning the Communist badge on the person it wanted to destroy.

The other insinuation of which complaint is made is said to have been directed to the same kind of charge, that the defendant was indulging in a covert attempt to assert the truth of the matters contained in the second libel. The incident occurred in the cross-examina-

tion and re-examination of the defendant's witness Reid who was the author of The Bulletin article. The witness had made a distinction between a Communist and an A.L.P. Left-winger. In re-examination he was asked questions as to his understandings of the Right and Left Wings. Counsel for the plaintiff then said "I take it my friend is going to set out to establish the truth in this article." The learned Judge said "I do not know what that observation is about." Mr. Evatt then said "I take it I can assume that his opening was to indicate his defence." And his Honour asked "What has that got to do with me?" It is said that this observation by Mr. Evatt was quite unwarranted and was highly prejudicial.

On both these incidents my opinion is that disputations of this kind between counsel as to what is the object and the effect of a line taken by one of them, which occur commonly in long trials, may generally be left as matters to be debated by counsel in their address to the jury or, if necessary, to be resolved by the trial Judge in the summing-up. Here his Honour stated clearly to the jury more than once in the summing-up that it was not alleged by the defendant that the statements in the articles were true. He had said this also during the course of the trial. He was not asked at the close of the trial to give any additional specific direction that there was no warrant for any suggestion that had been made that the defendant had been in a covert fashion endeavouring to establish that some of the statements were true. In my opinion these grounds do not establish that a new trial of the action is required.

SUB-HEAD 5. Here it is contended that the proper trial of the action was prevented because counsel for the plaintiff attempted to introduce untenable and prejudicial issues into it. It is claimed that, without any justification, counsel asserted that there was a disputed issue for the jury as to whether the plaintiff in asking questions in the House was inspired by (1) a Russian agent or (2) an official of the Soviet Embassy. It is argued that there was no issue, and the Judge had so ruled, as to whether the plaintiff asked any questions at the instigation of any such official. Even if truth had been in issue, there could have been no issue as to whether the instigation was made by a Russian spy. It is argued that at a time when any instigation could have occurred it was not known to anyone that Skripov was a spy or agent. He was merely a member of the Diplomatic Staff. I do not intend to set out all the details of the happenings at the trial upon which these complaints are based or of all arguments about them. The essential nature of the complaints can be explained by stating that the cross-examination of the plaintiff was interrupted by his counsel taking objection and then stating "The issue on the third and fourth counts, they are virtually the same, is whether the plaintiff in asking his question was inspired by this Russian agent." Despite attempts by counsel for the plaintiff to explain this away by detailed references to what had preceded it, I am of opinion that this was plainly enough a statement that there was an issue of fact as to whether the plaintiff when asking the questions, which admittedly he

did ask, was inspired by the "Russian Agent." It was so understood at the time by Mr. Larkins who sought unsuccessfully a special direction at this time that this was not in issue. I consider that in this matter counsel for the plaintiff did raise an issue, which can be seen on looking at the whole course of the trial to be an extraneous one, and that counsel for the defendant was justified in complaining about it. But I do not consider that this conduct, or the refusal of the Judge to give a specific warning to the jury about it, affords any sufficient reason in itself for concluding that a new trial should be ordered. At the conclusion of a long trial his Honour put to the jury the issues which they had to determine in a way to which no objection was or is taken. The fact that in the incident under discussion counsel sought to place before the jury a false issue would not be enough to lead to a conclusion that the jury failed to direct its mind to the proper issues, or that in dealing with them its judgment was impaired by prejudice against the defendant as a result of this incident.

The second objection under this head is somewhat similar to the first. At a stage a little later in the trial the cross-examination was interrupted by an objection, in the course of which counsel said that on the third count "it is a question of whether Mr. Uren asked questions at Skripov's instigation. That is the matter in point." It was not the matter in point, and again this was a mis-statement as to the issues, which should not have been made. I think that counsel for the appellant is right in saying that this was aggravated by later conduct of counsel for the plaintiff, including references in the closing address to the absence of any evidence that any spy ever spoke to the plaintiff or associated with him, and a statement in the submissions after the summing-up that there was no evidence at all to show that the plaintiff had been approached to ask questions.

Despite arguments to the contrary, I think that here as in the earlier incident counsel's conduct amounted to an unwarranted introduction of false issues into the case and the defendant is entitled to complain of it. But yet, upon my view of the trial as a whole, these incidents would not justify the conclusion that because of them the trial should be held to have miscarried. But these are matters to which I think that some weight must be given when later I come to examine the award of damages, as they may serve to throw some light upon the question why the jury made an award which in my opinion was too high. I think also that they may be taken into account when considering whether a new trial, if granted, should be a general one or should be limited to damages.

It is convenient at this point to refer to some submissions which are associated with those with which I have just dealt, but which are based upon complaints of the refusal of his Honour to give certain directions. The publication had referred to Skripov who it suggested had duped the plaintiff and who had at the date of publication been recently exposed as a spy. Counsel sought to make the point that it could not be taken to mean that the plaintiff had been duped by

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someone who was at that time a spy and known to be such, because at that earlier time there was nothing to suggest that Skripov was in fact or was known to be other than an accredited official of the Embassy. His Honour said he did not think that Mr. Evatt contended that they then knew he was engaged in espionage. He regarded this as a trifling matter and stated he would deal with it if he thought it necessary. He did not afterwards deal with it. The point, even if logically valid, was a somewhat fine one in relation to the effect upon a reader's mind of articles which had the headings "Spy Used Labor Men as Pawns?" and "Did Russian Spy Dupe A.L.P. Men?" and which stated that allegations were likely to be made in Parliament that some Labor men were used as pawns by Russian spy, Ivan Skripov. I think this was a point which could fairly be left to the debate of counsel upon it and did not require any specific comment by the Judge.

SUB-HEAD 6. It was ruled by the trial Judge that it was not open to the jury to treat the articles on which counts 3 and 4 were based as containing an implication that the plaintiff was a traitor. The appellant, of course, does not complain of this ruling. But it submits that the trial miscarried because this meaning was untenable but was repeatedly ascribed to the articles by counsel for the plaintiff, and this must have influenced the jury and inflamed it against the appellant. The meaning that the plaintiff was a traitor was ascribed in the opening address. In the course of doing this counsel asserted that if the plaintiff were guilty of such treachery he would not be appearing for him. It was not until much later in the trial that the ruling was given. Sometime afterwards counsel put a further submission that those who knew the plaintiff and knew he was not moronic or stupid would take the articles as imputing treachery. This was rejected. It appears to me that counsel did not thereafter put again to the jury that these articles had accused the plaintiff of treachery. It is suggested that in the closing address there were veiled renewals of this claim, but I do not agree that what was said could be fairly interpreted as a repetition by subterfuge of the claim.

I do not find in this matter any actual misconduct on the part of counsel. But it is unfortunate that in relation to a matter of such importance, where the contention which counsel wanted to put forward was a doubtful one, counsel should have embarked in his opening upon such strong and inflammatory observations upon it without first seeking a ruling. By doing so he exposed his client to the risk that the jury would later be discharged because of it, and also to the risk that if the case went to verdict it might be contended that the verdict was vitiated by the influence of this upon the jury. I cannot assert that the contention was so obviously untenable that counsel acted recklessly in putting it forward at all. But in relation to all matters of this kind, the real question is not whether counsel deserves censure but whether in an objective sense the jury was likely to be influenced in its judgment by prejudice.

SUB-HEAD 7. This relates to the putting forward on behalf of the plaintiff that the defendant was actuated by some "other improper motive" as a means of establishing the absence of good faith, as defined in the final paragraph of s.17. Counsel asserted that the publications were motivated by the defendant's policy of seeking to destroy the Labor Party. It is contended that in relation to this matter counsel opened facts which he did not afterwards prove, that he asserted facts which he did not prove, and did this even after the trial Judge had ruled that there was no proof of them. It was asserted that the defendant sought to undermine and destroy the reputation of Labor men by "pinning the red tab" on them, and that to prevent the achievement of the objectives of the Labor Party it sought to blacken and destroy the plaintiff. This charge was included, by reference, in the particulars given as to the amended replication. In the course of discussing the questions which he proposed to leave to the jury his Honour stated that he had omitted from them any questions as to "other improper motives" because he could see no evidence of any improper motive other than ill-will to the plaintiff. There was afterwards considerable discussion as to the content of the questions which should be left to the jury, but counsel for the plaintiff did not seek to persuade his Honour to include any other improper motive. Notwithstanding this, counsel in his closing address put in emphatic terms that the object of the defendant in attacking the plaintiff was to destroy the political party to which it was opposed and that this established a want of good faith.

After the address ended Mr. Larkins objected to the Judge that this matter had been put forward in the address despite the ruling which had been given, and his Honour said "That is just what I was going to point out." Shortly afterwards the summing-up began, but his Honour did not refer specifically to the infringement by counsel of this ruling. But in the questions which were left "other improper motive" was omitted and his Honour dealt in detail with those questions as being those which had to be considered in deliberating upon the case. In dealing with the topic of ill-will to the plaintiff he said the jury could consider whether the language used showed, on the fact of it, that there was ill-will and whether because there was a series of defamatory publications it was shown that there was ill-will against the plaintiff. In relation to one of the articles reference was made to the question of a request for a correction and a failure to publish it. After the summing-up and certain submissions upon it his Honour said in the presence of the jury:

> "Mr. Evatt has asked me to put as an element of improper motive, that it is open to the jury to find that the articles were published with a view to destroying the Labor Party. I think this submission is far too wide and has no relevance to the issues the jury have to try."

Earlier in the course of the submissions which followed the summing-up he had said, referring to the same point,

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"The jury will note that I never dealt with that. I have always put it on the basis of personal ill-will to the plaintiff and, indeed, I have left no other improper motive."

For the appellant complaint is made not only of the conduct of counsel in this matter but of the failure of the learned Judge to give specific and strong directions and warnings to lessen the prejudice created by it.

I consider that in this matter the conduct of counsel for the plaintiff was flagrantly a transgression of the proper limits of advocacy and it could have been of considerable prejudice to the defendant. I reject the arguments which have been submitted to this Court on behalf of the respondent in relation to this matter. As I understand them they are that the ruling which had been given was only a tentative one, that the attitudes of newspapers are matters of such notoriety that no evidence was required to establish this particular charge as to the policy of the newspaper and that matters such as this could be discussed as relevant to the matter of fair comment under s.17(h) and to damages. As to the first of these points the ruling, if tentative in the first instance, must be taken to have been accepted as a final one when no challenge was made to it prior to the closing addresses. The second point is obviously untenable. The third is answered simply by saying that in both the closing and opening addresses the matter under discussion was put as going to the question of good faith and not as going to some other matter.

I have not overlooked the fact that there was evidence from the plaintiff in cross-examination that he thought that the Daily Telegraph had been an offensive paper to the Labor Party and that it had always supported the Menzies Government. But this did not provide any proof of the allegation that the articles had been published in pursuance of a policy of the destruction of the Labor Party, or that there was such a policy. Nor did it afford any justification for the flouting of the ruling of the trial Judge.

Having regard to the principles stated in Croll v. McRae (30 S.R. 137) and in Vozza v. Tooth & Company Limited (1963 N.S.W.R. 1675) this Court would be warranted in intervening because of this incident to grant a new trial, if it thought in all the circumstances it ought to do so, notwithstanding that this question was excluded from the jury's consideration by his Honour's directions and that no further application was made for the discharge of the jury. But as these authorities make it clear, each case in which a new trial is sought on such a ground as this must be decided upon its own circumstances. On the whole, having regard to the repeated statements by his Honour that he was excluding this question from the consideration of the jury as well as his omission of it from the detailed questions submitted to the jury, the conclusion I reach is that we should not grant a new trial on this ground alone if no other reasons appear for doing so.

Certain grounds of appeal have been raised relating to alleged

mis-direction or to failure to give directions. Some of these have already been noticed and discussed and one of them relating to punitive damages will be considered later herein. There is one such contention with which I may deal at this point. It is that his Honour erred in refusing to direct the jury that, in New South Wales, there is no presumption of law that defamatory matter is false. The point was raised at the trial but not in the grounds of appeal, and leave is sought to argue it. It raises an interesting question as to whether having regard to the terms of the Defamation Act 1958, and in particular s.17, the statements, to be found in English cases and text books, that there is such a presumption, are applicable. But it is a question which need not be decided in this case. Having regard to the way in which the case was conducted I cannot think that such a ruling could have had any practical effect upon the trial. The truth or falsity of what had been published was not in issue at the trial because there was no plea which set up its truth, and because it was at all times made clear that the defendant was not asserting that the matters published were true. In the way in which the case was left to the jury there was indeed one point at which the jury was invited to consider, merely as one step in arriving at the determination of an issue, the circumstance that the matters published were untrue. The jury might have to decide as part of the inquiry as to good faith whether it had been shown that the defendant did not believe that the matters were untrue. His Honour put it that, in seeking to establish this, one might first say that the matter was in fact untrue and then seek to say that the circumstances were such that a belief in its untruth ought to be inferred. Apparently it was on the footing that the fact of truth or falsity might come up for consideration in that way that at one point his Honour admitted some evidence from the plaintiff of the untruth of part of one of the articles, although at other places his Honour stated that his view was that truth or falsity was not in issue and that evidence directed to this was not admissible.

The matter is complicated to some extent because until a late stage in the trial his Honour assumed that Mr. Larkins was admitting the falsity of all the defamatory matters, but he then accepted counsel's statement that the concession made was that he was not asserting that the matters were true, and this was not an admission that they were false. If the concession was merely that which was ultimately accepted, then in strictness the plaintiff was entitled to prove affirmatively that the matters were untrue, if the approach suggested to the proof of belief in untruth was a correct one. In spite of this difficulty, I think it is clear upon considering the whole course of the trial that the question whether there was a presumption of falsity was really an academic one. The only reasonable basis upon which the jury could deal with the case, having regard to the evidence and the attitude of the defendant, was to treat the defamatory matters as being untrue. As has been shown, a strong complaint is made against the conduct of counsel for the plaintiff in obtruding into the case suggestions that truth or falsity was in issue. It was never in practical sense in issue, so

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it can make no difference whether or not there was a presumption of falsity. In any event it appears that his Honour stated in the hearing of the jury the view that, within the contest of a case where the only substantive plea is under s.17(h), there is no such presumption. His failure to give a formal direction about it was, I think, of no importance in the circumstances of this case.

Some grounds of appeal have been taken as to the erroneous admission and rejection of evidence. First it is said that there was error in rejecting questions directed to rebutting suggestions that the object of the defendant was to destroy the Labor Party, and that because of this ruling the defendant was also precluded from tendering evidence in its own case to rebut that suggestion. The evidence would also, if admitted, have tended to show that the plaintiff himself was not always objective in his own criticism of the Daily Telegraph. It is said these matters were relevant not only to any case sought to be made by the plaintiff as to "other improper motive" but also to whether any comment was fair under s.17(h) and to damages.

I have already discussed the complaints made about the conduct of counsel for the plaintiff in relation to the matter of the defendant's alleged policy of destroying the Labor Party. The learned Judge ruled — correctly, I think — but in any event favourably to the defendant — that there was no evidence of this or of other improper motive. In the light of that ruling it is well that these questions were rejected, insofar as they sought to rebut something which in the end was never proved and was withdrawn from the jury. The rejection is not a matter of which the appellant can complain. As to the other point, that the defendant was entitled to show that the plaintiff was hard hitting in his own criticisms and, being hardened in debate, was not likely to be greatly upset by the publications, I think the questions asked were remote from providing any assistance upon this aspect of the case and could have no real bearing on the question of damages. As to fair comment in relation to s.17(h), I think none of the questions to which these grounds of appeal relate had any relevance to that question.

Next it is contended (Ground 70) that his Honour was in error in disallowing questions of the plaintiff directed to showing his understanding that it was no part of the defence that the matters published were true and (Ground 71) he was in error in disallowing questions to test the understanding of the plaintiff of the privilege attaching to answers given by a witness. Having examined the relevant part of the transcript and considered the submissions I am of opinion there is no substance in these grounds.

Two further grounds (72 and 73) are taken on rejection of evidence. One is that there was error in rejecting evidence tendered by the defendant towards establishing the public discussion of subjects of public interest, in the course of which discussion the first article as a whole was published. The second is that there was error in disallowing questions to the plaintiff in cross-examination directed to establishing the public discussion of the control of the Parliamentary Labor Party by

the Federal Conference and Executive. The matter set up in the first count was a small portion of an editorial which included statements upon various political matters, including an allegation that the Parliamentary leader of the Labor Party had to take orders from non-parliamentary "masters" of the A.L.P. The defendant sought to show that there had been public discussion of these other matters to which the article referred, which were not sued upon. His Honour ruled that this was not relevant to the issues in the case. In my opinion there was no error in this and the evidence was rightly rejected.

Next, it is complained that his Honour erred in allowing cross-examination of the defendant's witness Moyes as to his present belief in the truth of the matters to which the third and fourth counts related. Mr. Moyes was the Editor of the Sunday Telegraph and responsible for the articles published in it. He was asked whether he believed in the truth of these articles, that is at the time of publication, and he said he did. It is conceded that this was relevant. Then he was asked whether he still believed in their truth and against objection this was allowed. In my opinion this was correct. This was one way in which his evidence as to his earlier belief could properly be tested.

The next complaint is as follows. Counsel for the plaintiff tendered a copy of the Sun-Herald of 10th February 1963 which had on its front page an article similar to that in the Sunday Telegraph of the same date. This was admitted. Then counsel tendered another copy of the Sun-Herald of the same date. His Honour asked whether there was any reference in this to the front page story and he was told that there was not, and he rejected the document. The complaint is that by his question and the answer to it the information was revealed to the jury which the tender was designed to prove; that is, that in a subsequent edition the Sun-Herald had deleted this story. I think that this is a trivial complaint of which this Court should take no notice.

I have now discussed the numerous specific contentions upon which the appellant relies, apart from matters relating to the amount of damages awarded. The overall contention is that this was a trial which miscarried, that it was a trial in which there was not a fair presentation of the issues of fact to the tribunal, or a reasonable and proper adjudication upon them by it. Because of various different incidents and matters and because of the cumulative effect of all of them the defendant was denied a just and impartial trial.

I regard it as an established rule that a new trial should be ordered if the appellate Court is satisfied that in the sense stated the trial has miscarried; that is, if it is satisfied that justice has not been done to one of the parties at the trial. But unless a strong case is made out and the Court does really feel so satisfied its tendency must be against depriving a litigant of a decision in his favor, particularly one given after a very long trial. After consideration of all the matters so far discussed I have reached the conclusion that, if no other ground appeared for interfering with the jury's decision, this Court would not be justified in granting

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a new trial. I have already stated when dealing separately with various submissions my views as to their effect upon the trial. Apart from the questions of the discharge of the jury and of adjournment of the trial with which I have dealt in some detail, I have found some incidents in respect of which I think a complaint on behalf of the appellant that his case was prejudiced is justified. These were the imputations by counsel for the plaintiff that the defendant was seeking by hook or by crook to delay the trial, statements to the effect that there were issues of fact as to the plaintiff being inspired to ask questions by the Russian agent Skripov, the opening of the case as being one which the plaintiff had been defamed as a traitor and the persistence in the allegations by plaintiff's counsel about the defendant's policy of destruction of the Labor Party. As I indicated when dealing severally with these incidents, I do not think that any one of them requires the ordering of a new trial. I do not think in their combined effect they should be held to be sufficient to require that course to be taken if no other reason for it appeared. But I shall have to refer to them again later. Since, as will appear, I am of opinion that there should be a new assessment of damages, it will be necessary to consider whether or not in all the circumstances a new trial should be limited to such an assessment or should be a general one, and these incidents must in my opinion have a bearing upon that question.

I come now to the question of damages. The first matter which I wish to discuss is the contention that his Honour was in error in directing the jury that it was open to it to award punitive or exemplary damages. This is raised by the grounds of appeal but was not taken at the trial. But I think that the Court should nevertheless allow this ground to be taken. It is of a fundamental character so far as the award of damages is concerned, and there is considerable authority in favour of allowing it to be raised in an appeal. (See Holmes v. Jones (4 C.L.R. 1962 at 1696), Hardman v. McLeod (26 S.R. 578), King v. Ivanhoe Gold Corporation Limited (7 C.L.R. 617) and Rookes v. Barnard (1964 (2) W.L.R. 269 at 332).)

