UREN v. JOHN FAIRFAX & SONS PTY. LTD.[1] AUSTRALIAN CONSOLIDATED PRESS v. UREN[2]

Libel—exemplary damages—when available—conflict between House of Lords and High Court—ruling by Privy Council.

These two cases dealt with substantially the same facts and were heard by the same judges both in the New South Wales Supreme Court and in the High Court. The primary issue on which the defendant newspaper companies appealed concerned the availability of exemplary damages, a section of the law in which English and Australian law has diverged. Before examining the facts, it is helpful to first determine how the law stood on exemplary damages prior to these cases, both in Australia and England.

The law in Australia on exemplary damages was well settled. In *Whitfield v. De Lauret & Co. Ltd.*[3], Knox C.J. said: "Damages may be either compensatory or exemplary. Compensatory damages are awarded as compensation for and measured by the material loss suffered by the plaintiffs. Exemplary damages are given in cases of conscious wrongdoing in contumelious disregard of another's rights." In Mayne & McGregor on Damages[4], it is stated: "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." The views expressed in this passage have been followed by the High Court in *Herald and Weekly Times v. McGregor*[5], *Trigell v. Pheeney*[6], *Williams v. Hursey*[7], and *Fontin v. Katapodis*[8], the last three of these cases all being decided within the past decade. The passage from Mayne & McGregor quoted above was expressly adopted as the established Australian law by McTiernan J. in the *Uren v. John Fairfax* appeal[9]. The Australian law did not restrict exemplary damages to any particular section of the law but simply permitted it whenever "contumelious disregard" was shown for the plaintiff's rights.

Until 1964, the law in England was, for all intents and purposes, the

1. (1965) 83 W.N. (Pt. 2) (N.S.W.) 183: Full Court of N.S.W. Supreme Court. (1966) 40 A.L.J.R. 124: High Court of Australia.
2. (1965) 83 W.N. (Pt. 2) (N.S.W.) 229: Full Court of N.S.W. Supreme Court. (1966) 40 A.L.J.R. 142: High Court of Australia. (1967) 3 W.L.R. 1338, (1967) 3 All E.R. 523: Privy Council.
3. (1920) 29 C.L.R. 71.
4. 12th Ed., p. 196.
5. (1928) 41 C.L.R. 254.
6. (1951) 82 C.L.R. 497.
7. (1959) 103 C.L.R. 30.
8. (1963) 108 C.L.R. 177.
9. (1966) 40 A.L.J.R. 124 at 126.

same, but it was notable that the House of Lords had never taken the opportunity to discuss in detail the desirability or availability of exemplary damages[10].

In the 1964 case of *Rookes v. Barnard*[11], Lord Delvin (with the concurrence of the other four Lords hearing the appeal) sharply restricted the types of cases in which exemplary damages might be applied. In so doing, he recognised "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"[12]. After examining the authorities (and in the process disapproving of two cases and overruling a third) he 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"[12].

Having thus accepted the principle of exemplary damages in some instances, he listed the categories in which they are permissible. "The first category is oppression, arbitrary or unconstitutional action by the servants of the government." He expressly stated that this should not extend to private companies, the rationale behind the distinction being that "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"[13]. He continued: "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." The justification for this was that "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"[13]. The third category simply covers cases authorised by statute.

This authoritative statement is clearly good law at present in England and it has been applied twice by the Court of Appeal[14] and once at first instance[15].

10. The House of Lords has upheld a case in which exemplary damages were awarded, however: *Ley v. Hamilton* (1935) 153 L.T. 384.
11. (1964) A.C. 1129; (1964) 1 All E.R. 367.
12. (1964) A.C. 1129 at 1226.
13. (1964) A.C. 1129 at 1227.
14. *McCarey v. Associated Newspapers* (No. 2) (1965) 2 W.L.R. 45; *Fielding v. Variety Incorporated* (1967) 3 W.L.R. 415.
15. *Manson v. Associated Newspapers* (1965) 1 W.L.R. 1038.

It was in the light of this conflict of views between the House of Lords and the High Court that the two cases of alleged libel against Mr. Uren caused so much interest in the legal profession, for it was clear that the High Court would have to decide to either accept and follow the English changes in the law or else, in pursuance of the famous dictum of Dixon C.J. in *Parker v. The Queen*[17], refuse to follow the House of Lords in preference to its own earlier decisions.

The two cases evoked a great deal of public interest also. Mr. Tom Uren, M.H.R., is the member for Reid, a Sydney electorate, and is well known for his colourful, left-wing views on foreign policy and defence. In 1963, one Ivan Skripov, a member of the staff of the embassy of the Soviet Union at Canberra, was declared *persona non gratis* by the Australian Government for allegedly spying. In the same year, the Government announced that it had decided to allow the U.S. Government to build a radio and telecommunications base on the North-West Cape in West Australia, an action which many A.L.P. members, including Mr. Uren, opposed.

In articles in the *"Sun-Herald"* (owned by John Fairfax & Sons Pty. Ltd.) and the *"Sunday Telegraph"* (owned by Australian Consolidated Press), it was suggested that Mr. Uren had been "duped" by Skripov into asking questions of Government Ministers in the House of Representatives, the inference being that, by so doing, Skripov could find out otherwise secret information about the base[18]. The article was withdrawn from the last edition of the *"Sun-Herald"* and subsequently an apology was made by John Fairfax, but Australian Consolidated Press at no time apologised.

Uren sued both companies for libel and the case against Australian Consolidated Press came on first. The defendants argued that the articles were "fair comment" and were thus protected by s. 17(h) of the New South Wales *Defamation Act* (1958). Uren was successful and the jury awarded him damages totalling £30,000, of which £15,000 related to the Skripov articles. Immediately the case was decided, John Fairfax offered to make an apology in court and pay Uren's costs, but this offer was refused. At the ensuing proceedings, Fairfax admitted liability and the only issue in dispute concerned damages. In the end, the jury awarded damages of £13,000.

In both cases, the judge instructed the jury that it might award exemplary damages and it was this ruling that provided the main grounds of appeal for both defendants.

The same bench of the Full Supreme Court of New South Wales heard both appeals[19]. The court was divided on the effect of the deci-

17. (1963) 111 C.L.R. 610 at 632; (1963) A.L.R. 524.
18. Uren also sued Australian Consolidated Press in regard to two other articles published in the *Daily Telegraph* and *Bulletin*.
19. Herron C.J., Walsh J., Wallace J.

sion of *Rookes v. Barnard*[20] on Australian courts. The majority (Herron C.J. and Walsh J.) thought that the dictum in *Parker v. The Queen*[17] had the effect of committing Australian courts to following High Court decisions in preference to decisions of the House of Lords only where the High Court carefully reviewed the law and expressly dissented from a House of Lords case. Otherwise, propositions laid down in *Piro v. Foster*[21] that Australian courts should follow House of Lords decisions at