In the case of Uren v. John Fairfax & Sons Pty. Limited, in which an appeal was heard by us immediately before the present appeal, and in which the judgment of the Court was recently published, I have set out my reasons for the opinion that this Court should follow the pronouncements recently made in the House of Lords in Rookes v. Barnard, which were interpreted and applied by the Court of Appeal in McCarey v. Associated Newspapers Limited (1965 (2) W.L.R. 45), even if they are in collision with principles contained in the judgments of the High Court. I expressed also the view that in some respects there are divergences between what has been said in the High Court and what the House of Lords has said, which will in some cases require a choice to be made as to which should be followed.

In the present case in the summing-up the jury was told that in assessing damages it would have regard to all the circumstances of the case. In relation to the second count it might take into account the

failure to publish a correction. It might take into account the whole conduct of the defendant. His Honour stated that sometimes the conduct of the case itself might aggravate damages, but that this did not apply in this case. His Honour said this:

> "The plaintiff is entitled to compensation at your hands for the damage that has been done to his reputation. He is entitled to compensation, and that compensation to be awarded may be increased if you find that the publications were made with ill-will to the plaintiff, were made as part of a campaign. The damages may be aggravated by those circumstances. But in addition to compensatory damages, the law permits, in a case such as this, the award of what are called punitive damages; it permits a jury to award punitive damages. It certainly does not require a jury to award punitive damages; it all depends on the view that the jury takes of the case. They are in addition to compensation; they are called by a number of names, two of which have been used in the course of the case, punitive damages and exemplary damages, damages awarded to punish, damages awarded to make an example of the defendant. They are awarded, of course, to the plaintiff. They are not in the nature of a fine, and they should only be awarded where the conduct of the defendant merits punishment, and this could only be considered to be so where its conduct has been malicious; that it has shown what has been described as contumelious disregard for the rights of the plaintiff, here, of the plaintiff's right to enjoy the reputation that he possesses".

So far as this passage referred to compensatory damages I am of opinion that no objection could be taken to it. But so far as it states the circumstances in which an award of punitive damages is warranted it goes outside the categories stated in Rookes v. Barnard as being those in which alone such an award can be made. But it does appear I think that the statement made by his Honour on this subject is in accord with statements which have been made in the High Court. I do not elaborate upon this proposition here, because in the case of Uren v. John Fairfax & Sons Pty. Limited the cases in the High Court have been discussed. In this case I think that a choice must be made between the pronouncements of the High Court and those of the House of Lords, and for reasons which I have stated at length in the recent case, I apply the principles laid down by Lord Devlin and therefore I decide that the direction given as to exemplary damages was erroneous.

In my reasons in the recent case I have discussed the effect of Rookes v. Barnard and McCarey's case. I do not think that a particular case can be brought into the second category mentioned by Lord Devlin merely upon the broad basis that the object of any newspaper may be supposed to be to increase its circulation and therefore its profits. It is shown by what Lord Devlin said, and by McCarey's case, that more than this is required. If it can be inferred that the defendant has had

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it in mind not merely that there will be extra sales but that he will obtain extra profits sufficient to outweigh any reasonable compensation likely to be awarded then the requirements of this category will be fulfilled. Even if Lord Devlin's speech should not be interpreted so narrowly as to make it necessary that these should appear to have been a conscious calculation of the probable amount of compensation and a judgment that it is less than the anticipated profit, at least it is necessary that an inference should be open that a substantial profit was expected to result directly from the inclusion of the defamatory matter in the newspaper. In relation to the first and second counts clearly no such inference could be drawn. The first count related to a small portion of an election editorial. No one could suppose that it was believed or intended that this editorial would cause a great leap in the sales of the Telegraph. The second count related to a small portion of an article in the Bulletin, concerning an alleged change in the policy of the Labor Party towards defence. It could not be supposed that the inclusion in this article of the reference to Mr. Uren could bring about or was expected to bring about a significant increase in circulation. As to the matter in the third and fourth counts it is true that this was featured. But there was no evidence that the matter was advertised in advance, and no material from which a valid inference could be drawn of a deliberate intention to make a profit at the expense of the plaintiff's reputation. It has indeed been submitted for the respondent that this was the culmination of a campaign against him and of a campaign aimed at destroying the party of which he was a member. This is quite a different motive from the profit motive, and if these submissions were to be accepted they would tend to negative rather than support a claim to bring the matter into Lord Devlin's second category, but whether the submission be accepted or not, in my opinion there is no material to support the requisite inference required to bring the matter into that category.

If the foregoing views are correct this is sufficient to lead to the conclusion that insofar as the summing-up left it to the jury to award exemplary damages, then accepting the principles of Rookes v. Barnard this was an error for there was no material which would have warranted the jury in doing so.

Another way in which the recent English cases, if accepted, can have a bearing upon the correctness of the summing-up is concerned with the treatment in those cases of aggravated damages; that is to say, the treatment of the circumstances in which and the extent to which certain factors in a particular case may enlarge the amount to be awarded as compensatory damages. What was said by Lord Devlin on this subject has been interpreted in McCarey's case, I think correctly, to mean that it is a part of the proper scope of compensatory damages to provide compensation to the plaintiff for injury to his feelings and for annoyance, grief or distress caused to him by the publication of defamatory matter, and damages under this head may be aggravated by the manner in which and the motives with which the publication was made or persisted in including any arrogance or spite which has

been displayed. What his Honour said in the present case in the passage quoted above in relation to compensatory damages seems to be in accordance with the foregoing principle, that these may be increased if the publication was made with motives of spite or ill-will. But the passage quoted does not make the sharp distinction between exemplary and compensatory damages which is a feature of Lord Devlin's speech. For his Honour went on to refer to malicious conduct of the defendant as the basis of exemplary damages, having already treated ill-will as a basis for an increase of compensatory damages.

It is important I think to consider whether in the case under appeal there were circumstances which warranted the increase of compensatory damages by reference to the motives of the defendant. In Rookes v. Barnard it was doubted whether the facts in that case provided a basis for the award of aggravated damages in the foregoing sense of the term. In McCarey's case it was treated as common ground that there was no basis for such damages, despite the very wide circulation of the reports of the proceedings at the inquest which contained a serious imputation against the plaintiff.

In the present case I think there was some material upon which the jury could find that the injury to the plaintiff's feelings and the upsetting and annoying effect on his mind were increased by the conduct of the defendant. But I think the circumstances upon which this could be based are much more limited than those which the respondent contends should be taken into account. I think that the learned trial Judge was right in telling the jury that the rule that the conduct of the case by counsel at the trial might aggravate damages did not apply. I say this notwithstanding the submissions that in the conduct of the trial counsel for the appellant was professing not to assert the truth of any of the statements but nevertheless in a covert fashion insinuated that some of them were true, and cross-examined the plaintiff in a way which in effect amounted to a repetition of the libels, and to an attack upon him.

As to these submissions I consider that it is not open to a jury to award additional damages in respect of the conduct of counsel which consists merely in the legitimate litigating of issues which are open to him, although the doing of this may cause distress to the opposing party. (See Triggell v. Pheeney (82 C.L.R. 497 at 514).) In the present case I think the matters in the cross-examination and in the address of counsel for the defendant which are relied upon on this point by the respondent could not be used to increase the damages. I think it was open to the jury to take the view, if it chose to do so, that in their sequence the three publications in their cumulative effect indicated some ill-will against the plaintiff. This matter was left — correctly I think — as a factor which could increase the compensatory damages. Perhaps also some arrogance or insolence could be found to have been exhibited, because of the use of the contemptuous terms in which in the first libel the plaintiff and others were described. Another matter which I think could be taken into account in relation to the second count was the failure of the defendant to take any notice of the letter

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of protest which the jury could have found to have been sent to the editor of the Bulletin. Whilst I think the foregoing matters were open for the consideration of the Jury in assessing the compensatory damages they could not, in my opinion, have warranted a very large increase in the amount of damages, over and above whatever was proper for damage to the reputation of the plaintiff. Furthermore, as I have said, in my opinion, these matters did not provide material upon which exemplary damages could be awarded, nor was there any other such material. I think that some of these matters could have been regarded as indicative of conduct which within the meaning of the various terms used in the High Court cases could be characterised as "high-handed" or "reprehensible" and thus could warrant an award of exemplary damages. But according to the House of Lords such conduct could not warrant that award. I do not think it is true to say, for the reason that for such conduct it could properly have made an increase in the amount awarded for compensatory damages, that it is a matter of no consequence that the jury was, because of these matters, permitted to award exemplary damages. For the jury might very reasonably regard a much higher amount as appropriate upon the former approach than would be appropriate upon the latter approach.

I am of opinion, thus far, that this misdirection about exemplary damages, as I hold it to be, could have had a material effect upon the assessment of damages. Prima facie at least the appellant is entitled because of it to have the verdict set aside. It may be that if no other ground appeared and the awards themselves appeared to be reasonable and moderate ones, the Court might hesitate to allow the appeal upon a point not taken at the trial and which is concerned with directions to which there was no objection and which did not depart from proper principles as they were then understood, but which are seen to be incorrect because of a decision, the report of which may not then have been available here (having been pronounced on 21st January, 1964), and which was not relied upon.

But in addition to this ground there are other reasons why in my opinion the assessments of damages should not be regarded as proper ones. I think that the amount of damages may well have been increased by happenings which I have already discussed; that is, by the emphasis placed on the alleged imputation of treachery, by the repeated charges of an alleged policy of destruction of the Labor Party, by the repeated assertions about the truth or falsity of the matters published being in issue, and the comments upon the defendant's failure to call evidence on this issue, and by the charge that the defendant was seeking by hook or by crook to delay the trial. If the amounts awarded appeared reasonable there would then be no sufficient reason to suppose that these incidents, or any of them, had had any real effect. But I cannot regard them as reasonable. I seek to keep fully in mind the latitude traditionally allowed in relation to the verdicts of juries in defamation actions and the warnings often given against a Court usurping the functions of the jury in relation to such assessments. But it is well recognised that in these cases, as in others, the verdict of a jury is not

sacrosanct and may and should be controlled by the Court where it appears to have gone beyond all reasonable bounds. Some leading authorities on this point were reviewed by Sugerman J. in Kornhauser v. John Fairfax & Sons Pty. Limited (1964-1965 N.S.W.R. 199 at 209), and in addition see now McCarey's case. I do not think it necessary to consider whether assistance in evaluating an award in defamation actions might properly be derived from considering awards in personal injury cases. Leaving that aside, I refer to the circumstance that the first and second libels provoked no action from the plaintiff until after the third had been published, which was some fourteen months after the first and three months after the second. It was not shown that he had suffered any actual damage in his position as Member of Parliament or otherwise. He had been re-elected to Parliament and still held the position which he had previously held. The first libel, which contained some contemptuous references rather than any real attack upon reputation, was followed immediately by a resounding victory of the plaintiff at the polls. The second article in the Bulletin was a small portion of a political article directed mainly to persons other than the plaintiff. The third and more serious matter did not refer to the plaintiff by name and would be taken to refer to him only by a limited class of persons.

In the circumstances I am of opinion that even having regard to some legitimate matters of "aggravation" to which I have referred, these awards of a total amount of £30,000 were extravagant and ought not to stand. I should be in favour of setting them aside, even if there was no other ground than the amount of them for challenging them. I think that one can find a possible explanation of such large awards in the matters of prejudice which I have mentioned and in the probable inclusion of a considerable sum as punitive damages. But whatever the explanation, the verdicts should be set aside.

Then I must consider whether the appropriate order is to grant a new trial limited to the assessment of damages or to grant a general new trial. The matter is one of discretion but some "guiding principles" have been laid down for determining how the discretion should be exercised. See Willis v. David Jones Limited 34 S.R. 303 at 317. It has been suggested that the granting of a new trial of the whole case is the general rule and that a departure from this is the exception. See Holford v. Melbourne Tramway & Omnibus Company Limited (1909 V.L.R. 497 at 529); Pateman v. Higgin (97 C.L.R. 521 at 527—per Kitto J.). But the contrary has also been asserted. See Pateman's case 97 C.L.R. at 532, per Taylor J.; see also the observations of Isaacs and Gavan-Duffy J. in Ryan v. Ross 22 C.L.R. 1 at 32, which were stated in Coroneo v. Kurri Kurri Amusement Company Limited 51 C.L.R. 328 at 345 to be "by no means inapplicable to a case of libel." In the case last cited reference was made to the libel case of Tolley v. J. S. Fry & Sons 1931 A.C. 333 in which the House of Lords ordered a new trial limited to damages, whereas Scrutton L.J. in the Court of Appeal (1930) 1 K.B. at 477 considered that there should be a general new trial. In Bates v. Producers & Citizens Co-operative

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Assurance Co. Limited 52 W.N. 95 this Court considered that it was apparent that matters of little or no relevance had been given considerable prominence and that there was a possibility, or more, that these might have diverted the jury from a proper consideration of the real matter in issue in the case, and therefore it ordered a general new trial. See also King v. Ivanhoe Gold Corporation Limited (7 C.L.R. 617 at 622).

In Pateman v. Higgin (97 C.L.R. at 528) Kitto J. said:

> "It is often true, in a defamation action for example, that the case on liability and the case on damages are not in distinct compartments and therefore ought not to be decided by different tribunals . . ."

But he went on to say that the case then before the Court fell naturally and clearly into the two divisions.

The question of the manner in which the discretion of the Court as to the form of a new trial was exercised was discussed also in Doyle v. Indo-China Steam Navigation Co. (1964-65 N.S.W.R. 263). In that case reference was made to the statement by Dixon J., as he then was, in Row v. Edwards (51 C.L.R. 351 at 356), who said:

> "I think there is such a chance of the jury having completely failed to deal with the whole case that the action should be set down for re-trial generally and not as to damages only."

I have held that by reason of the combined effect of three grounds for regarding them as unsatisfactory the assessments of damages should be set aside. These are that the amounts awarded are extravagant, that there was mis-direction as to damages and that having regard to the amounts awarded there is reason to believe that these may well have been inflated by the prejudicial happenings which I have mentioned. There appears to me to be good reason for supposing that if the jury was influenced against the defendant by those happenings, this would have affected its deliberations upon liability as well as upon the quantum of damages. The extravagant character of the awards supplies a reason for thinking that prejudice did probably affect the jury's deliberations, both as to liability and as to damages, since it is not easy to believe that its effects could be confined to one part of the jury's task. Because of this, and notwithstanding that the amounts may be explicable to a considerable extent by reference to the directions given as to exemplary damages, and to that extent may not be indicative of a lack of proper consideration of the case, I consider that the order to be preferred is an order for a new trial generally.

Notwithstanding the argument of the appellant to the contrary I think that the costs of the first trial should follow the result of the new trial. If the appeal had succeeded solely on the basis of prejudice, no doubt such an order might have been considered unjust to the appellant. But as liability has always been, and still is contested, and as my decision that there must be a new trial is in part dependent upon a misdirection as to damages, in respect of which no objection

was raised at the trial, it seems right that whichever party succeeds in the end should bear the costs of both trials.

However, there is in my mind a very real doubt as to the propriety in the circumstances of this case of exercising the discretion of the Court by granting a certificate of indemnity under s.6 of the Suitors' Fund Act. Having regard to the views which I have formed upon the case and to the grounds upon which I hold that the appeal succeeds, it may well be that this is a proper case for refusing such a certificate. In Gurnett v. The Macquarie Stevedoring Co. Pty. Limited (No. 2), (95 C.L.R. 106 at 113) Dixon, C.J., considered the discretionary power conferred by s. 6. The other members of the Court in that case did not have occasion to consider it as they held that the High Court could not exercise the power at all. What his Honour said shows clearly that in cases to which the section applies, that is where an appeal "on a question of law" succeeds, the respondent is by no means entitled automatically to a grant. It may be pointed out that by the amending Act of 1959, s.6B was introduced by which, when a new trial is ordered on the ground that the damages awarded in the action were excessive or inadequate, the respondent is to be entitled to be paid from the Fund an amount which the section goes on to define. Whether this provision is applicable where, as here, a new trial should in my opinion be ordered upon this ground and upon other grounds, does not call for a decision now. If it applies it appears that the respondent gets his entitlement directly from the Act and not from the grant by the Court of a Certificate under the discretionary power conferred by s.6. Assuming s.6B does not apply in such a case, the Court has power to grant a certificate if it thinks fit to do so in the present case, because all the members of the Court in holding that the appeal has succeeded are of opinion that this is at least in part upon a question of law, namely the question as to the correctness of the directions concerning damages. Then the question arises whether or not this is a proper case for a grant. The other members of the Court, for whom the resolution of this question would of course be affected by their respective views of the whole case, which do not at all points coincide completely with my own, are of opinion that a certificate should be granted and therefore there is no purpose in my stating a concluded view upon this question and I refrain from doing so.

In my opinion the appeal should be allowed with costs. The verdicts should be set aside. There should be a new trial of all issues in the action. The costs of the first trial should follow the result of the second trial.

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4th May, 1965.

WALLACE, J.: This is an appeal brought by the defendant in a libel action. In that action there were four counts in the declaration, each count setting forth a separate alleged defamatory article.

The first count related to portion of an editorial published on the front page of the "Daily Telegraph" on 8th December, 1961. The second related to portion of a weekly periodical newspaper known as "The Bulletin" published on 3rd November, 1962. The third and fourth counts related to two articles each published respectively in two editions of the "Sunday Telegraph" (a weekly newspaper) on 10th February, 1963. These two articles differed only in the headlines and so the third and fourth counts were treated during the hearing as one count. All these newspapers are owned and published by the defendant.

The writ was issued on the 14th February, 1963, and the trial began on the 24th February, 1964 (a date which had been accelerated and specially fixed) and after a hearing occupying thirteen days concluded on the 11th March, 1964.

The jury awarded the plaintiff £5,000 on the first count, £10,000 on the second count, and £15,000 on the third and fourth counts—a total of £30,000.

The relevant portions of the first, second and third counts are as follows:—

First count.

> "'Who is behind Mr. Calwell in the Federal House? A divided, warring rag-tag and bob-tail outfit ranging from Eddie Ward and Les Haylen through to Dan Curtin and Tom Uren (thereby meaning the plaintiff). This is a team (thereby meaning the plaintiff and others) which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country,' the defendant meaning thereby that the plaintiff was a person unworthy of the confidence and support of the electors and unfit to be a member of parliament."

Second count.

> "'Leftwinger Tom Uren (Labor N.S.W.) (thereby meaning the plaintiff) still stubbornly adhered to the line that Moscow and Peking controlled Communist Parties in non-Communist countries assiduously peddle mainly through peace movements. He (thereby meaning the plaintiff) described suggestions for greater defence expenditure as "so much hysteria." But even Uren (thereby meaning the plaintiff) was susceptible to the prevailing climate.' The defendant meaning thereby that the plaintiff was disloyal and recreant to the defence needs of Australia and was unworthy of the trust and support of the electors and unfit to be a member of the House of Representatives."

Third count.

"SPY USED LABOR MEN (thereby meaning the plaintiff and others) as "PAWNS"?

From a Special Reporter

Canberra, Sat. — Allegations are likely to be made in Federal Parliament that some Labor M.P.'s (thereby meaning the plaintiff and others) were used as "pawns" by Russian spy Ivan Skripov to try to get defence secrets.

It will be claimed that Skripov persuaded the unsuspecting Labor men (thereby meaning the plaintiff and others) to ask questions in Parliament about defence establishments in Australia.

Labor M.P.'s (thereby meaning the plaintiff and others) are said to have asked for information about the new secret £40 million U.S. radio communications base at Learmonth, Western Australia.

The American navy will use this base to help keep track of its Polaris-equipped nuclear submarines operating in the Indian and Pacific oceans. The Labor M.P.'s (thereby meaning the plaintiff's and others') questions were directed in the House of Representatives to Prime Minister Menzies and Defence Minister Townley the defendant meaning thereby that the plaintiff was a "pawn" and a person lacking in a due sense of loyalty and responsibility and judgment and was capable of being used by the representative of a foreign power for an improper and disloyal purpose and was not a fit and proper person to be a member of parliament and was unworthy of the trust and support of the electors."

The headline set forth in the fourth count was: "DID RUSSIAN SPY DUPE ALP MEN?"

The plaintiff at all relevant times was (and is) a Labor member of the Federal, or National, Parliament.

The defences relied upon in the defendant's pleas consisted of a plea of "not guilty," a denial of innuendoes, fair comment and a reliance upon part of paragraph (h) of s.17 of the Defamation Act 1958. It will be convenient to set forth the relevant portions of such last mentioned provision at this stage:—

17. It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith .....

(h) in the course of . . . the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair.

For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in

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good faith of defamatory matter; if the manner and extent of the publication do not exceed what is reasonably sufficent for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue."

The burden of proof of good faith is set forth in s.18 which reads:—

"18. When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging the absence."

Although the opening averments in each count of the declaration included the phrase "falsely and maliciously published" — the plaintiff did not specifically aver the absence of good faith and the defendant did not aver that the publication was made in good faith in the pleadings. The original replication was a joinder of issue on the defendant's pleas.

Before the trial began certain aspects of the declaration had received judicial examination and certain particulars of the defendant's defence under paragraph (h) of s.17 were sought and given but I do not think it necessary to give details thereof.

The grounds of appeal taken number 77 in all but these were, for our convenience, grouped by Mr. Larkins, Q.C., senior counsel for the appellant. These groups can I think be further condensed as follows:

(1) Refusal to adjourn the hearing for one month,
(2) Refusal to discharge the jury,
(3) Prejudicial conduct of plaintiff's counsel resulting in a miscarriage of the trial. Failure on the part of the learned trial Judge to give appropriate warnings to the jury was associated with this ground,
(4) Misdirection and non-direction by the trial Judge on material matters. This included the leaving of punitive damages to the jury,
(5) Wrongful admission and rejection of evidence and,
(6) Excessive damages partly induced by (3) and (4) above,

and I will now deal with these headings in the same order.

(1) Refusal to adjourn the hearing for one month.

In his opening address on behalf of the plaintiff on the first morning of the trial Mr. Evatt, Q.C., with customary force, referred inter alia to (1) the innuendo assigning an implication of disloyalty (2) falsity and (3) lack of good faith. At the conclusion of this address Mr. Larkins, Q.C., for the defendant took exception to these aspects

of Mr. Evatt's opening address and sought the discharge of the jury, and during the morning of the third day (most of the second day being an adjournment at Mr. Larkins' request) sought an adjournment of one month. Both applications were refused, but in refusing the adjournment for such a period his Honour made it clear that his ruling was tentative and suggested that the application could, if thought fit, be renewed later. Two or three days later after certain particulars had been given Mr. Larkins renewed his application for a month's adjournment and in the alternative sought an adjournment for a period of some days, and both such applications were refused.

The main reason for seeking a month's adjournment was that after the argument which followed Mr. Evatt's opening address Mr. Evatt had for more abundant caution and pursuant to leave, amended his replication by specifically alleging absence of good faith (see Motel Holdings Ltd. v. Bulletin Newspaper Co. Pty. Ltd. 1963 S.R. 208). Mr. Larkins stated specifically that he was prejudiced on the ground (amongst others) that a vital witness was abroad. This witness as later evidence showed was Mr. McNicoll the editor-in-chief of the Daily Telegraph and Sunday Telegraph newspapers. He in fact returned to Sydney as we now know early in the morning of the 5th April, that is to say some six days before the jury's verdict was given, and I think if an application had then been made by Mr. Larkins to re-open his case (albeit he had finished his concluding address) there is little room for doubt that the learned trial Judge would have acceded to such a request. Mr. Larkins told this Court in response to a question put by a member of the Court that when he first heard of Mr. McNicoll's return (at a time when he had just completed his closing address) he considered the trial had miscarried to such an extent that no useful purpose would be served by making such an application. In fact, Mr. McNicoll's return was not made known either to the Judge or to opposing counsel, the Judge stating in his summing up "The author and publisher of that editorial we are told, was Mr. McNicoll, who is not available as a witness because he is overseas." At the time his Honour spoke these words to the jury, Mr. McNicoll to the knowledge of Mr. Larkins had been back in Sydney for five days. During his final address to the jury Mr. Larkins had said:

> "However, we did not have the advantage as Mr. McNicoll is abroad, of calling him, as the author of that article, to ask of him, as we did of Mr. Moyes and Mr. Reid, 'Did you have any ill will towards the plaintiff?' "

This disappointing incident has I think a bearing on the question whether we should grant a new trial on the ground that a month's adjournment was refused because Mr. Larkins made an election, when it was not too late, that he would not call Mr. McNicoll.

I think it must be conceded that after Motel Holdings Ltd. v. Bulletin Newspaper Co. Pty. Ltd. (supra), Mr. Larkins was as a matter of pleading justified in regarding the words "falsely and maliciously"

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which appear in the declaration as surplusage for Sugerman J said so at p.212 and such a proposition may be thought implicit in my own judgment therein. But the phrase was in fact used and the whole background and circumstances of the case might well, as the learned trial Judge clearly enough thought, have at least put the defendant on guard. It seems a little unreal to think that the absence of good faith was not a contemplated issue in an action of this sort where the defamatory material was open to be viewed seriously and where no apology had been given. The innuendoes contained in the first and second counts (including disloyalty in the second count) had been before the Full Court, 1963 S.R. 680, which had refused to hold that the words of the second count were not capable of supporting such innuendo of disloyalty. Although not directly to the point I think I should also with respect express some measure of doubt whether after 1958 the phrase "falsely and maliciously" should be deemed as inactive as it was before that date for the reason that the definition of "good faith" in s.17 includes six separate constituents the proof of any one whereof by the plaintiff is fatal to the defendant and so it might be thought that since 1958 if a plaintiff were to aver (for example) "and actuated by ill will to the plaintiff" in his declaration he would thereby sufficiently aver absence of good faith because he would be adopting in an acceptable pleading form a statutory definition — and there is not much relevant difference between ill-will and malice. This was an aspect to which I did not direct my mind in Motel Holdings Ltd. v. Bulletin Newspaper Co. Pty. Ltd. (supra). I should add that in that case a strict point of pleading and onus of proof were under discussion and when I said "I think the true view is that the question of good faith 'arises' as soon as the defendant pleads privilege because 'good faith' by virtue of s.17 is then at once in issue" I was dealing merely with a technical point of pleading and with arguments which I thought to be incorrect centering around the true construction of "appear" and "arises" in s.18. I intended to convey that for the purposes of pleading the question of good faith arises when one of the paragraphs of s.17 is pleaded by the defendant in the sense that the onus is then on the plaintiff to plead and prove absence of good faith if he wishes to raise this issue.

But to leave this short excursus it is appropriate to say whilst acknowledging the correctness of Mr. Larkins' stand on the pleadings that the whole course of this lengthy trial must be considered when a new trial is being sought on such a ground. It is well settled that the exercise of the discretion vested in the trial Judge on such a matter will not be interfered with by an appellate court except in exceptional circumstances or where the refusal to adjourn is demonstrably due to some misconception of the law.

It was said that another witness, a Mr. Schapel who was the head of the defendant's Canberra bureau was also overseas having left Sydney about the 11th February, 1964, but I am quite satisfied after carefully considering the evidence and the arguments of learned counsel

that his evidence if given could not have had any real or serious impact on the case one way or the other. The relevant evidence was that Mr. Moyes who as editor of the Sunday Telegraph was responsible for the material referred to in the third and fourth counts telephoned Mr. Schapel before publishing the article and accepted his advice on two aspects of the publication so that any evidence given by Mr. Schapel could only have been of a corroborating nature.

Whilst therefore I unhesitatingly accept Mr. Larkins' statement both to the trial Judge and to us that he deemed himself prejudiced by the last-minute inclusion of the issue raised by the amended replication, I feel the factors, (1) that the trial was so long, (2) there were so many adjournments in it (for example owing to a juror attending the funeral of a close relative the Court did not sit on Monday, 2nd March), (3) of Mr. McNicoll's return long before the trial ended, and (4) of Mr. Larkins' election not to ask leave to re-open his case after such return, have a cumulative effect and lead to the view that it would not be right for this Court to order a new trial on such a ground. I feel also that there was much force in Mr. Evatt's submission that in the absence of some evidence to the contrary it is reasonable to think that the projected date of departure from England and the expected date of arrival in Sydney in respect of Mr. McNicoll's movements, he being the editor-in-chief, would have been known to some senior executive of the defendant company some days at least before his actual arrival and at a time when Mr. Larkins was still in evidence. Mr. Evatt also stressed justifiably enough that the time distance between London and Sydney is only 36 hours.

(2) Refusal to discharge the jury.

This again is eminently a matter of discretion for the trial Judge. We are dealing with a long hearing in which blows were struck on each side. The major application to discharge the jury was made after Mr. Evatt's opening address. Some of the material to which Mr. Larkins took strongest objection had not been ruled upon at the time of the address, and even though later, perhaps much later, the trial Judge gave rulings which were against some of the matters opened by Mr. Evatt I think his Honour sufficiently rectified the position in his remarks to the jury. For example Mr. Evatt at the stage of his opening address was entitled in respect of the second count in the light of the observations in Uren v. Australian Consolidated Press, 1963 S.R. 680, to refer to the innuendo assigning disloyalty whilst falsity was a matter which the Judge later told the jury that he had himself misinterpreted and he expressly and clearly rectified the position shortly before the jury retired. Moreover his Honour left to the jury under absence of good faith the issue that the defendant did not believe the defamatory matter to be untrue on all counts (with much respect, wrongly I think, but Mr. Larkins expressly informed his Honour—page 642 of the Appeal Book—that he was content and did not ask such issue to be withdrawn) and I agree with his Honour that objective falsity can be a step (e.g. by legitimate inferences) in proving such an issue. The

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situation arising from alleged absence of good faith I have already dealt with. Once leave to amend had (rightly or wrongly) in fact been granted no ground for complaint in relation to Mr. Evatt having opened up lack of good faith could be sustained. I am satisfied that the Judge's decisions not to discharge the jury should not be interfered with by this Court.

(3) Prejudicial conduct of plaintiff's counsel resulting in a miscarriage of the trial.

The remarks which I have just made in (2) above are applicable. Although Mr. Larkins' criticisms of Mr. Evatt's conduct were to a considerable extent justified, I would not, after a review of the whole course of the hearing, order a new trial on this ground.

It must be kept in mind I think that in a case of this sort it not infrequently happens that cross-examination or statements by counsel may be legitimate on one aspect of the pleadings and issues, yet be out of order on another aspect. One only has to recall the refinements involved in the legal arguments which took place before us and which extended over seven days to realise that this proposition is true. The balance can only be kept by the vigilance of the trial Judge and by appropriate directions to the jury, and this, if I may respectfully say so, the trial Judge did. Thus his Honour expressly told the jury on more than one occasion that "other improper motive" was not an issue for them. (Curiously enough Mr. Larkins himself invited the jury to consider whether there was evidence of "ill will or any improper motive".) His Honour overruled quite firmly Mr. Evatt's submission (improperly made I think in the presence of a jury as it was a demurrer point which, under our system of pleading should have been formally taken months before the hearing) that s.17(h) was not available as a defence to a newspaper. This submission made in this way at the very heel of the hunt exemplifies the type of advocacy in which Mr. Evatt delights. But what more could his Honour have done? However I do not propose to embark on an analysis of all the arguments raised under this heading because such a task would be a very lengthy one and, I think, unrewarding. Mr. Evatt in turn attacked Mr. Larkins and I give one illustration, not to show I agree with the criticism, but to demonstrate the proposition to which I have referred above and perhaps also because of the sustained attacks made during this appeal by Mr. Larkins on Mr. Evatt's conduct, namely, that during Mr. Larkins' lengthy cross-examination of the plaintiff (it occupied nearly 160 pages of the appeal book) he included a series of questions of which it could not unreasonably be said—(although I do not overlook Mr. Larkins' explanation, indeed his explanation gives force to what I have said above)—that he was thereby covertly and improperly endeavouring to give the jury the impression that the plaintiff was a Communist. Perhaps additional force to this comment stems from the fact that Mr. Larkins both in cross-examination and in his final address devoted much time (on the issue of "in the course of the discussion of some subject of public interest") to Communism, China, Indonesia,

Cuba, the defence of Australia and allied subjects. But that Mr. Evatt did err is clear enough. There was for example no excuse for his charge that Mr. Larkins in applying for an adjournment was attempting to postpone the hearing "by hook or by crook" a phrase which in its context could not have the gentle Miltonian meaning which Mr. Evatt suggested we should accept. I think his transgressions were unfortunate and undesirable — unfortunate because they attract time-wasting appeals, and undesirable if only because they were unnecessary. Thus in the light of the nature of the defamatory material and of the plaintiff's excellent war record it is likely that Mr. Evatt could have obtained adequate and unassailable damages without the use of prejudicial flourishes. Perhaps, in fairness to Mr. Evatt, it can be said in some degree of mitigation that the defence was conducted on a so-called matter of "principle" and that the cross-examination of the plaintiff was tiresomely long and in places of an acid nature — this on behalf of a defendant which had for its own purposes three times over a period of fifteen months defamed the plaintiff, which did not attempt to justify and which at times gave the impression of trying to get the best of two worlds. The words of Jane Austen's best known heroine when she was finally accepting Mr. D'Arcy's proposal seem appropriate:—"The conduct of neither, if strictly examined, will be irreproachable."

But on a review of the whole trial and of his Honour's various directions to the jury I am satisfied that a new trial generally on this ground is not called for.

(4) Misdirection and non-direction by the trial Judge.

My opinion is that by and large most of the directions given by the trial Judge were in favour of the defendant and except for punitive damages to which I will refer later I do not find it necessary to deal further with this ground.

(5) Wrongful admission and rejection of evidence.

In my opinion there was no wrongful admission or rejection of evidence justifying a new trial within the principles recently enunciated by the High Court. Again I do not propose to examine the arguments in detail. It would be surprising indeed if during a hearing of this length and with such issues as were here involved there would not be two or three examples of wrongful admission or rejection of evidence, but I am quite satisfied that they were not at all of such a character as to attract a new trial and that is all I propose to say.

(6) Excessive damages.

Two matters were argued under this heading:—

(a) On the evidence punitive damages should not have been left to the jury. If this submission be correct then a new trial on the issue of damages must be granted because his Honour left punitive damages to the jury on all counts and the sums awarded were such that the possibility of punitive damages forming a component in such sums cannot be excluded.

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(b) The sum awarded under each count was so high "that no reasonable body of men could have awarded it" (Triggell v. Pheeney 82 C.L.R. 497 at 516).

As to (a)

In the recently delivered judgment of this Court in Uren v. John Fairfax and Sons Ltd. I gave two reasons why in my opinion this Court should follow the principles which have been adopted by the High Court of Australia on the subject of punitive damages in preference to the test laid down by Lord Devlin in his second category in Rookes v. Barnard 1964 A.C. 1129 and I will not repeat those reasons here.

In that judgment I expressed the view that Lord Devlin's speech could not be reconciled with principles enunciated by the High Court and I made reference to Fontin v. Katapodes 36 A.L.J.R. at p.286; Triggell v. Pheeney (supra at 512) and The Herald and Weekly Times v. McGregor 41 C.L.R. 254. I said that whilst I did not think it had been prescribed here that a mere intention to make some profit out of the publication of itself justified punitive damages (actually such motives as malice and venom do not seem to require prompting by such an intention) on the other hand it had never been the law here that punitive damages could only be awarded where the plaintiff (by some method not easy to envisage) was able to show that the defendant prior to publication had calculated or estimated that he would make (as it were) a net profit from the publication over and above the estimated compensatory damages likely to be awarded to a plaintiff in respect of the publication. For this seems to be the preferred view of the meaning and effect of Lord Devlin's second category (cf. McCarey v. Associated Newspapers Ltd., 1965 2 W.L.R. 45 at p.62).

I can say at once that if I am wrong on these views and if contrary to my opinion we are bound to apply Rookes v. Barnard (supra) then I would be clearly of opinion that there should be a new trial on all counts (but limited to damages) because there is no evidence at all which brings the case within Lord Devlin's second category on any view thereof.

If, however, I am correct in applying the principles governing punitive damages being those which the High Court has from time to time stated, (and which are in a sense much more favorable to a plaintiff than Lord Devlin's second category as construed by Diplock L.J.) and which with respect I again propose to apply, the matter at least as regards the evidence relating to the second count is much less simple. It is of course clear that if my view that we should follow the High Court and not the House of Lords be correct, the plaintiff is entitled to have the evidence on each count carefully examined with the view of it being adjudged whether there was any evidence fit to be left to a jury of malice, malevolence, venom or the like.

Mr. Larkins told the jury in his closing address in effect that the defendant was not before the jury on the question of damages, but to uphold the principle that the matters complained of were published

on occasions of qualified privilege. The learned trial Judge said in his summing up "Mr. Larkins on the questions of damages did not take up much time at all". No objection was taken by Mr. Larkins to the Judge leaving the question of punitive damages to the jury but although this is a consideration yet in an appellate court as the authorities both here and in England show this is not fatal.

I will now turn to each count separately.

(1) As to the first count.

At first sight this defamatory matter might be regarded as mere vulgar abuse, unworthy to appear in an editorial of a great daily newspaper but scarcely entering the field of defamation. But on reflection, I think it is capable of being viewed as a serious defamation of a politician in his parliamentary profession and that the innuendo is supportable. Indeed the first plea of not guilty does not seem to have been very seriously pressed whilst a defence based on s.17 assumes and concedes that the matter complained of is defamatory. The difficulty which however confronts the respondent lies not only in the magnitude of the verdict but in detecting any evidence either intrinsic or extrinsic justifying exemplary damages. As regards the former, the colloquialisms and other phrases used are contemptuous rather than malicious and intrinsic evidence of malice, high handedness and the like is not, to my mind, revealed. Then the only argument which sought to establish extrinsic evidence was based on an alleged "campaign" against the plaintiff as revealed by the material contained in the second, third and fourth counts. But I am unable to accept this application of some doctrine of relation back. The first count relates to portion of an editorial published on the eve of an important election and must, I think, be regarded in its own setting. The plaintiff was attacked as one of a group of four and the strong feelings evinced in the editorial related primarily to the comparative merits of rival political parties. Furthermore, it does not follow in political libels that ill-will even if shown to exist in 1962 or 1963 is evidence of ill-will in 1961.

There was in my opinion no evidence justifying exemplary damages being left to the jury on the first count and there should therefore be a new trial in respect thereof, limited to the assessment of damages.

(2) As to the second count.

The matter complained of is a small extract from a fairly long article devoted to a broader subject, and published about a year after the matter complained of in the first count. The Judge again left punitive damages to the jury so again one must search for evidence of malice, high handedness and the like. This was said to be comprised within three headings (1) the extract was part of a "campaign" (to which I have referred earlier) (2) the extract omitted reference to other parts of the plaintiff's speech in Parliament which (it was claimed) would have shewn that he as an individual member was not stubbornly adhering to a line peddled by Communist parties but was merely advocating accepted and known Labor Party principles, (3) the non-publication of a correcting letter written by the plaintiff and

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stated in evidence by him to have been handed to Mr. A. D. Reid, a senior representative of the defendant at Canberra and being the person from whom the article derived and which Mr. Reid on his own evidence promised would be published. (An issue of fact was also involved here but one must assume for present purposes this was found in favour of the plaintiff.)

The first heading I think is flimsy. One enters the field of conjecture only when trying to detect a "campaign" in three articles widely dispersed in point of time and one of which does not even name the plaintiff, and which was inspired as I will show when I turn to the third and fourth counts, by a publication in a rival newspaper.

The second and third headings however attract careful consideration. The evidence relating thereto includes the following:—

(a) From the plaintiff:

"I said (to Mr. Reid) 'What is this about me peddling the Moscow and Peking Line? Am I the conciliating force? All I said in my speech was Labor policy'. He said to me, in reply, 'As a matter of fact, I said also that you had expressed Labor Party policy, and they did not print exactly what I said'.

. . . . . .

I said, 'I am going to write a letter'. He said, 'I will see it is published'. So I went away and wrote a letter . . .

. . . . . .

Q. What did you do with that letter?
A. I handed it to Mr. Alan Reid, personally."

(b) From the defendant (Mr. Reid)

"Q. And yet you say you were going to recommend that it be published? A. No, I said I recommended that it be published.
Q. What? A. I said I recommended — past tense.
Q. Recommended it? A. Are you asking me about my reply to you or whether I replied to Mr. Uren?
Q. This is your words to Mr. Uren.
A. That is it. I said 'I will recommend that it be published'.
Q. And it was put into your hand? A. No.
Q. Didn't you ask to see it? A. No.
Q. Did you ask him what was in it? A. No, he told me what was in it.
Q. What did he tell you was in it? A. He said 'I am writing to the editor to prove that I am not a Marxist', and I took this as what was in it, what he thought — what he was producing as proof that he was not a Marxist."

. . . . . .

"Q. Did he say anything about A.L.P. policy?
A. Yes he said 'I followed A.L.P. policy, didn't I?'
Q. What did you say? A. I said 'You did it quite cleverly but you sheltered behind A.L.P. policy to fire your bullets' and I

said 'I said that in my official article and I am rather sorry that they cut that out'."

. . . . . .

"Q. So you assumed from that conversation he had taken other steps to get it to Sydney? (Objected to; allowed). A. I assume he posted it.
Q. Did you check up with the Sydney people as to why it did not appear? A. No, but I 'phoned them to recommend that it should have been.
Q. Who did you speak to when you made the recommendation? A. It would either be Peter Hastings or Peter Coleman, the editor or the associate editor.
Q. And then I suppose you waited for it to appear? A. Well, yes, I was interested in the letter.
Q. And you are still waiting, are you?
A. I am still waiting."

(c) The portion of Mr. Reid's article which was excised (apparently by the sub-editor) read as follows:—

"He erected for himself a respectable rocket site of protection by quoting Labor policy decisions into which his utterances would fit before loosing his verbal guided missiles against even the present defence programme. Though his own Labor colleagues were even more vociferous than the Government's supporters about the 'inadequacy' of the present defence programme, he also made it clear that his accusation of hysteria was being levelled only against those Government members who wanted larger defence spending."

This omitted portion followed immediately after the sentence "But even Uren was susceptible to the prevailing climate".

(d) Part of the plaintiff's speech in Parliament (made some three months before the publication) and relied on (inter alia) by Mr. Evatt in proving lack of good faith was as follows:—

" 'We of the Australian Labor Party agree that money must be spent on defence, but we say that portion of it can be spent most effectively on defence by concentrating on national development projects such as the standardisation of our rail gauges, the construction of roads, the modernising of port installations and the building of air-strips'. Didn't he say those words? A. Yes."

Upon consideration I have reached the conclusion that the excerpts from the evidence which I have given do not reveal malice in the relevant sense.

The portion of Mr. Reid's original article excised by the sub-editor is capable of the construction that it is also defamatory because it seems to mean that the plaintiff was "sheltering" (as Mr. Reid himself said) behind avowed Labor policy and implies that he was doing this in an equivocal if not hypocritical manner.

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The published paragraph is clearly capable of being held defamatory, but I do not think that the excised paragraph could have improved the situation — rather its presence could have had a contrary result. The excision therefore cannot reasonably be assigned to a malicious or venomous motive.

Again, the published paragraph may well be thought to be unfair comment upon an analysis of the plaintiff's speech in Parliament in the light of the extract therefrom which I have quoted above—but unfair comment of itself, especially in a purely political article, does not of itself amount to "malice". Something more than unfairness or inaccuracy must be shown. Unfair comment, if proved to the satisfaction of the jury, will overcome a defence under s.17(h) and may in some cases be capable of justifying an award of compensatory damages but if punitive damages are sought an additional element of animus towards the plaintiff must be established and however tart or unfair the defamatory material in question may be thought to be, I cannot for myself detect malice.

The failure to publish the correcting letter caused me hesitation (especially as his Honour directed the jury that such failure was for consideration under the issue of ill-will) before finally coming to the view that this also is not evidence of malice or animus. It is a fairly long letter purporting to set forth the plaintiff's speech and it includes the quotation which I have set forth in (d) above.

If it were in fact received by the defendant the view is open that fairness required that some of it at least should have been published. Yet it seems difficult to say that unfairness of this sort is evidentiary of malice at the time of publication even when considered in conjunction with the other features which I have just mentioned. In Howe and McColough v. Lees, 11 C.L.R. 361, Griffiths C.J. (with whom Barton J. expressly agreed) at pages 371-2 said that the failure to correct a false statement although highly reprehensible did not under the circumstances throw any light on the state of the defendant's mind when he made the original mistake. It is true that his Honour said also that there was otherwise no evidence of any actual ill-will or improper motive on the part of the defendant and that there was no evidence upon which reasonable men could come to any other conclusion than that the defendant had honestly forgotten the real facts so that the case may be thought clearer than the present one because of the evidence here relating to the excision of portion of Mr. Reid's original article and the issue of unfair comment. But as I do not consider that either of these features in this political libel is evidence of animus of the relevant type the failure to publish the letter does not seem to add anything material on the question of malice. It is not as though the letter were an express correction of a clear and unequivocal mis-statement of fact. Here the defamatory matter consists substantially of comment — political comment — and the mere failure to present the plaintiff's version of his actual speech upon

which the comment was based does not seem to me to be evidence of personal animus towards the plaintiff although it could legitimately increase compensatory damages.

I should add that Mr. Larkins informed us that he did not press the 64th ground of appeal and he submitted no argument thereon. This ground reads:—

> "His Honour was in error in directing the jury that if they found the original of Exhibit C (—that is the so-called correcting letter—) had been received by the defendant, the failure to publish it was evidence of ill-will."

We do not therefore have to consider whether his Honour was correct in so directing the jury.

There are four classes of damages available (in appropriate cases) in libel actions namely (1) Nominal (2) Compensatory (3) Aggravated compensatory and (4) Punitive. In my opinion the highest of these classes attracted by the various features relied on by Mr. Evatt under the second count is aggravated compensatory damages. Lord Devlin has suggested that in practice there may not be much difference between aggravated and punitive damages as the former will do most if not all which the latter does. Yet it is certain that punitive damages may only be left to the jury in appropriate cases. The difference between the factors which attract aggravated compensatory damages and those which attract punitive damages may be a rather fine one in some cases, and Lord Devlin's second category and his observations which result in such matters as ill-will, malice and the like being included in compensatory damages at least make the English position, if I may respectfully say so, clear. But some matters are also clear, I think, under the principles hitherto obtaining in Australia. In the first place objective falsity cannot of itself attract punitive damages. All defamatory matter whether true or false is unlawful unless it is protected, or justified or excused by law (s.9). (Belief by the defendant in the untruth of the defamatory material is on a much different footing). Then carelessness or even recklessness in the publication is insufficient. Unfairness, such as the failure to publish a correcting letter, or refusal to apologise do not, of themselves, amount to malice although they may well justify aggravated compensatory damages. There must be shown, I think, some malice, malevolence, high-handedness or the like "in the sense of animus towards the plaintiff" (Triggell v. Pheeney, supra at 512). Some types of lack of good faith under our statutory definition could, I think be sufficient. Thus a finding by a jury of ill-will especially if coupled with belief in the untruth of the defamatory material would seem capable of satisfying the test for punitive damages yet as regards ill-will much would turn on the particular evidence of a case. In other words I think a finding of ill-will within the meaning of s.17(h) may in some cases justify leaving punitive damages to a jury but not in others. It is a question of degree and the trial Judge will take stock of the evidence as a whole and give appropriate directions in his summing up accordingly.

In the Supreme Court of New South Wales.

No. 13.
Reasons for Judgment of the Full Court (Wallace J.). *(Continued)*

4th May, 1965.

And so although both ill-will and belief in the untruth were here left to the jury, I think this Court is entitled to review all the evidence when considering whether punitive damages should have been left to the jury.

An evinced distaste for the political beliefs of a group such as "Left Wingers" may I think amount to "ill will" within the meaning of s.17 but not of itself to malice in the sense of animus towards one of them.

In the result I am of opinion that the evidence under the second count did not warrant punitive damages being left to the jury although there are features which would justify an award of aggravated compensatory damages.

A new trial limited to the assessment of damages should therefore be ordered on the second count.

(3) As to the third and fourth counts.

These were the counts (treated together) in respect of which the jury awarded £15,000. The plaintiff was not mentioned by name and he could be identified only by a limited section of the public. The innuendo of disloyalty was (correctly in my opinion) taken away from the jury. The words without such an innuendo merely mean that the plaintiff was a man who could unwittingly become a dupe of a foreign agent.

Under the third and fourth counts his Honour gave short treatment to ill-will. He merely said:—

> "Then you come to the question of ill-will. I think it now unnecessary even to refer you to the argument. You will remember the arguments of learned counsel whether ill-will has or has not been shown to be present, the onus of course being on the plaintiff."

After a careful consideration of the evidence and of the arguments submitted to us I cannot detect any evidence which warranted punitive damages being left to the jury on the third and fourth counts. The evidence of Mr. Moyes showing the circumstances in which the defendant published the defamatory material seems to me to lead away from the necessary animus towards the plaintiff although it could have a bearing on the question whether the defamatory material justified the leaving of aggravated compensatory damages to the jury. This evidence summarised, is as follows:—

Speeches had been made in Parliament about the end of October, 1962, and an article thereon appeared in the Daily Telegraph newspaper on November 30th, 1962. An article appeared in the "Sun-Herald" Sunday Newspaper on the morning of Sunday, 10th February, 1963, entitled "Labor Link with Red Spy." Mr. Moyes, the Editor of the "Sunday Telegraph" newspaper saw and read the "Sun-Herald" article early in the morning of the 10th February, 1963, and as it seemed to him to be similar to the 30th November, 1962, article in the "Daily Telegraph" he telephoned Mr. Schapel at the defendant's

Canberra bureau and obtained and acted upon information so given. Mr. Moyes added "The story was an amalgam of what Mr. Schapel told me and a report in the Telegraph of November 30th."

The fact that Skripov was not known to be a spy at the time the plaintiff asked the questions in the House but was known so to be by the 10th February, 1962, does not seem very important although it may be thought that the defamatory material was consciously or unconsciously equivocal on this matter.

For these reasons I am of opinion that there should be a new trial also on the third and fourth counts, again limited to the amount of damages to be awarded.

As to (b)

The plaintiff was a member of Federal Parliament and apart from the attacks made on his political views the evidence shows that he has a worthy background both in war and in peace. He was defamed three times over a period of fifteen months by the defendant which may be one reason why the three amounts awarded by the jury were by way of arithmetical progression. On the other hand he claimed no special damages, he was re-elected after the publications to Parliament of which he is still a member, and he made no complaint regarding the matters set forth in the first and second counts until after the writ was issued following the third publication.

But in view of the decision I have reached on punitive damages, this question raised under (b) loses importance with me. The respective sums awarded under the three counts do seem unduly large but my view thereon cannot assist either judge or jury at the next trial. There are however two matters to which I will briefly refer.

I have considered whether a new trial generally should be awarded by reason of the excessive nature of the sums awarded:— see (e.g.) Pateman v. Higgin, 97 C.L.R. 521 at 532; James v. Colahan 1951 A.L.R. 90 at 92; Kortekaas v. Maslen, 58 S.R. 224; and Doyle v. Indo-China Steam Navigation Co. Ltd. and Anor., 1964-5 N.S.W.R. 263, but in view of what I have regarded, with respect, as the wrongful intrusion of punitive damages, it seems to me that such a consideration is scarcely apposite. A substantial portion of the verdict may well be due to a punitive component in accordance with the directions of the trial Judge so that an inference that the jury "took a biased or mistaken view of the whole case" (Tolley v. J. S. Fry & Sons Ltd. 1931 A.C. 333 at 341) is not available.

Secondly the provisions of s.24 in relation to the then current proceedings in Uren v. John Fairfax Ltd. were not referred to in this case. In my reasons for judgment given in Uren v. John Fairfax Ltd. I respectfully adopted Lord Reid's statement in Lewis v. Daily Telegraph Ltd. 1964 A.C. 234 at 261 that the jury "can only deal with this matter (s.12 of the English 1952 Act) on very broad lines and they must take it that the other jury will be given a similar direction." But I expressed the view that it is undesirable to read anything into this difficult provision and in particular I venture to doubt whether the

In the Supreme Court of New South Wales.

No. 13.
Reasons for Judgment of the Full Court (Wallace J.).
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precise amount of the verdict in the first case should be made known to the jury in the second case. The facts (a) that we are about to order a new trial in this the first of the Uren cases and (b) that we have already ordered a new trial in the second case, deepen my doubts. Also I cannot see much weight in the submission made to us that merely because Mr. Uren (in respect of the third and fourth counts here) received in effect a total of £28,000 being £13,000 in the Fairfax case and £15,000 here there should be a new trial. For all we know he may in the absence of any punitive component ultimately receive only a comparatively small sum in the Fairfax case. I would add in conclusion that because I am of opinion that belief in the untruth of the defamatory matter should not have been left to the jury the position thus created in relation to punitive damages may be thought somewhat curious and anomalous but no ground of appeal was taken on the inclusion of this issue. Fleming (2nd Ed) at page 554 states the "absence of a genuine belief in the truth of the statement is conclusive proof of malice." Whether this is correct as a firm generalisation in all circumstances is perhaps doubtful but is a question for another day. Under the first count I regard the reference (in the subjunctive mood) to raffling a duck as mere extravagant comment scarcely attracting a serious debate as to belief or unbelief — an issue which as a rule is more germane to allegations of fact than to comment. Then although I encountered some hesitation in regard to the second count, I have reached the view that there was no evidence fit to be left to the jury on this issue under any of the remaining counts. Yet, as I have shown, both ill-will and belief in untruth were in fact left to the jury under all counts. It may then be asked does it not follow that having regard to the courses of the trial and of the appeal that his Honour correctly left punitive damages to the jury? I am of opinion that this is not necessarily so because absence of good faith (sufficient to destroy the privilege) and punitive damages are in separate evidentiary compartments, and there must be evidence of the relevant animus to justify the latter. This is why I have earlier expressed the view that this Court is entitled to review all the evidence when considering whether punitive damages should have been left to the jury.

In the result I would order a new trial on all counts but limited to the assessment of damages.

The costs of this appeal must be paid by the respondent but he is to receive a Certificate under the Suitors' Fund Act.

The costs of the first trial should be included in the costs of the new trial.

No. 14

Rule of the Supreme Court of New South Wales

In the Supreme Court of New South Wales.

No. 14.
Rule of the Supreme Court.

4th May, 1965.

The 4th day of May, 1965.

UPON MOTION the 25th day of February and the 1st, 2nd, 3rd, 4th, 5th and 8th days of March, 1965, WHEREUPON AND UPON READING the Notice of Motion herein dated the 1st April, 1964, and the appeal book filed herein AND UPON HEARING Mr. A. Larkins of Queen's Counsel with whom was Mr. D. Hunt of Counsel for the Appellant and Mr. C. Evatt, of Queen's Counsel with whom were Mr. C. Evatt and Mr. J. K. McLaughlin of Counsel for the Respondent IT WAS ORDERED that the matter stand for judgment and the same standing in the list this day for judgment accordingly IT IS ORDERED that there be a new trial limited to damages AND IT IS FURTHER ORDERED that the costs of the Appellant of and incidental to this appeal be paid by the Respondent to the Appellant or to his Solicitor AND IT IS FURTHER ORDERED that the Respondent have a Certificate under the Suitors Fund Act, AND IT IS FURTHER ORDERED that the costs of the first trial follow the costs of the second trial.

By the Court,
For the Prothonotary,
E. R. Stephens
Chief Clerk

In the High Court of Australia.

—

No. 15.
Order Granting Leave to Appeal.

—

26th May, 1965.

No. 15

Order Granting Leave to Appeal

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR GARFIELD BARWICK, MR. JUSTICE TAYLOR AND MR. JUSTICE WINDEYER.

WEDNESDAY, THE 26TH DAY OF MAY, 1965

UPON APPLICATION made to the Court this day at Sydney by Counsel on behalf of Australian Consolidated Press Limited (hereinafter called "the Applicant") AND UPON READING the Affidavit of Hugh Hunter Jamieson sworn on the 24th day of May, 1965, and filed herein and the exhibit referred to in the said Affidavit AND UPON HEARING Mr. Larkins of Queen's Counsel and Mr. Hunt of Counsel for the Applicant THIS COURT DOTH ORDER that leave be and the same is hereby granted to the Applicant to appeal to this Court from the judgment and order of the Full Court of the Supreme Court of New South Wales given and made on the 4th day of May, 1965, in proceedings No. 1185 of 1963.

By the Court
H. Cannon
DISTRICT REGISTRAR

No. 16

Notice of Appeal

In the High Court of Australia.

No. 16.
Notice of Appeal.
2nd June, 1965.

TAKE NOTICE that pursuant to leave granted by this Honourable Court on the 26th day of May, 1965, the abovenamed Appellant (defendant) appeals to the High Court of Australia against part of the Rule of the Supreme Court of New South Wales made by majority on the 4th day of May, 1965, upon a motion by the Defendant seeking orders that:—

(1) the verdict obtained by the Respondent (plaintiff) be set aside;

(2) a new trial of the action generally be had; and

(3) the defendant's costs of the first trial be paid by the plaintiff in any event

whereby the majority of the Supreme Court ordered that

(1) the verdict be set aside;

(2) a new trial of the action limited to damages be had;

(3) the costs of the first trial follow the result of the new trial; and

(4) the defendant's costs of the motion be paid by the plaintiff, who was granted a certificate under the Suitor's Fund Act.

AND FURTHER TAKE NOTICE that the part of the Rule appealed against is that which refuses to grant the Appellant (defendant) a new trial generally and to order the Respondent (plaintiff) to pay the defendant's costs of the first trial in any event. AND FURTHER TAKE NOTICE that the grounds upon which the Appellant (defendant) will rely in support of the Appeal are as follows:—

1. That the majority of the Supreme Court was in error in not ordering a new trial generally.

2. That the Supreme Court was in error in not ordering that the costs of the first trial be paid by the Respondent (plaintiff) in any event.

AND FURTHER TAKE NOTICE that in lieu of that part of the judgment appealed from, the Appellant (defendant) seeks the following Orders:—

1. That a new trial generally be had; and

2. That the defendant's costs of the first trial be paid by the Respondent (plaintiff) in any event.

In the High Court of Australia.

No. 16.
Notice of Appeal.
(Continued)

2nd June, 1965.

AND FURTHER TAKE NOTICE that the Appellant (defendant) seeks an Order that the Respondent (plaintiff) do pay to the Appellant the costs of this Appeal AND such further or other Order as to this Court may seem just.

DATED this 2nd day of June, 1965.

Anthony Larkins
Counsel for the Appellant
(Defendant)

NOTE: This Notice of Appeal is filed by Messieurs Allen, Allen & Hemsley of 55 Hunter Street, Sydney, Solicitors for Australian Consolidated Press Limited, the abovenamed Appellant.

TO: Thomas Uren and to his Solicitors, Messrs. Teece, Hodgson and Ward, of 2 Hunter Street, Sydney, in the State of New South Wales

AND TO: The Prothonotary,
Supreme Court of New South Wales

No. 17

In the High Court of Australia.

No. 17. Plaintiff's Notice of Cross Appeal.

23rd June, 1965

Plaintiff's Notice of Cross Appeal

TAKE NOTICE that pursuant to the Notice of Appeal dated the 2nd day of June, 1965, and filed herein the abovenamed Respondent (Plaintiff) cross-appeals to the High Court of Australia from the whole of the judgment and order of the Supreme Court of New South Wales delivered and made on the 4th day of May, 1965, by their Honours the Chief Justice Mr. Justice Herron and Mr. Justice Wallace (his Honour Mr. Justice Walsh dissenting), which judgment set aside a verdict for the Respondent (Plaintiff) in the sum of thirty thousand pounds (£30,000.0.0) in the Supreme Court of New South Wales and ordered a new trial of the action limited to damages.

THE GROUNDS OF CROSS-APPEAL are as follows:

1. That the Supreme Court was in error in setting aside the verdict of the jury and directing a new trial limited to damages.

2. That the Supreme Court was in error in holding that the verdict herein necessarily comprised punitive damages.

3. That the Supreme Court was in error in holding that this was not a case for the awarding of punitive damages.

4. That the Supreme Court was in error in any event in holding that the damages awarded were excessive.

5. That the Supreme Court was in error in following its decision in Uren v. John Fairfax & Sons Pty. Limited and in so doing in holding itself to be bound by the decision of the House of Lords in Rookes v. Barnard (1964) 2 W.L.R. 269; 1964 A.C. 1129.

6. That the Supreme Court was in error in following its decision in Uren v. John Fairfax & Sons Pty. Limited and the interpretation given by it therein to the decision of the High Court of Australia in Parker v. The Queen (1964) 37 A.L.J.R. 3, and in so holding that it should follow the House of Lords in preference to the High Court of Australia.

AND FURTHER TAKE NOTICE that the Respondent (Plaintiff) seeks in lieu of the judgment appealed from the judgment as follows:—

1. That the appeal to the Supreme Court of New South Wales from the above verdict be dismissed and the above verdict be restored.

In the High Court of Australia.

No. 17. Plaintiff's Notice of Cross Appeal. *(Continued)*

23rd June, 1965.

2. That the Appellant pay the Respondent's costs of the trial and of the appeal to the Supreme Court of New South Wales and of this appeal.

DATED this 23rd day of June, 1965.

CLIVE EVATT
Counsel for the Respondent
(Plaintiff)

NOTE: This Notice of Cross-Appeal is filed by Messieurs Teece, Hodgson & Ward of 2 Hunter Street, Sydney, Solicitors for Thomas Uren, the abovenamed Respondent (Plaintiff).

TO: Australian Consolidated Press Limited and to its Solicitors, Messrs. Allen, Allen & Hemsley of 55 Hunter Street, Sydney, and to the Prothonotary, Supreme Court of New South Wales.

No. 18

In the High Court of Australia.

No. 18. Reasons for Judgment of the Full Court (McTiernan J.).

2nd June, 1966.

Reasons for Judgment of the Full Court of the High Court of Australia

McTIERNAN J.: I agree with the conclusion of the State Full Court that no miscarriage of justice resulted from the refusal of the trial judge to grant the defendant's application for the discharge of the jury or for a long adjournment of the trial. I also agree that the amount of damages awarded under the first and second counts is excessive and that there should be a new trial of each count limited to damages. I would not interfere with the order of the State Full Court that the new trial be limited to damages. This order is based on the decision of the majority of the Court. I agree with their reasons for confining the new trial to the issue of damages. It seems to me that the explanation of the large amounts of damages assessed under the first and second counts is that the jury understood from the summing-up that they could award both compensatory and exemplary damages under each of those counts. In my view, the question whether there was proof of circumstances which would entitle the jury to award exemplary damages should be decided according to decisions of this Court. I have stated my reasons for not departing from those decisions in Uren v. John Fairfax & Sons Pty. Limited. In my opinion, there is no evidence of such circumstances. I think that for these reasons the verdict on the first count and the verdict on the second count should be set aside. As I have said, I think that the issue of liability should not be tried again.

As regards the third and fourth counts: In my view the words of the libels are extremely offensive to the plaintiff. He is identified by the evidence as one of the persons to whom the libels referred. The defendant has put forward no plea of justification. It disavowed throughout the case that it was contending that the imputations cast on the plaintiff were true. I think that the defamatory words themselves carry an implication of actual malice. The defendant tendered a large number of publications of political matter ostensibly referable to its pleas under s. 17 (h) of the Defamation Act 1958 of the State. One of these publications, Exhibit 132, consists of pages of Hansard reporting a debate in Parliament held on 29th and 30th November 1962. A speech reported at p. 2829 contains these passages: "I invite honorable members to look at the remarks of the honorable member for . . . which followed fairly closely after his interview with a man who is, I understand, not only the First Secretary of the Russian Embassy but also the representative in Australia of the Russian secret police. If this were a single instance one would perhaps think nothing of it. But when one looks at this happening and the concerted by-play between the honorable member for . . . and the honorable member for Reid (Mr. Uren) directed against Australia's security and towards

In the High Court of Australia.

No. 18. Reasons for Judgment of the Full Court (McTiernan J.). *(Continued)*

2nd June, 1966.

the interests of communism in regard to a base in the north-west of Western Australia, one thinks that there may be a little more in this than meets the eye . . . it is a little strange when we find members of the Opposition in close consultation with the Russian Embassy and subsequently coming out in this House openly and playing a game that is inimical to the defence security of Australia and can only be in the interests of the Communist Party. This is not just a case of association. Association could be perfectly innocent. This is a case of association followed by a line of policy which conforms to a pattern. For the proof of this I need not go further than 'Hansard' itself. I invite honorable members to have a look at 'Hansard and see what this precious pair has been up to. I ask honorable members to look at the way in which their so-called inquiries are aimed at the security of the Australian people". These are grave accusations. It is a principle of the law of libel that the defendant's conduct at the trial may afford proof of malice in publishing matter defamatory of the plaintiff. (See Gatley on Libel and Slander, 5th edn., p. 626; Herald and Weekly Times Limited v. McGregor (1928) 41 C.L.R. 254 and Triggell v. Pheeney (1951) 82 C.L.R. 497.) In my opinion, the tender of the report of the speech containing the words quoted was proof of actual malice in the publishing of the libels sued on in the third and fourth counts. If it is right to hold that it was within the proper limits of the discretion of the jury in the matter of damages to give an award containing a punitive element, as I think it was, there is no sound reason for interfering with the jury's assessment of damages on the third and fourth counts. I refer to what I said towards the conclusion of my judgment in Uren v. John Fairfax & Sons Pty. Limited.

In the result, I would dismiss the appeal and allow the cross-appeal in so far as it seeks the restoration of the verdict on the third and fourth counts.

In the High Court of Australia.

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No. 18.
Reasons for Judgment of the Full Court (Taylor J.).

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2nd June, 1966.

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

In the High Court of Australia.
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No. 18.
Reasons for Judgment of the Full Court (Menzies J.).
—
2nd June, 1966.

MENZIES J.: The present respondent sued the appellant for damages for libel in an action covering four counts. The jury's verdict was in favour of the respondent on each count and damages as follows were awarded: First count £5,000; second count £10,000; third and fourth counts £15,000. The appellant thereupon sought a new trial relying upon seventy-seven grounds of appeal, and upon that application the Full Court ordered that the verdict be set aside and, by a majority (Herron C. J. and Wallace J., Walsh J. dissenting as to the limitation), that a new trial be had limited to damages. The costs of the first trial were ordered to follow the costs of the second trial. This appeal is against that order, the appellant seeking a new trial generally and an order that it receive the costs of the first trial. The respondent has cross-appealed seeking the restoration of the verdict of the jury.

The decision of the Full Court to set aside the jury's verdict was based upon two grounds. First, that the learned trial judge had misdirected the jury in telling them that punitive or exemplary damages could be awarded to the plaintiff. Secondly, that the verdicts reflected prejudice engendered by inflammatory advocacy exceeding permissible limits.

In charging the jury his Honour said: "The plaintiff is entitled to compensation at your hands for the damage that has been done to his reputation. He is entitled to compensation, and that compensation to be awarded may be increased if you find that the publications were made with ill-will to the plaintiff, were made as part of a campaign. The damages may be aggravated by those circumstances. But in addition to compensatory damages, the law permits, in a case such as this, the award of what are called punitive damages; it permits a jury to award punitive damages. It ertainly does not require a jury to award punitive damages; it all depends on the view that the jury takes of the case. They are in addition to compensation; they are called by a number of names, two of which have been used in the course of the case, punitive damages and exemplary damages, damages awarded to punish, damages awarded to make an example of the defendant. They are awarded, of course, to the plaintiff. They are not in the nature of a fine, and they should only be awarded where the conduct of the defendant merits punishment, and this could only be considered to be so where its conduct has been malicious; that it has shown what has been described as contumelious disregard for the rights of the plaintiff, here, of the plaintiff's right to enjoy the reputation that he possesses". Herron C. J. and Walsh J., following Rookes v. Barnard (1964) A.C. 1129, held that this was a misdirection. Wallace J. held that the Court was not bound to follow Rookes v. Barnard but said: ". . . if I am wrong on these views and if contrary to my opinion we are bound to apply Rookes v. Barnard (supra) then I would be clearly of opinion that there should be a new trial on all counts (but limited to damages) because there is no evidence at all which brings the case within Lord Devlin's second category on any view thereof". His Honour held further that, independently of

Rookes v. Barnard and on the basis of the law as previously understood, there was no evidence warranting the leaving of punitive or exemplary damages to the jury in respect of any of the libels of which the respondent complained.

In Uren v. John Fairfax & Sons Pty. Limited I have stated why I think this Court should not follow Rookes v. Barnard, and to what I there said I do not wish to make any addition here.

I have here to consider now whether, independently of Rookes v. Barnard, there was, as to any of the counts, a case for the award of exemplary damages.

The libel to which the first count related was published in the "Daily Telegraph" of 8th December 1961 and its burden was that the plaintiff was one of a "divided, warring rag-tag and bob-tail outfit" behind the Labor leader, Mr. Calwell, in Parliament "which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country". It was published on the eve of a federal election in which the plaintiff was returned as Member for Reid in the House of Representatives. There was no complaint or protest about the publication until 14th February 1963 when the plaintiff sued for a somewhat stale publication. I agree with Wallace J. that exemplary damages could not be awarded for this libel. Political differences not infrequently find public expression in unrefined figures of speech and language. Although a politician is no doubt entitled to compensation for any loss of reputation brought about by an earthy political libel, it would be going beyond the authorities to allow the publisher of such a libel to be punished by an award of exemplary damages. It was ridiculous to award £5,000 for this libel. The award casts doubt upon the reasonableness of the whole verdict. There must be a retrial with regard to the first count.

The second count relates to a publication in "The Bulletin" of 3rd November 1962 as follows: "Leftwinger Tom Uren (Labor NSW) still stubbornly adhered to the line that Moscow and Peking controlled Communist Parties in non - Communist countries assiduously peddle mainly through peace movements. He described suggestions for greater defence expenditure as 'so much hysteria'. But even Uren was susceptible to the prevailing climate". Again I agree with Wallace J. that exemplary damages over and above damages to compensate the plaintiff for any loss of reputation he may have suffered by reason of that publication could not be awarded to punish the defendant. There must therefore be a retrial with regard to the second count.

The third and fourth counts relate to publications in two editions of the "Sunday Telegraph" of 10th February 1963 under the headings "Spy Used Labor Men as 'Pawns'?" and "Did Russian Spy Dupe ALP Men?". The article, published under a Canberra dateline, was, to all intents and purposes, the same as that published by "The Sun-Herald" which was the subject of the claim in Uren v. John Fairfax & Sons Pty. Limited; indeed, it seems that it was brazenly copied from that sensational article. The keynote of the article can be gathered

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from the first two paragraphs, viz. "Allegations are likely to be made in Federal Parliament that some Labor M.P.s were used as 'pawns' by Russian spy Ivan Skripov to try to get defence secrets. It will be claimed that Skripov persuaded the unsuspecting Labor men to ask questions in Parliament about defence establishments in Australia". These libels were, I think, published in circumstances which did warrant the jury in awarding exemplary damages and I will not repeat here my reasons stated in Uren v. John Fairfax & Sons Pty. Limited for so thinking. Furthermore, as in the other case, the tactics of the defendant could have been regarded as adding sting to the libel.

Were there nothing further, therefore, I would restore the jury's verdict for £15,000 damages in respect of the third and fourth counts, but not the awards of £5,000 and £10,000 in respect of the first and second counts respectively. There is, however, something more.

Herron C. J. and Walsh J. decided that the large awards of damages were due in a measure to the conduct of senior counsel for the plaintiff calculated to lead the jury astray by improperly instilling into their minds prejudice against the defendant. Herron C. J. said: "A mis-trial on the issue of damages I believe resulted, at least in part, from prejudice engendered by speeches of and statements by counsel for the plaintiff. Mr. Evatt, I regret to say, constantly and at times in face of rulings by the learned trial judge, mis-stated the issues raised by the pleadings. Time and time again senior counsel conveyed to the jury by direct statements, or by implications from argument that they were either called upon or were at liberty to decide issues against the appellant which either were not relevant to the trial or which were the subject of rulings to the contrary by his Honour. I do not propose to refer to all these in detail for they have been adequately analysed by Walsh, J. and I concur".

Walsh J. dealt with a number of matters relied upon as calculated to engender misconceptions. I will refer to the more important of these. In the first place, his Honour considered that the appellant's complaint that an unfair aspersion had been cast upon it was not without some basis. The particular aspersion was a statement made when an application for an adjournment had been made by counsel for the appellant in circumstances which I need not recount beyond saying that the application arose out of the failure on the part of the plaintiff's advisers to appreciate that, in accordance with the recent decision of the Full Court of New South Wales in Motel Holdings Ltd. v. The Bulletin Newspaper Co. Pty. Ltd. (1963) S.R. (N.S.W.) 208, a defence plea of qualified privilege under s. 17 of the Defamation Act, 1958 did not have to allege good faith and, if good faith were to be put in issue, it must be by the plaintiff's alleging its absence. Counsel for the plaintiff said: "I think it is time for some plain speaking in this matter. I submit it must become very apparent now that by hook or by crook the defendant is endeavouring to delay this trial". As to this, Walsh J. said: "In my opinion the statement by counsel for the plaintiff was unwarranted and improper. The expression 'by hook

or by crook' conveys an imputation of a readiness to resort to fair means or foul to achieve the object in view. But notwithstanding the arguments for the appellant upon this incident, in my opinion it did not require the discharge of the jury, nor do I think it requires a new trial to be ordered." The second complaint was that, despite a ruling by the learned trial judge to the contrary, it had been asserted that there was an issue whether the plaintiff had been instigated by a Russian spy to ask questions in Parliament about defence establishments. After examining each of the incidents the subjects of this complaint, Walsh J. said: "Despite arguments to the contrary, I think that here as in the earlier incident counsel's conduct amounted to an unwarranted introduction of false issues into the case and the defendant is entitled to complain of it. But yet, upon my view of the trial as a whole, these incidents would not justify the conclusion that because of them the trial should be held to have miscarried. But these are matters to which I think that some weight must be given when later I come to examine the award of damages, as they may serve to throw some light upon the question why the jury made an award which in my opinion was too high. I think also that they may be taken into account when considering whether a new trial, if granted, should be a general one or should be limited to damages". Thirdly, it was claimed that the libels alleged in counts 3 and 4 contained the implication that the plaintiff was a traitor. As to this, Walsh J. said: "The meaning that the plaintiff was a traitor was ascribed in the opening address. In the course of doing this counsel asserted that if the plaintiff were guilty of such treachery he would not be appearing for him. It was not until much later in the trial that the ruling was given. Sometime afterwards counsel put a further submission that those who knew the plaintiff and knew he was not moronic or stupid would take the articles as imputing treachery. This was rejected. It appears to me that counsel did not thereafter put again to the jury that these articles had accused the plaintiff of treachery. It is suggested that in the closing address there were veiled renewals of this claim, but I do not agree that what was said could be fairly interpreted as a repetition by subterfuge of the claim." His Honour adds: "I cannot assert that the contention was so obviously untenable that counsel acted recklessly in putting it forward at all. But in relation to all matters of this kind, the real question is not whether counsel deserves censure but whether in an objective sense the jury was likely to be influenced in its judgment by prejudice." Fourthly, as a means of establishing some "other improper motive" to negative good faith for the purposes of s. 17 of the Defamation Act, 1958, it was asserted — and I use the language of Walsh J.—"that the defendant sought to undermine and destroy the reputation of Labor men by 'pinning the red tab' on them, and that to prevent the achievement of the objectives of the Labor Party it sought to blacken and destroy the plaintiff." This complaint was made out and, indeed, it was made out that the assertion was made after a ruling by the learned trial judge that "he could see no evidence of any improper motive other than ill-will to the plaintiff". Walsh J.

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said: "I consider that in this matter the conduct of counsel for the plaintiff was flagrantly a transgression of the proper limits of advocacy and it could have been of considerable prejudice to the defendant". After discussing this in its setting, his Honour added: "On the whole, having regard to the repeated statements by his Honour that he was excluding this question from the consideration of the jury as well as his omission of it from the detailed questions submitted to the jury, the conclusion I reach is that we should not grant a new trial on this ground alone if no other reasons appear for doing so".

His Honour's conclusion on the foregoing matters was as follows: "After consideration of all the matters so far discussed I have reached the conclusion that, if no other ground appeared for interfering with the jury's decision, this Court would not be justified in granting a new trial". His Honour then turned to the question of damages and, after referring to a number of matters in respect of which aggravated, as distinct from punitive, damages could have been awarded, he said: "Whilst I think the foregoing matters were open for the consideration of the Jury in assessing the compensatory damages they could not, in my opinion, have warranted a very large increase in the amount of damages, over and above whatever was proper for damage to the reputation of the plaintiff." His Honour then ruled that there had been a misdirection about exemplary damages but said that, if no other ground had appeared and the damages appeared to be reasonable and moderate, the Court might hesitate to order a new trial upon a misdirection now "seen to be incorrect because of a decision" (viz. Rookes v. Barnard) "the report of which may not then have been available here . . . and which was not relied upon". Finally, his Honour said that because this misdirection did not stand alone, the amount of damages may well have been increased "by the emphasis placed on the alleged imputation of treachery, by the repeated charges of an alleged policy of destruction of the Labor Party, by the repeated assertions about the truth or falsity of the matters published being in issue, and the comments upon the defendant's failure to call evidence on this issue, and by the charge that the defendant was seeking by hook or by crook to delay the trial". His Honour thereupon, having stated that he could not regard the damages as awarded as reasonable, decided that they should be set aside. He said: "I think that one can find a possible explanation of such large awards in the matters of prejudice which I have mentioned and in the probable inclusion of a considerable sum as punitive damages. But whatever the explanation, the verdicts should be set aside". His Honour thought that the order should be for a new trial generally.

Wallace J., referring to the conduct of senior counsel for the plaintiff, said: "I think his transgressions were unfortunate and undesirable — unfortunate because they attract time-wasting appeals, and undesirable if only because they were unnecessary". His Honour's view was that "on a review of the whole trial and of his Honour's various directions to the jury I am satisfied that a new trial generally on this

ground" (viz. prejudicial conduct of plaintiff's counsel resulting in a miscarriage at the trial) "is not called for".

My own conclusion is that Herron C.J. and Walsh J. were correct in their conclusion that senior counsel for the plaintiff did exceed the limits of what was permissible in an endeavour to inflame the jury against the defendant and that his success in doing so may well have been reflected in the verdicts that were returned. In these circumstances, I do not think that the damages awarded upon counts 3 and 4 can be allowed to stand. I think, therefore, that the verdict was rightly set aside.

In a case where an appeal court comes to the conclusion that the prejudice of the jury has been aroused against the defendant, there can be but few cases where the right order can be less than for a new trial of the action without limitation, and I am impressed by the strength of the reasoning of Walsh J. that this should be the order here. If, however, counts 3 and 4 were the only ones to be considered, I am nevertheless disposed to think that I would agree with Herron C.J. and Wallace J. that a new trial limited to damages would meet the justice of the case for, with respect to these libels, the real issue, as it seems to me, was the amount at which damages should be assessed. Taking the case as a whole, however — and this I feel bound to do — I cannot be satisfied that the prejudice of the jury did not affect their consideration of the question of the liability of the defendant in respect of the libels covered by the first and second counts. Upon the whole, therefore, I have reached the same conclusion as Walsh J. that there should be a new trial generally.

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WINDEYER J.: The trial of this action got off to a bad start. Counsel for the plaintiff, all three of them apparently, went into Court ignorant of a important decision of the Supreme Court of New South Wales directly relevant to their case. It, the decision in Motel Holdings Ltd. v. The Bulletin Newspaper Co. Pty. Ltd., [1963] S.R. (N.S.W.) 208, 80 W.N. (N.S.W.) 213, had been reported over six months before the trial and some little time before the plaintiff's replication was filed. Mr. Evatt, who led for the plaintiff at the trial, frankly said in this Court that, using his words, they had been "in blissful ignorance of this". It would not have been folly to have been wise. From ignorance trouble began.

Mr. Evatt opened his case to the jury in strong language. He said that the matters that had appeared in the defendant's newspapers made serious imputations against his client, that they exhibited ill-will and that the defendant had published them in its newspapers from ill-will and with, as he put it, a desire "to destroy the Labor Party" by deliberately, falsely and recklessly discrediting his client and other members of that party. These matters, he claimed, put the publications outside the qualified protection given by s. 17(h) of the Defamation Act 1958 (N.S.W.) on which the defendant by its pleadings was relying. I shall postpone for the moment a consideration of that statutory provision and its application in these proceedings, and deal very briefly with certain events in the course of the trial that were made the ground of a motion for a new trial. Mr. Evatt having concluded his opening address, Mr. Larkins for the defendant at once complained that what had been said went beyond the issues raised by the pleadings. Good faith on the part of the defendant was, he said, conceded on the pleadings; and the defendant had therefore not come prepared to meet a charge of want of good faith. Complaining that what counsel for the plaintiff had said was prejudicial, he asked that the jury be discharged. The learned trial judge refused this. It had been made perfectly clear in counsel's opening address that the plaintiff's case was to be that the matter complained of was not published in good faith, that the publications were malicious and thus outside the protection of s. 17(h): any disadvantage that the defendant was under in meeting this case could thus, his Honour considered, have been overcome by an adjournment, and by an amendment of the pleadings if that were thought necessary. The defendant did not then ask for an adjournment. The plaintiff did not at once formulate any amendment of its replication. The trial went on, not without wrangling. I do not propose to recount all of that. In the Supreme Court their Honours thought that certain remarks that Mr. Evatt made, suggesting that the defendant was trying to frustrate the trial, were unwarranted, ought not to have been made and were calculated to prejudice the jury. I do not disagree; but I think it unnecessary to go into that. There are ample grounds for saying that the trial was unsatisfactory and that the jury were somehow led into a mistaken approach to the question they had to try. If there were nothing else the verdict on the first count would show this, and it provides a touchstone for the whole.

I do not mean to suggest that the verdicts which the jury returned are entirely the result of the advocacy and attitude — whether proper or reprehensible — of counsel for the plaintiff. They may reflect also an unfavourable response by the jury to the manner in which counsel for the defendant cross-examined the plaintiff. He began his cross-examination by saying several times to the plaintiff: "you understand do you not that the defendant company does not come here to assert the truth of any of the matters that have been published about you?" He then proceeded to question him about his attitude to events in various parts of the world, about his statements and ideas on various topics of current controversy, to read to him passages from reports in Hansard of Parliamentary discussion of these topics and of what some time before other people had said about him, and so forth and so on. This went on for days. Some of it seems to have reached the uttermost bounds of relevancy, if it did not transgress them. The purpose, it was said, was to show that what had been published of him had been "in the course of the discussion of some subject of public interest". The jury may well have thought this specious, especially when, at the end of the summing up, counsel requested his Honour, who had thought that the defendant had meant to admit falsity, to tell the jury that although the defendant did not assert that what it said was true, it did not concede that it was untrue. Counsel was of course quite entitled to take the line that he did, but the method of Mark Antony may miscarry. The remarks of Jordan C. J. in Guise v. Kouvelis (1946), 46 S.R. (N.S.W.) 419 at p. 423 are in point. However, a wrong result is not to be perpetuated simply because both sides may have helped to bring it about. An appellate court is always reluctant to disturb the verdict of a jury in a libel action. But that assumes a verdict that was given by a jury properly instructed in a trial of which no serious criticism could be made, a verdict that does not reflect passion or prejudice: see the remarks of Lord Halsbury in Watt v. Watt, [1905] A.C. 115. A grossly excessive verdict in a libel case can be set aside: Lewis v. Daily Telegraph Ltd., [1964] A.C. 234.

I turn then to the libels sued upon and to consider the verdict given in respect of each. There were four counts in the declaration. The first count relates to matter published in the Daily Telegraph, the second in The Bulletin. The third and fourth counts can be considered together, for they relate to publications substantially the same in successive editions of the Sunday Telegraph. All three papers are published by the defendant. The argument on the appeal turned mainly upon the amount of damages found by the jury on each count. The learned trial judge had, on the invitation of the plaintiff's counsel, informed the jury that they could award exemplary damages. In saying this he made no distinction between the several counts. Counsel for the plaintiff had urged upon the jury that they should award exemplary damages.

In my judgement in the case of Uren v. John Fairfax and Sons Pty. Limited I said something about the principles governing the assess-

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ment of damages in defamation and stated my understanding of the decision of the House of Lords in Rookes v. Barnard, [1964] A.C. 1129. I do not doubt that exemplary damages for defamation may be given in a proper case, and I do not think the cases in which exemplary damages may be given are to be so drastically limited as a narrowly literal reading of Lord Devlin's judgement might suggest. I shall not repeat here what I have said in the other case. I shall apply it in relation to the several matters that were in question in this case. But before doing so, it is important to notice exactly what issues were raised by the pleadings and the state of the law as to those issues.

Using common law terminology, the main defence was one of qualified privilege, the plaintiff's answer to that being express malice. But it is necessary to remember always that in New South Wales (as elsewhere in Australia except in Victoria and South Australia) much of the law of defamation has been codified. The code, although to a large extent it reproduces the common law, and in fact can only be interpreted and applied by having regard to the common law, also makes some very important departures from it. The special considerations that these raise in the assessment of damages are sometimes overlooked. Two departures from the common law have existed in the law of New South Wales since 1847 [11 Vic., No. 13]. They are first, that the distinction between slander and libel has, for most purposes, been abolished: all defamation is actionable without proof of special damage. Secondly, truth alone is no defence in either a civil action for defamation or upon a prosecution. A plea of justification must therefore allege that the matter published was true and that its publication was for the public benefit. This provision of the law of New South Wales is sometimes said to have been a local invention, enacted because of the number of former convicts in the population of the Colony in the 1840s. But, whatever the cause of its adoption in New South Wales, it was not a local product. Its derivation is from a proposal for the reform of the law of England made by a Committee of the House of Lords in 1843. It was that the common law be altered to provide that in both criminal proceedings for libel (where at common law truth was no defence) and in civil actions (where truth was a complete defence) the defence should be truth coupled with public benefit. The Parliament in England adopted only one half of the proposal, which became law in 1843 as Lord Campbell's Libel Act. The legislature of New South Wales, however, adopted the whole. The result in a civil action in New South Wales, when there is no plea of justification, has been the subject of some controversy.

At common law, since truth is a complete defence, evidence of the truth of the defamatory matter cannot be given unless truth be pleaded in justification. For this reason it is generally said that, at common law, a plea of the general issue without a plea in justification admits that the matter complained of was false. Some writers have commented critically on this: for the common averment that the words were published "falsely and maliciously" is little more than a pleader's

flourish or a survival of older ways, now, as Sugerman J. said in Motel Holdings Ltd. v. The Bulletin Newspaper Co. Pty. Ltd., supra at p. 212, to be regarded as surplusage: see Holdsworth, History of English Law, Vol. 8 p. 371; Spencer Bower, Actionable Defamation, 2nd ed. p. 236. Whatever the position at common law, there is not in New South Wales (or elsewhere in Australia where the law is the same) any reason for saying that in the absence of a plea of truth and public benefit the libel is presumed to be untrue. There appears to be no logical presumption either way. But I am unable to accept the proposition that without a plea of justification (that is of truth and public benefit) the truth or falsity of a defamatory statement is an irrelevant consideration in a defamation case. The truth or falsity of the words is irrelevant to the question whether they are actionable but not, I think, to the amount of damages if they be defamatory. A jury is always likely to think that heavier damages should be given for the gratuitous publication of statements that are false than would be appropriate if the same statements were true. A plaintiff is always permitted to go into the witness box to say that what was said of him was a lie. If he does so, surely the defendant should be permitted to call evidence to answer him? If he does not, must the defendant remain silent on the matter unless he has pleaded truth and public benefit? An answer to this question was long ago given in New South Wales. It was held that a defendant could call evidence of the truth of his statements with a view to mitigating damages although he had not pleaded justification. If a plaintiff could prove the matter untrue in order to agravate damage, the defendant could, it was assumed, prove it true in mitigation of damage. That until 1934 was the established rule. The Full Court of the Supreme Court had said so often, and decisively: West v. Wigg (1886), 3 W.N. (N.S.W.) 46; Harper v. Bennett (1900), 21 L.R. (N.S.W.) 365; Lemaire v. Smith's Newspapers Ltd. (1927), 28 S.R. (N.S.W.) 161; Mutch v. Sleeman (1928), 29 S.R. (N.S.W.) 125 at p. 134. The existence of the practice was noted, but without either approval or disapproval, by Dixon J. in Lang v. Willis (1934), 52 C.L.R. 637 at p. 661. However, in Goldsbrough v. John Fairfax and Sons Ltd. (1934), 34 S.R. (N.S.W.) 524, Jordan C. J. and Halse Rogers J. in strong dicta disapproved of it. We do not have to consider here the validity of that decision on that or any other point. I say no more than that I have never been satisfied that is was not mistaken. The questions that arise are peculiar to New South Wales and those States which inherited the law of New South Wales (as Queensland did) and did not alter it (as Victoria did), or which have adopted a similar rule (as Western Australia and Tasmania have). They are not questions that can be answered by the application of common law rules. They are perhaps not all answerable by merely legal logic. Conflicting considerations of fairness and policy are adverted to in passages in some of the judgments referred to above and also in what Ferguson J. said in Maling v. S. Bennett Ltd. (1928), 29 S.R. (N.S.W.) 280 at pp. 289-90, which should be read along with Judd v. Sun Newspapers Ltd. (1930), 30 S.R. (N.S.W.) 294.

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It is this somewhat uncertain state of the law of New South Wales as to the truth of a libel that explains Mr. Larkins' amphibology. It is impossible to know what exactly in the light of his cross-examination the jury made of his insistence that the defendant did not assert that what it had said was true yet did not concede that it was false. It seems to me in the upshot that, in considering whether the verdict on any count was excessive, we must assume that the jury could have found the words used were (in any meaning that they could reasonably bear) untrue so far as they consisted of statements of fact concerning the plaintiff; and that they took this into account in assessing damages; and that they were entitled to do so.

Turning now from the effect of not raising truth and public benefit as a defence to the defence of qualified privilege that was raised. Here too the law in New South Wales is now codified. The statutory provisions are copied from the Queensland Criminal Code, which has sections codifying the law of defamation for both criminal proceedings and civil actions. They were derived from the Queensland Defamation Act 1889, with what Sir Samuel Griffith, their draftsman, described as "a few verbal alterations" (see Wilson and Graham, The Criminal Code of Queensland (1901), introduction p. XVI). The provisions here in question, which alter and supplant the common law of qualified privilege, first became law in New South Wales in 1958. They had earlier been copied from Queensland in Tasmania and Western Australia. In New South Wales they appear as s. 17 of the Defamation Act 1958 (N.S.W.). This section lists eight occasions of qualified privilege or, as it describes it, "qualified protection". These to some extent reflect the privileged occasions of common law, but with some very considerable departures. The one on which the defendant relied in this case is paragraph (h) of s. 17. Section 17 not only describes the occasions when privilege exists; it also defines the matters by which it can be lost— that is it states what matters amount to what at common law would be called express malice. This it does by stating the ingredients of a publication "made in good faith". It is convenient at this point to set out s. 17 so far as relevant and also ss. 18 and 19, each with the italicized heading it has in the Act.

Qualified Protection

"17. It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith—

. . . . .

(h) in the course of, or for the purpose of, the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair.

For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.

Good Faith

18. When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging the absence.

Relevancy and Public Benefit Questions of Fact

19. Whether any defamatory matter is or is not relevant to any other matter, and whether the public discussion of any subject is or is not for the public benefit, are questions of fact."

There are several observations to be made on these provisions.

First, s. 17(h) has no direct common law ancestor, although its several phrases recall various statements of common law principle. It is not a statutory counterpart of the common law defence of fair comment. That is to be found, within the limits prescribed, in s. 15 and s. 10. Fair comment in that sense is lawful as at common law. The statutory arrangement seems to displace Sir John Salmond's view that fair comment is an instance of qualified privilege. But fair comment does not arise for consideration in this case, except indirectly in so far as the concluding words of s. 17(h) refer to fair comment. These concluding words were not in s. 17(8) of the Queensland statute of 1889. They are among the "verbal alterations" introduced by Sir Samuel Griffith into s. 377(8) of the Criminal Code. If the expression "fair comment" has its common law meaning, as presumably it has, then the effect of s. 18, read with the decision of the Court of Appeal in Thomas v. Bradbury, Agnew & Co. Ltd. (1906), 2 K.B. 627 in mind, seems to mean that the defendant who invokes the protection of s. 17(h) for any matter of comment must first show that comment to be fair in an objective sense before the onus is put upon the plaintiff to establish that it was not made in good faith: see Salmond on Torts, 14th ed. (1965) pp. 247-249. That is how the question was dealt with at the trial. It is perhaps debatable; but it was not debated before us. I therefore say no more about it.

Secondly: section 17 sets out the occasions of qualified privilege exhaustively, and it defines them rigidly. It not only to this extent supplants the common law. It also, as has been observed, has stultified its development. But it only describes the occasions that are protected. It does not say anything as to how the existence or otherwise of such an occasion is to be decided. At common law it is for the judge, not for the jury, to say whether an occasion was privileged. If some fact that he must know in order to give a ruling is in dispute, then that fact may have to be determined for him by the jury. But it is for him, not the jury, to decide whether or not the occasion was privileged. If the judge rules that the occasion was privileged then, and only then, is the jury to say whether by express malice, as understood in the common law, the protection of the occasion was forfeited. This, the firm rule of the common law, has not been displaced by the code and is applied to the protected occasions as defined in the codes: see Telegraph Newspaper Co. Ltd. v. Bedford (1934), 50 C.L.R. 632 at pp. 647, 658; and see Musgrave v. The Commonwealth (1937), 57 C.L.R. 514 at pp. 548, 552-553. This rule of the respective functions of judge and jury seems to have been somewhat departed from at the trial. His Honour, with the assent of the parties, ruled that certain subjects were of public interest. I think that he should have gone further. Neither party took any objection on this aspect at the trial or before us. As we heard no argument on it, I express no concluded opinion. I say what I do because I would not wish by silence to seem to have accepted as correct a course that seems to me to have been mistaken. The judge had to determine whether the occasion was privileged. His task in this case was therefore, I think, to determine all elements of s. 17(h), except those that are expressly declared to be matters of fact and thus for the jury. The latter are whether or not the public discussion of a subject ruled to be of public interest was for the public benefit (s.19); and whether any comment was fair—that is assuming as I do that the concluding words of s. 15 should be read as applying to the reference to fair comment in s. 17(h).

The critical question for his Honour on my view of the matter was thus, in respect of each count, whether the publication was "in the course of the discussion of a matter of public interest". (I may mention here that this was all that the plea alleged. There had been an alternative plea that it was "for the purposes of the discussion of a matter of public interest"; but this was withdrawn.) The question for his Honour thus required some limitation of the subject of public interest that was under public discussion. When protection is claimed for a defamatory publication on the ground that it was made in the course of discussion of a subject under public discussion and relevant to it, that subject must necessarily be determined with some exactness. As North J., speaking for the Court of Appeal of New Zealand, said, "There is no principle of law, and certainly no case that we know of which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the

general topic developed in the article is a matter of public interest": Truth (N.Z.) Ltd. v. Holloway (1960) N.Z.L.R. 69 at p. 83 (affirmed (1960) 1 W.L.R. 997). A matter is, I think, published in the course of the discussion of some subject of public interest when, as the learned trial judge in the present case said, a discussion of that subject is currently going on. This accords with what Latham C. J. said in Loveday v. Sun Newspapers Ltd. (1938), 59 C.L.R. 503 at p. 513, "The press cannot itself make a matter one of public interest by publishing statements about it (Chapman v. Ellesmere, 48 T.L.R. 309 at p. 316)": and with the remark of Dixon J. in the same case (at p. 521) that when a matter of public interest is spoken of, what is meant is a matter that has already become of public interest.

Thirdly: the description in the statute of the meaning of a publication made in good faith is wide enough to indicate almost every way in which the protection of the occasion can be forfeited by being used for purposes foreign to that for which it is given. One is if the person making the defamatory statement believes it to be untrue. What if he publishes defamatory falsehoods careless whether they be true or false? Can this dissolve the protection? At common law it could. True, mere carelessness is not express malice at common law. But a reckless indifference to the truth or falsity of statements obviously defamatory may amount to malice. It seems to me that under the statute it would be open in some cases to a jury to find that such conduct showed that the defendant was "actuated by ill-will or by some other improper motive"—that is to say in substance the position under the statute is not different from that at common law.

With the above considerations in mind I turn to the first count. On this the jury found a verdict for the plaintiff for £5,000. The matter complained of was certainly published in the course of a discussion on a subject of public interest, namely the forthcoming election to the national Parliament. And it was for the public benefit that the capacity of candidates seeking election, the policies of the contending parties and their claims to retain or gain office should be the subject of vigorous public discussion. No reasonable jury could possibly hold otherwise. Freedom at election time to praise the merits and policies of some candidates and to dispute and decry those of others is an essential of Parliamentary democracy. The freedom extends to the use of language that is vigorous, and sarcastic, as well as that which is reasoned, restrained and elevated. Invective is not banned. And a man who chooses to enter the arena of politics must expect to suffer hard words at times. Nevertheless, an election is not a licence for personal abuse and calumny. We have got away from the brawling of the days of the hustings. We have got somewhat away too from the vigorous vituperation of some election oratory of the past. A jury could to-day reasonably think that words that might have been allowable from a soap-box would, if published in the editorial columns of an important newspaper, be beyond the protection of the occasion. I find, however, great difficulty in seeing what evidence there was to

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go to the jury on the first count. There is not in the article itself any intrinsic evidence that I can see of a want of good faith. It disparaged the plaintiff and others as politicians and emphatically denied their capacity to undertake tasks of government. It spoke of him and the others it named as the rag-tag and bob-tail of their party. The description could be considered uncalled-for, but it is a phrase that becoming hackneyed has lost harshness. Neither it nor the allusion, perhaps mildly amusing by its incongruity, to a capacity to raffle ducks seems to have disturbed the plaintiff at the time. Not only is there no intrinsic evidence that I can see of a want of good faith, I cannot see any extrinsic fact that would justify an inference of this. There was not, as far as I have seen, any evidence that the defendant was actuated in this publication by positive personal ill-will to the plaintiff. The policy of the defendant was through its newspapers to support the government party in the election. That is clear enough. It was in that sense hostile to the plaintiff and to the party to which he belonged. It wanted it to be defeated in the election, and the editorial efforts of its newspaper were directed strongly to that end. What more is there? Political differences can no doubt breed personal animosities. But that does not mean that all political commentary and criticism must be taken to have been actuated by personal animosity, even if some personal animosity be shown to exist; and that was not shown here.

It was for the plaintiff to prove positively an absence of good faith. It had to be shown by credible evidence. Mere conjecture would not suffice, still less would the assertions of counsel. The protection that the law gives to the discussion of matters of public interest is given for the public benefit. That protection is not lost except it be well proved that it was abused by being used for some purpose foreign to that for which it is given. To say this is only to repeat what has been said often enough in the past: see e.g. Laughton v. Bishop of Sodor and Man (1872), L.R. 4 P.C. 495; Hart v. Gumpach (1873), L.R. 4 P.C. 439; Godfrey v. Henderson (1944), 44 S.R. (N.S.W,) 447 at p. 454. It is important that it be not forgotten. Evidence of other similar defamatory publications, whether before or after that sued upon, may sometimes provide evidence of malice, but only within the limits pointed out by Jordan C. J. in Mowlds v. Fergusson (1939), 40 S.R. (N.S.W.) 311 at pp. 328-330.

The matter is to go to a new trial. The evidence may be different. I shall therefore say only that if there were any justification for a verdict for the plantiff on the first count, there was no justification for an award of £5,000. This was excessive in the extreme. Five thousand pounds for this! Hearing of it many men might echo Dogberry and say "Oh that I had been writ down an ass".

It may be that the jury arrived at this amount because the plaintiff's counsel had strongly urged them to award exemplary damages to his client on all counts, and the learned trial judge had left them at liberty to do so. Was he right in this? The question is of crucial

importance—for this reason: the occasion was incontrovertibly a protected one; therefore a verdict for the plaintiff must be taken to mean that the jury found that the defendant had not acted in good faith. Absence of good faith, in the statutory sense, accords with the common law term "express malice". The meaning, for relevant purposes, is the same. When a jury find that a defendant did not act in good faith, can a court say that the case was not in law one for exemplary damages? And if it can, on what criteria does it arrive at this conclusion? These are big questions. In Rookes v. Barnard, supra, the House of Lords has drastically limited the scope of terms that had formerly been used indifferently. Until then it was possible for the learned editors of successive editions of Salmond on Torts to say "no distinction has been taken in the authorities between 'aggravated' and 'exemplary' damages". And it has been generally accepted that malice on the part of a defendant can increase damages. If it be the law that proof of malice or want of good faith in any degree which is sufficient to overthrow the protection of a privileged occasion is at the same time a sufficient warrant for an increase in damages, then it may be argued that it can never be for a court to say that exemplary damages cannot be awarded in a case in which the jury could find that the publication went beyond the protection of the occasion. But I do not think that this is so or ever was so. In the appeal by John Fairfax & Sons Pty. Limited I have said why I do not take what was said in Rookes v. Barnard, supra, as a rigid formulation of the only circumstances in which exemplary damages may be given in a libel action, certainly not as a formulation that we must follow in this Court. Nevertheless, without repeating here all that I said, I regard that case as showing what was I think already clear, namely that an appreciation of the purpose of exemplary damages restricts cases in which they can properly be awarded to more flagrant instances of conscious wrongdoing than occur from the mere use of language that a jury may think went somewhat beyond the protection of a privileged occasion. There was in my view no ground at all for exemplary damages on the first count. It would have been better if the learned trial judge had counselled the jury strongly to moderation on this count, if indeed there was any evidence on which they could find for the plaintiff on it. His Honour was, however, in a difficult position, because of the ways in which the matter was approached by counsel on each side.

Turning now to the second count. At the trial the subject of public interest, in the course of the discussion of which the defamatory statement was said to have been made, was loosely and widely defined. Presumably it would not have required much evidence to show, if indeed it were seriously disputed, that the policies of the government concerning measures that should be taken for the military defence of Australia, and the views of different members of the Parliament on these topics, were a subject of current public discussion. This was obviously a subject of public interest. It would, I shall assume, have been open to his Honour to rule that the matter complained of was published in the course of that discussion. And a jury could not reasonably

have found otherwise than that the public discussion of this subject was for the public benefit. But I feel great doubt whether the scope of relevancy under s. 17(h) and of permissible cross-examination could be enlarged by the list of subjects of public interest which the defendant gave in its particulars. They included "the world wide conflict between Communism and non-Communism", "the blockade of Cuba by the United States of America", "the attack on India by Chinese forces", "the emergence of Indonesia as a military power". The protection given by s. 17(h) is for a contribution to a discussion upon a subject of public interest, not for everything that may be said about a person that can be in some way related to a subject that is of public interest.

The plaintiff's real complaint seems to have been that the article published in The Bulletin gave, he said, a distorted and unfair version of opinions that he had expressed in the Parliament, that it misrepresented the attitude he had there expressed and falsely suggested that his views differed from those of his party as a whole. But his counsel chose to say that what was in issue was an accusation of treachery. I can see no justification at all for this extravagance. The statements in the article could be hurtful to the plaintiff as a member of Parliament, and there is evidence that they were resented by him. A jury might have awarded him substantial damages on this count; but, of course, only if they were satisfied that he had proved a want of good faith on the part of the defendant. And even so I do not think that the case was one for exemplary damages, and I consider that the jury should have been told so. The verdict for £10,000, regarded simply as compensation and without any punitive element, is very large. It is more than in very many cases is awarded for serious and permanent physical injuries that greatly hamper a man in his activities and affect his livelihood. It strongly suggests that the jury were in some way misled. This conclusion is reinforced by their verdict on the first count. As there is to be a new trial I say nothing more about the second count.

I go finally to the libel that is the subject of the third and fourth counts. I do not find it easy to see that these publications were made in the course of the discussion of a matter of public interest. What was the matter under discussion? The particulars that the defendant gave of what it relied upon were even more exuberant and imprecise than those given in relation to the matter of the second count. Doubtless the activities of Skripov were a matter of public interest. But that does not establish that the articles in the Sunday Telegraph were made in the course of a discussion of that matter. Nor, I think, does this appear because what was said in those articles could be linked with allegations or suggestions concerning the plaintiff made in Parliament many weeks before. However, the learned trial judge left it to the jury to say whether or not the publication was in the course of the discussion of a matter of public interest. He did not rule on this himself. The jury's verdict is therefore open to the interpretation that they found

that the occasion was not protected by s. 17(h), a conclusion that on the evidence would seem correct.

The articles when fairly read do not say that the plaintiff was deliberately aiding a Russian agent to get information that it would be harmful to Australia for him to have. What they say, the plaintiff being identified as a person referred to, is that it was being said or would be said in Canberra that he had allowed himself to be an unwitting tool of the Russian. Again the plaintiff's case was damaged by the assertions of his counsel to the jury that what they had to consider was whether or not his client was a traitor, a collaborator with a spy. It would have been quite enough for his purpose, one would have thought, to say that the mischief of the publication was that all readers do not always appreciate or remember nice distinctions between acts done knowingly and purposefully and acts done unsuspectingly and innocently.

The fact is that a serious libel was published. It might well attract heavy damages. Nevertheless I do not think that there was evidence which would justify the jury adding to the damages some further amount merely to punish the defendant. A suitable direction to the jury might have been to tell them, using words that Bramwell B. used in Bruton v. Downes (1859), 1 F. & F. 668, that they could, if they thought fit, give the plaintiff "such good sound substantial damages as will mark your sense of the injury the plaintiff has sustained"; and to tell them that in considering the extent of that injury they might take all the circumstances of the publication into account, but that they ought not to add anything to the damages simply from a desire to punish the defendant.

A passage from the judgment of Lord Loreburn in E. Hulton & Co. v. Jones (1910) A.C. 20 at p. 25, will bear quotation here: "There is no tribunal more fitted to decide in regard to publications, especially publications in the newspaper Press, whether they bear a stamp and character which ought to enlist sympathy and to secure protection. If they think that the licence is not fairly used and that the tone and style of the libel is reprehensible and ought to be checked, it is for the jury to say so". I add some remarks by Farwell L. J. in his judgment in the Court of Appeal in the same case, a judgment that Lord Atkinson and Lord Gorrell approved. His Lordship said ([1909] 2 K.B. at p. 483): "It is difficult to estimate the consequences of libel in a newspaper . . . Those who read it may never read the subsequent explanation or the report of the trial; and some of those who read both may forget the result, and be left with a general recollection that the plaintiff was a man of whom a discreditable story was reported in a paper. 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 newspaper proprietors cannot complain if juries remember this in assessing damages". With these general statements I fully and respectfully agree. I do not doubt that a jury may properly think that a plaintiff who has been seriously defamed

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in a newspaper should have heavy damages by way of compensation. What I dispute is that, except when there is positive evidence of conscious, contumelious and calculated wrongdoing, a jury can be invited to add to the damages which they think the plaintiff should have for the wrong done him some further amount professedly and intentionally to punish the defendant.

I need not consider whether we would interfere with the verdict on the third and fourth counts if it had stood alone and were criticized only as being excessive and if the jury had not been told that they could award exemplary damages. The verdicts taken together shew that the jury were led into a mistaken approach to the case as a whole, and it was not in my view a case for exemplary damages. I think therefore that there must be a new trial on all issues. A new trial of a libel action limited to damages can seldom be satisfactory, especially in a case where malice is alleged. The appeal should, I consider, be allowed and the cross-appeal dismissed.

OWEN J.: The plaintiff, the respondent to this appeal, sued the defendant for libel. Liability was disputed, the defendant relying (inter alia) upon s. 17(h) of the Defamation Act 1958 which provides that:

> "17. It is a lawful excuse for the publication of defamatory matter if the publication is made in good faith—
>
> . . . . .
>
> (h) in the course of, or for the purposes of, the discussion of some subject of public interest, the public discussion of which is for the public benefit and if, so far as the defamatory matter consists of comment, the comment is fair.
>
> For the purposes of this section, a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication do not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill-will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue."

By s. 18:

> "When any question arises whether a publication of defamatory matter was or was not made in good faith, and it appears that the publication was made under circumstances which would afford lawful excuse for the publication if it was made in good faith, the burden of proof of the absence of good faith lies upon the party alleging the absence."

At all material times the plaintiff was a member of the opposition in the House of Representatives having been elected in 1958 to represent a New South Wales electorate. On 9th December 1961 a general election was to be held and on the previous day the defendant published in its "Daily Telegraph" newspaper a leading article urging the electors to return the Menzies Government to power, praising that government's achievements and offering criticism of the opposition party. In the course of it the writer said:

> "What, and who, has Labor to offer? Arthur Calwell, a decent, straight, hard working parliamentary leader. But a leader in name only, because like any other Labor parliamentary leader he must take his orders from Mr. Chamberlain and the other non-parliamentary masters of the A.L.P. Who is behind Mr. Calwell in the Federal House? A divided, warring rag-tag and bob-tail outfit ranging from Eddie Ward and Les Haylen through to Dan Curtin and Tom Uren"— the last named being the plaintiff —"This is a team which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone running a country."

No complaint appears to have been made of this publication until the writ in the present action was issued in February 1963 followed by the

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plaintiff's declaration in which there were four counts, the first of which was based upon the passage I have quoted. On 3rd November 1962 the defendant published in a weekly newspaper, "The Bulletin", an article expressing the opinion that in the debate in the House of Representatives on the defence estimates which had just concluded there had been a perceptible change in the attitude towards defence of some members of the Labour Party due, it was said, to various international developments, such as "the tension between the United States and Russia arising from the Russian arming of Cuba", "the emergence of Indonesia as a relatively major military power due to Soviet-supplied arms" and "China's attack upon India". In the course of the article the writer said of the debate that:

> "Anti-Americanism had waned. Labor's rightwingers for the first time for years lost some of their timidity . . . The left-wingers lay either cautiously low, or . . . gave indications that they were not blindly shutting their eyes to the significance of recent international events . . .
>
> Leftwinger Tom Uren (Labor N.S.W.) still stubbornly adhered to the line that Moscow and Peking controlled Communist Parties in non-Communist countries assiduously peddle mainly through peace movements. He described suggestions for greater defence expenditure as 'so much hysteria'. But even Uren was susceptible to the prevailing climate . . ."

He went on to refer to a number of other members of the opposition and set out what he regarded as their attitude on defence matters. The passage referring to the plaintiff which I have set out above was the matter sued upon in the second count of the declaration.

On 10th February 1963 in each of two editions of the "Sunday Telegraph" the defendant published a news item suggesting that some members of the opposition in the House of Representatives who had asked questions in the House regarding defence matters had been the unsuspecting "pawns" of a "Russian Spy", one Skripov, an official of the Soviet Embassy at Canberra who a few days earlier had been declared persona non grata by the Commonwealth Government. Except that the headlines differed, these publications were in the same terms. They were similar to reports which appeared on the same day in the "Sun Herald" and were the subject of a libel action by the plaintiff against the proprietor of that newspaper, John Fairfax & Sons Pty. Ltd., which came on appeal to this Court and was argued immediately after the appeal in the present case. These statements in the "Sunday Telegraph" were the subject of the third and fourth counts of the declaration but at the trial these two counts were treated as one. The publications did not refer to the plaintiff by name but it was not disputed that he was one of the members to whom they referred. On each count the jury found for the plaintiff. On the first they awarded £5,000 damages, on the second £10,000 and on the combined third and fourth counts £15,000. The defendant appealed to the Full Supreme Court which allowed the appeal and ordered a new trial.

Herron C. J. and Wallace J. took the view that the new trial should be limited to damages while Walsh J. was of opinion that there should be a new trial on all issues. The learned trial judge had directed the jury that it was open to them, if they thought fit to do so, to award punitive damages and each of their Honours thought that this was a misdirection. Herron C.J. and Walsh J. based their conclusion on this point on the propositions laid down by Lord Devlin and accepted by the other members of the House of Lords in Rookes v. Barnard (1964) A.C. 1129, as interpreted and applied by the Court of Appeal in McCarey v. Associated Newspapers Ltd. (1965) 2 Q.B. 86. As I read their Honours' reasons they were also of opinion that the amounts awarded were in any event excessive and this they thought might have been due, in part at least, to the way in which counsel for the plaintiff had conducted his case at the trial. In some respects he had, they considered, overstepped the bounds of legitimate advocacy and unfairly created an atmosphere which might seriously have prejudiced the defendant in the minds of the jury. It was this last factor which led Walsh J. to the conclusion that there should be a general new trial since whatever prejudice may have been aroused would have been as likely to affect the jury's views on issues of liability as on the question of damages. Wallace J., for the reasons which he had given in the case of Uren v. John Fairfax & and Sons Pty. Ltd., thought that Rookes v. Barnard should not be followed since it was in conflict with a number of decisions of this Court. Applying those decisions, however, he could find no evidence which would have warranted an award of punitive damages on any of the counts. He thought therefore that there should be a new trial but one limited to damages.

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

There remains the question whether the new trial should be limited to damages. If, as Herron C. J. and Walsh J. thought, the conduct of counsel for the plaintiff at the trial had unfairly created an atmosphere prejudicial to the defendant I would agree with Walsh J. that there should be a new trial on all issues since I find it impossible to

think that its effect would have been confined to the assessment of damages. But I do not find it necessary to consider whether the complaints of unfair advocacy made against counsel for the plaintiff are justified or not since for other reasons I am of opinion that there should be a new trial on all the issues.

The reference to the plaintiff in the article on which the first count was based, while capable of being regarded as defamatory of him—and I put on one side the defence based on s. 17(h) of the Defamation Act which the jury for some reason must have rejected—could scarcely be regarded as being more than a facetious method—not distinguished by subtlety—of expressing an editorial opinion in the course of a hard-fought election campaign that members of the opposition, including the plaintiff, lacked sufficient capacity to govern the country and that the electors should therefore return the retiring government to power. It was not suggested that, as a result of the publication, the plaintiff suffered any special damage and in fact he won his seat by a large majority. To take the view, as the jury did, that such a publication warranted an award of £5,000, even when regard is had to the direction that punitive damages might be awarded, seems to me to go far beyond the bounds of reason. The reference to the plaintiff in the article upon which the second count was based might have been regarded by a jury as a more serious reflection upon him and, again leaving aside the provisions of s. 17(h), might have merited an award of an amount larger than would have been justified under the first count but here again there was no suggestion of any special damage and an award of £10,000, even when regard is had to the direction as to punitive damages, is in my opinion an extravagant figure. The amounts so awarded are such as to cause me to feel that for some reason or another the jury must have taken "a biased view of the whole case" as Jordan C. J. put it in Willis v. David Jones Ltd. (1934) 34 S.R. (N.S.W.) 303 at p. 317. And what Kitto J. remarked in Pateman v. Higgin (1957) 97 C.L.R. 521 at p. 528 must be borne in mind. He there said, "It is often true, in a defamation action for example, that the case on liability and the case on damages are not in distinct compartments and therefore ought not to be decided by different tribunals". That is certainly true of the present case.

For these reasons I would uphold the appeal and, in place of the limited order made by the Full Supreme Court, I would substitute an order for a general new trial. It follows that the plaintiff's cross-appeal by which it was sought to restore the jury's verdicts should be dismissed.

No. 19

In the High Court of Australia.

No. 19. Order of the High Court of Australia. 2nd June, 1966.

Order of The High Court of Australia

Thursday the 2nd day of June, 1966.

THIS APPEAL from that part of the Order of the Supreme Court of New South Wales made the 4th day of May, 1965, in Action No. 1185 of 1963 which refused to grant the Appellant (Defendant) a new trial generally and to order the Respondent (Plaintiff) to pay the Defendant's costs of the first trial in any event AND THIS CROSS-APPEAL from the whole of the Judgment and Order of the Supreme Court of New South Wales delivered and made the 4th day of May, 1965 which Judgment set aside a verdict for the Respondent (Plaintiff) in the sum of sixty thousand dollars ($60,000.00) in the Supreme Court of New South Wales and ordered a new trial of the action limited to damages coming on for hearing before this Court at Sydney the 23rd, 24th, 25th, 26th and 29th days of November 1965 pursuant to leave to appeal granted by the Full Court of the High Court of Australia UPON READING the transcript record of proceedings AND UPON HEARING Mr. Larkins of Queens' Counsel with whom was Mr. Hunt of Counsel for the Appellant and Mr. Evatt of Queen's Counsel with whom were Mr. C. R. Evatt Jnr. and Mr. J. K. McLaughlin of Counsel for the Respondent THIS COURT DID ORDER on the said 29th day of November 1965 that this appeal and cross-appeal should stand for judgment and the same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER 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 THIS COURT DOTH FURTHER ORDER that the costs of the first trial abide the event of the second trial AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Appellant of this appeal and of this cross-appeal and that such costs when so taxed and certified be paid by the Respondent to the Appellant or to its Solicitors Messieurs Allen Allen & Hemsley AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the sum of one hundred dollars ($100.00) paid into Court as security for the costs of this appeal be paid out to the Appellant or to its Solicitors Messieurs Allen Allen & Hemsley.

By the Court,
H. Cannon,
DISTRICT REGISTRAR.

In the High Court of Australia.

No. 20. Reasons for Judgment of the Full Court in Uren v. John Fairfax & Sons Pty. Limited (McTiernan J.).

2nd June, 1966.

No. 20
Reasons for Judgment of The Full Court of The High Court of Australia in Uren v. John Fairfax & Sons Pty. Limited

McTIERNAN J.: The Full Court of the Supreme Court of New South Wales has ordered a new trial of the issue of damages in this action. It is an action of 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 the 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.

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 M.Ps.". I will not quote all 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 paragraph:

> "Allegations are expected to be made in Parliament that two Labor M.Ps. 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 {underlines / italics} are mine)

In a subsequent paragraph it is said that:

> "Political observers say several Government back-bench members will make the allegations against the Labor M.Ps. when Parliament begins its next sitting on March 28."

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.

The pleas of the defendant raised the issue whether the words "two Labor M.Ps." 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.

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.

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 apologised for the publications of the libel which occurred in the first and second edition.

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.

The jury assessed damages in respect of the publication of the defamatory matter under the headlines: "LABOR LINK WITH RED SPY" at £8,000, and in respect of its publication under the headlines: "SPY DUPED LABOR M.Ps." at £5,000.

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.

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) A.C. 1129 is compendiously stated in Mayne & McGregor on Damages, 12th edn., at 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 recognised to be recoverable in appropriate cases of defamation".

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.

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.

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." 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.

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 (supra) 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.

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.

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 publica-

tion 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."

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 the 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 headlines "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." There is no evidence that the defendant made such a calculation.

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.

It is said in Gatley on Libel and Slander, 5th edn., at 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."

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.

In my view the statements that Skripov "inspired" the plaintiff to ask "searching questions" in Parliament "unsuspectingly" are extravagant and evidenced by themselves afford evidence of malice.

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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 at 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 K.B. 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.

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 L.T. 384 at p. 386: "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". That case was decided in 1935.

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 edition 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 edn., 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 apologised "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 apologise 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.

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. His plea to the jury was that in all the circumstances justice did not call for a heavy award of damages.

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) Lofft 1; 98 E.R. 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.

The judgment of Pearson L. J. in McCarey v. Associated Newspapers, Ltd. (1964) 3 All E.R. 947 at p. 954 said: "However, there still remains the question of the excessive damages, as to which the

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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?" 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. Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd. (1934) 50 T.L.R. 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." 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) (1964) 3 All E.R. 947 at p. 956. 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." (p. 959). In my view, the present case is such a case.

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.

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.

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 A.C. 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 J.) — 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, 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 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 111 C.L.R. 610: (1963 A.L.R. 524) and because the law as stated in Rookes v. Barnard 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.

Prior to Rookes v. Barnard 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 had 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 intangible, resulting from the circumstances and manner of the defendant's wrong-doing. On the other hand, exemplary damages are awarded, as Lord Devlin says in Rookes v. Barnard, 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.

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 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."

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" 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". 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 humiliation 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) 10 C.B.N.S. 287. Maule J. in Williams v. Currie (1845) 1 C.B. 841, 848 suggests the same thing; and so does Martin B. in an obiter dictum in Crouch v. Great Northern Railway Co. (1856 11 Ex. 742, 759). 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 money making 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."

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 a 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. 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) A.C. 457. 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.

It seems that the basis of the first category was a group of three cases decided between 1763 and 1766 — Wilkes v. Wood (1763) Lofft. 1; Huckle v. Money (1763) 2 Wils. 205; and Benson v. Frederick 3 Burr. 1845. 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."

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". 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) 3 Wils. 18, the first of these six cases, was decided in 1769 — a mere three years after Benson v. Frederick. 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". 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

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mentioned. I do not refer to the later English cases which his Lordship mentions other than Bell v. Midland Railway Co. (1861) 10 C.B. N.S. 287 which he explains as an example of the award of exemplary damages where the wrong-doer was seeking to make a profit out of his wrong-doing. 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" 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". 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". 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". I do not find in the judgments any suggestion that as against a private individual exemplary damages may be awarded only where the wrong-doer is seeking to make a profit out of his wrong-doing; 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.

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.

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 Limited (No. 2) (1965) 2 W.L.R. 45; Broadway Approvals Ltd. v. Odhams Press Limited (No. 2) (1965) 1 W.L.R. 807 and Manson v. Associated Newspapers Ltd. (1965) 1 W.L.R. 1038. This category is based upon the observations in Bell v. Midland Railway Co. (supra) to which I have already referred, and to some extent upon the observations of Maule J. in Williams v. Currie (1845) 1 C.B. 841 at p. 848 and those of Martin B. in Crouch v. The Great Northern Railway Company (1856) 11 Ex. 742 at p. 748. 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 wrong-doer 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 (1774) 2 W. 942 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 (1779) 2 Bl. W. 1327 — which is noted at the foot of the report of Sharpe v. Brice — where a verdict for £10,000 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. The Great Northern Railway Company to justify the formulation of the second category.

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 Sedwick 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 (13 How. 363):

> "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 offense 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 of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further 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."

To my mind — and I say this with the greatest respect — the attempt, expressly made in Rookes v. Barnard "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 ground, 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 wrong-doing 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, arro-

gantly or high-handedly with a contumelious disregard for the plaintiff's rights.

However this may be, the measure of research disclosed by the observations in Rookes v. Barnard 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 and Company Limited (1920) 29 C.L.R. 71 at p. 77 Knox 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 wrong-doing in contumelious disregard of another's rights."

In the same case Isaacs J., at p. 81 dealt with the matter at some length. Having mentioned that, in general, damages are compensatory in character, his Honour went on to say:

> "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) 5 Taunt. 442 in 1814, and of Story J. in the Amiable Nancy (3 Wheat. 546, at p. 558) in 1818. In Emblen v. Myers (1860) 6 H. & N. 54, at p. 58 in 1860 Pollock C. B. used the expression "vindictive damages"; in 1861 Byles J., in Bell v. Midland Railway Co. 10 C.B. (N.S.) 287, at p. 308, 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) A.C. 75, at p. 88, called them "penal"; in The Mediana (1900) A.C. at p. 118 Lord Halsbury L.C. called them "punitive damages"; in 1908, in Anderson v. Calvert (1908) 24 T.L.R. 399, Lord Cozens Hardy, and Lord Wrensbury (then in the Court of Appeal), used the word "punitive"; in 1913, in Smith v. Streatfield (1913) 3 K.B. 764, at p. 769 Banks J. called them "vindictive" damages. See also Willoughby Municipal Council v. Halstead (1916) 22 C.L.R. 352."

This principle has been clearly recognized by this Court in the subsequent cases of The Herald and Weekly Times Limited v. McGregor

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(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 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 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 do not express the law of this country and that they should not be followed.

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.

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 apologises 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. Realising 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 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.

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 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 in respect of the second count relating to the publication of the same article under the heading "Labor Link With Red Spy".

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 than to induce people to buy the paper. To this matter I must return later.

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.

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.

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) A.C. 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

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found, was malicious, wilful and reprehensible. It was a "contumelious disregard" of the rights of the plaintiff to his reputation. See Whitfield v. De Lauret & Co. Ltd. (1920) 29 C.L.R. 71, at p. 77.

The next question is whether the law in Australia is as stated by the House of Lords in Rookes v. Barnard (supra). 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.

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". Having considered earlier authority going back to Wilkes v. Wood (1763) Lofft. 1, 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". 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 recognise 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."

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". 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". 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".

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: (1) "the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour"; (2) "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 (3) "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." 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 Q. B. 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 L.T. 274 and Williams v. Settle (1960) 1 W.L.R. 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".

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".

The first thing to be said is that in Australia, as in England prior to Rookes v. Barnard (supra), 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 Whitfield v. De Lauret & Co. Ltd. (1920) 29 C.L.R. 71; The Herald and Weekly Times Ltd. v. McGregor (1928) 41 C.L.R. 254; Triggell v. Pheeney (1951) 82 C.L.R. 497; and Fontin v. Katapodis and Others (1962) 108 C.L.R. 177. It is, perhaps, of more importance that it has always been taken for granted that damages beyond restitution 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. Thus, for instance, in cases of trespass "high-handed procedure or insolent behaviour", to use the language of the Earl of Halsbury L.C. in The "Mediana" (1900) A. C. 113, has been regarded as warranting the award of exemplary damages. In Fontin v. Katapodis (1962) 108 C.L.R. 177 Owen J., with the concurrence of the Chief Justice, expressed this common understanding in Australia when, at p. 187, 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". Again, in libel cases what Farwell L. J. said in Jones v. R. Hulton & Co. (1909) 2 K.B. 444, at p. 483, 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". Thus, to use McTiernan J.'s phrase in Smith's Newspapers Limited v. Becker (1932) 47 C.L.R. 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 Q.B.D. 494 where, at p. 504, his Lordship said: "The question we have to decide to-day 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?" Must it now be said that Bowen L. J. was in error?

My examination of the English and Australian authorities has not shown that before Rookes v. Barnard 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 enquiry whether the House could "remove an anomaly from the law of England". 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 . . ." 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, Paragraph 908, Punitive Damages — seems not to have been considered.

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) (supra). 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 11 Law ed. 2d 686 Headnote 20.

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) 5 man. & G. 700. 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.

I would therefore allow the appeal and restore the jury's verdicts of £5,000 and £8,000 damages.

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2nd June, 1966.

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.

The argument about damages became largely centred upon what was said in Rookes v. Barnard, (1964) A.C. 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) 39 A.L.J.R. 480, 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 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.

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 had 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., (1964) A.C. 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.

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 at informative article, Problems of Assessing Damages for Defamation, by Mr. Samuels in the Law Quarterly Review, 1963, Vol. 79, p. 64. 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 (40 L.Q.R. 302, 397; 41 L.Q.R. 13). References to some aspects, presently relevant, appear in the sketch Exemplary Damages for Defamation, by L. F. S. Robinson (3 A.L.J. (1929) 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.

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.

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 tanglible 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 plantiff 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 ought to pay". These words come from Forsdike v. Stone (1868), L.R. 3 C.P. 607. That was a case of slander, but the proposition was not new. It was applicable to defamation generally and has often been repeated.

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 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. 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 C.L.R. 254 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.

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, supra 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.

Returning to Rookes v. Barnard — 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 note-worthy that in Merest v. Harvey (1814), 5 Taunt. 442 at p. 444 (one of the cases referred to by Lord Devlin) Heath J. said: "I remember a case where a jury gave £500 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".

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 to 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.

What we should welcome in the decision in Rookes v. Barnard 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 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 exem-

plary 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 wrongdoing in contumelious disregard of another's rights". I select that particular phrase out of many, because it has been used more than once in this Court. 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 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 Limited. 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.

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 showing 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.

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.

I would dismiss the appeal.

In the High Court of Australia.

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No. 20.
Reasons for Judgment of the Full Court in Uren v. John Fairfax & Sons Pty. Limited. (Owen J.).

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2nd June, 1966.

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 Labour M.P.s — Canberra Charge" while the headlines in the second publication read "Labour Link With Red Spy — Canberra Charge."

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 on the first count and £8,000 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.

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 & 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) A.C. 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) 111 C.L.R. 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 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, which had been applied by the Court of Appeal in McCarey v. Associated Newspapers Limited (No. 2) (1965) 2 Q.B. 86 and Broadway Approvals Ltd. v. Odhams Press Limited (No. 2) (1965) 1 W.L.R. 805 and by Widgery J. in Manson v. Associated Newspapers Ltd. (1965) 1 W.L.R. 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. 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.

The hearing of the appeal in this Court followed immediately upon the conclusion of the argument in an appeal in another defamation action of Uren v. Consolidated Press Limited 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 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; 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.

It would be sufficient in the present appeal for me to say that whether Rookes' Case 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,

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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.

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 Limited v. McGregor (1928) 41 C.L.R. 254 and Triggell v. Pheeney (1951) 82 C.L.R. 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 and Company Limited (1920) 29 C.L.R. 71, is such a case and in the judgment of Isaacs J., 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 Limited (1930) 1 K.B. 467; Knupffer v. London Express Newspapers Limited (1943) K.B. 80; Loudon v. Ryder (1953) 2 Q.B. 202; Owen and Smith v. Reo Motors (Britain) Limited (1934) 151 L.T. 274; and Williams v. Settle (1960) 1 W.L.R. 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) 103 C.L.R. 30, where the defendants were alleged to have conspired to prevent the plaintiff from continuing in his employment, and Fontin v. Katapodis (1962) 108 C.L.R. 177, an action for trespass to the person. In England, however, the decision in Rookes v. Barnard 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." 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" 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." His Lordship proceeded then to state what, in his opinion, those categories were, agreeing, however, that there was "powerful, though not compelling, authority" 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, arbitary or unconstitutional action by servants of the government." 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." 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 Whitfield's Case (supra at p, 77).

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." 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 Limited (No. 2) (supra) 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

In the High Court of Australia.

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refer to three of the decisions of the Court of Appeal, which I have mentioned earlier: Loudon v. Ryder, Owen and Smith v. Reo Motors (Britain) Limited and Williams v. Settle. 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 could not be sustained at all and should be overruled.

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 (as yet unreported) 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 — "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."

and add that where 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.

In the present case and with all due respect to those who decide Rooke's Case 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.

In the Privy Council.

No. 21.
Order in Council Granting Special Leave to Appeal to Her Majesty in Council.

28th July, 1966.

No. 21

Order in Council Granting Special Leave to Appeal to Her Majesty in Council

AT THE COURT AT BUCKINGHAM PALACE

The 28th day of July, 1966

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT — MR. SHORT
LORD SHEPHERD — MR. DIAMOND

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 20th day of July 1966 in the words following viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Australian Consolidated Press Limited in the matter of an Appeal from the High Court of Australia between the Petitioner and Thomas Uren Respondent setting forth that the Petitioner seeks special leave to appeal from a Decision of the High Court of Australia delivered on the 2nd June 1966 upon the Respondent's Cross-Appeal to that Court against a Decision by the Full Court of the Supreme Court of New South Wales delivered on the 4th May 1965: that the Respondent was the Plaintiff in a defamation action against the Petitioner instituted in the Supreme Court of New South Wales by Writ of Summons issued on the 14th February of that year: that at the trial of the action the Jury returned a verdict in favour of the Respondent in the sum of £30,000: that the Petitioner appealed to the Full Court of the Supreme Court and moved that Court for a general new trial of the action: that the said Full Court ordered a new trial limited to the issue of damages: that the Petitioner sought leave ex parte from the High Court of Australia to appeal from the refusal of the majority of the said Full Court to order a general new trial and the Respondent by Notices of Motion also sought leave to appeal to the High Court from the Order granting your Petitioner a new trial limited to damages: that the High Court granted the leave sought by the Petitioner and pursuant to this leave the Petitioner appealed to the High Court of Australia seeking a general new trial of the action and the Respondent cross-appealed: that the Petitioner succeeded in obtaining an Order for a general new trial but the submissions of the Respondent as to the principles which should govern damages at the new trial prevailed: And humbly praying Your Majesty in Council to order that the Petitioner should have special leave to appeal

In the Privy Council.

No. 21.
Order in Council Granting Special Leave to Appeal to Her Majesty in Council.
(Continued)

28th July, 1966.

from so much of the Decision of the High Court of Australia delivered on the 2nd June 1966 on the Respondents Cross-Appeal as determined that as a matter of law it was competent to award punitive damages in this case:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar on behalf of the Respondent Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its 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 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"And Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

No. 22

Certificate of the District Registrar of the High Court of Australia Verifying the Transcript Record of Proceedings

I HAROLD FREDERICK OSCAR CANNON District Registrar of the High Court of Australia New South Wales Registry DO HEREBY CERTIFY as follows:

That this transcript record contains a true copy of all such orders judgments and documents as had relation to the matter of this Appeal and a copy of the reasons for the respective judgments pronounced in the course of the proceedings out of which the Appeal ~~arises~~ arose—

That the Respondent herein has received notice of the Order of Her Majesty in Council giving the Appellant Special Leave to appeal to Her Majesty in Council AND has also received notice of the dispatch of this transcript record to the Registrar of the Privy Council.

DATED at Sydney in the State of New South Wales this day of One Thousand nine hundred and sixty-

District Registrar of the
High Court of Australia

Exhibit "A".
—
Extract from "Daily Telegraph".
—
8th Dec., 1961.

EXHIBIT "A"
Extract from "Daily Telegraph" (1st Count), 8/12/1961

A matter of trust

The Prime Minister (Mr. Menzies) should be returned to office at tomorrow's election for one very simple reason:

The people of Australia trust him and the Government he heads.

THEY cannot feel the same trust for Messrs. Calwell, Whitlam, Ward, Haylen and the divided men behind them.

In the election campaign just finishing the Prime Minister has encountered quite a bit of hostility — a reception which, in the main, he expected.

It would have been nothing short of remarkable if, having subjected the population to an astringent and somewhat painful cure for an unhealthy boom, he had not antagonised some of the patients.

It is the measure of Mr. Menzies' character — and a demonstration of his faith in the commonsense of his fellow Australians — that he has not thrown round wild promises at this election.

He knows that if he wished to take reckless inflationary steps he could speed up re-employment.

But he also knows that if he did a boom would follow again and the country would soon find itself once more in the dangerous condition of November, 1960.

So he makes no such promises.

He relies on the steady and growing decline in the unemployment figures — the latest showing 19,000 fewer unemployed in October.

He could be panicked into promising to re-impose import controls.

But he doesn't.

He knows, as thinking people know, that the raising of import restrictions shook out the shoddy, over-protected and uneconomic manufacturing industries; built up a stronger base; turned thoughts towards export markets and better production methods.

He knows, as sensible Australians know, what the latest trade figures mean — export earnings of £101 million in November, a five-month trading surplus of £95 million. They mean that prosperity, *real* prosperity, is returning.

He does not rush in with promises of increased social benefits, which would cost millions of *your* money.

He relies on the good sense of Australians who know that the steady increase in every type of social benefit over the past 12 years has been made possible by the Menzies Government.

As Mr. Menzies said in his policy speech: "We offer you good government."

Who can deny that it *has* been good government from which Australia has reaped enormous benefits and made tremendous advances.

Overseas investment in Australia tells its own story of the confidence in our country felt by friends in other lands.

Australia's international status has never been higher — and Mr. Menzies today is one of the great world figures.

The past 12 years have been years of steady progress for Australia; of intelligent planning for the future; of continual vigilance against the inroads of Communism politically and in unions; of increasing industrial peace and improving employer-employee relations; of adequate defence preparedness; of assistance to the pastoral industry; of enlightened and progressive legislation.

What, and who, has Labor to offer?

Arthur Calwell, a decent, straight, hard-working parliamentary leader.

But a leader in name only, because like any other Labor parliamentary leader he *must* take his orders from Mr. Chamberlain and the other non-parliamentary masters of the A.L.P.

Who is behind Mr. Calwell in the Federal House?

A divided, warring rag-tag and bob-tail outfit ranging from Eddie Ward and Les Haylen through to Dan Curtin and Tom Uren.

This is a team which would have difficulty running a raffle for a duck in a hotel on Saturday afternoon, let alone a country.

And what about Mr. Calwell's policy?

He would end unemployment — temporarily — by inflationary means, and start off the mad costs spiral all over again.

Overseas investment would dry up, and as it dried unemployment would leap.

He would abolish the secret ballot and deliver good unions once more into the hands of the Communists.

He would bump up social service payments which could be done only by increasing taxation.

He would "review" our SEATO agreements, cancel the military aspects, and thereby weaken our defence links with our allies.

He would "immediately" restore the quarterly cost of living adjustments, despite the fact that this method of assessment is nowadays discredited.

These are not pieces of supposition — these are the actions which, in his policy speech, he declares he will take.

And the public must never forget that when a politician talks of money he is talking of *your* money. That is all he has to spend — he has none of his own.

But it is not merely the policy of Labor which Australia should reject tomorrow.

It should reject any idea of government by a collection of bitter, divided men whose performance in opposition has been pitiful; who have flirted with unity tickets; allowed fellow-travellers to stand for the Senate; and who would if it suited them politically drop the fight against Communism which the Federal Government has waged so successfully for the past 12 years.

There are many reasons why Mr. Menzies should and will be voted back into power tomorrow, but one reason is paramount—

He is a man who can be trusted.

EXHIBIT "B" **Extract from "The Bulletin" (2nd Count), 3/11/1962**

Exhibit "B". — Extract from "Bulletin". — 3rd Nov., 1962.

THIS AUSTRALIA

POLITICS

LABOR CHANGES ITS DEFENCE POLICY

In the light of China, Indonesia and Cuba

DR J. CAIRNS

A shift in emphasis

As I see it

THERE was a perceptible shift in attitudes in last week's debate on the Defence estimates. Anti-Americanism had waned. Labor's rightwingers for the first time for years lost some of their timidity. They wanted more and not less defence. The leftwingers lay either cautiously low, or as in the case of Dr J Cairns (Lab., Vic.), gave indications that they were not blindly shutting their eyes to the significance of recent international events.

Though Cuba and the tension between the United States and Russia arising from Russian arming of Cuba naturally got the most mention — the debate took place while it was still uncertain whether there would be an incident between the US blockaders and the arms-carrying Soviet freighters — my impression is that other developments were primarily responsible for the difference in tone between this debate and that on the Defence estimates in 1961.

These developments were (1) the emergence of Indonesia as a relatively major military power due to Soviet-supplied arms, and (2) China's attack upon India, which had pursued the policy of relying almost exclusively upon a cultural, economic and educational association to protect itself against aggression — a policy which Labor in 1961 was insistently maintaining should receive the approbation of Australian imitation.

Leftwinger Tom Uren (Labor NSW) still stubbornly adhered to the line that Moscow and Peking controlled Communist Parties in non-Communist countries assidulously peddle mainly through peace movements. He described suggestions for greater defence expenditure as "so much justifiably rated as among the most intelligent of the the leftwingers. When he applies his mind to a subject he can be an impressively logical and clear thinker. His speech on the defence estimates was both thoughtful and thought provoking. It contained no anti-Americanism as such though he was highly critical of aspects of American policy, which in his view "has driven Cuba into the Russian camp". He came very close to advocating a national, non-party attitude on Defence.

Labor's rightwing for once was uninhibited and threw off temporarily at least its fear of Leftwing reprisals for the public stating of rightwing viewpoints. Gordon Bryant, who though a Victorian and as such exposed to the influence of the leftwing Victorian ALP Executive, could hardly be described as an extremist of any kind, probably gave the lead. Bryant, an ex-soldier and former schoolteacher, is still an active member of the CMF and the convenor of a Labor Defence Committee.

Bryant's attitude like Cairns' also shows a shift. In 1961 Bryant's tone was one of anti-Americanism. "The Menzies Government slavishly followed the USA in its foreign policies and military policies," he then told the House of Representatives. As he then saw Asutralia's defence need, it was most likely to be to provide a contingent to a United Nations' force in a place such as the Congo, Syria, or "wherever else we may be required." Now he sees Australia in a different position and in a different role. "We are not necessarily surrounded by enemies, but we are a long way from our potential friends," he told Parliament last week, obviously speaking with the USA in mind as one of Australia's "potential friends". "Our fundamental duty is see how this country is to be defended."

Probably heartened by this lead, the rightwing started enunciating viewpoints that were very close to those on the Government side of the Parliament. Queenslander William Riordan was shocked by the inadequacy of the Government's defence plans. Why had not the Government announced the acquisition of six submarines? What about a nuclear powered underwater force? Riordan's fellow Queenslander George Gray, an ex-soldier and seemingly a tank expert, wanted to know why only 60 new Mirage fighters were provided in the Air Force programme. "What contribution is that to the defence of this country," he asked scornfully. Les Reynolds, of Sydney's Barton, even dared to commit the sin of sins in leftist eyes. He spoke favorably of the United States. 'I have faith that the United States would not stand by and see Australia invaded," he said.

Labor's rightwingers, undoubtedly shocked from timidity by recent international events among which Cuba may have been less of an influence than China's attack on India and the development of Indonesia's military power, set the Labor tone for the defence estimates, and were to a considerable extent responsible for the perceptible change in the Labor attitude.

ALAN REID

Exhibit "D"
—
Extract from "Sunday Telegraph".
—
10th Feb., 1963.

EXHIBIT "D"
Extract from "Sunday Telegraph" (~~3rd~~ 4th Count), 10/2/1963

SPY USED LABOR MEN AS "PAWNS"?

From a Special Reporter

CANBERRA, Sat. — Allegations are likely to be made in Federal Parliament that some Labor M.Ps. were used as "pawns" by Russian spy Ivan Skripov to try to get defence secrets.

It will be claimed that Skripov persuaded the unsuspecting Labor men to ask questions in Parliament about defence establishments in Australia.

Labor M.Ps. are said to have asked for information about the new secret £40 million U.S. radio communications base at Learmonth, Western Australia.

The American Navy will use this base to help keep track of its Polaris-equipped nuclear submarines operating in the Indian and Pacific oceans.

The Labor M.Ps'. questions were directed in the House of Representatives to Prime Minister Menzies, and Defence Minister Townley.

But in answering the questions both Mr. Menzies and Mr. Townley gave no information beyond what already had been officially released.

A number of Government back-benchers are almost certain to raise the matter of these questions when Parliament resumes on March 28.

In the House of Representatives on November 29 last a Victorian Liberal, Mr. Dudley Erwin, alleged that members of the Russian Embassy in Canberra had been cultivating the friendship of certain members of the Opposition.

Mr. Erwin said that Skripov had made frequent visits to Parliament House and had associated with a number of Labor M.Ps.

Mr. Erwin said that Members were perfectly entitled to speak to representatives of any diplomatic mission.

But, he added, in the present state of world affairs members of the Labor Party should be more careful of their contacts with Russian representatives.

Contact with these representatives should be limited to those members who were sophisticated and not easily brain-washed.

Some members were being directly inspired by Soviet Embassy officials, Mr. Erwin added.

Defence Minister Townley

Throughout his stay in Canberra, Skripov was the most frequent visitor to Parliament House among all foreign diplomats in Canberra.

Besides keenly following debates from the diplomatic galleries, he also moved freely through Parliamentary lobbies talking to M.Ps. and Senators with whom he had become acquainted.

He also rarely turned down invitations to cocktails at which many politicians were present.

EXHIBIT "E"

Extract from "Sunday Telegraph" (4th Count) 10/2/63

3rd.

Exhibit "E".
—
Extract from "Sunday Telegraph".
—
10th Feb., 1963

DID RUSSIAN SPY DUPE ALP MEN?

From a Special Reporter

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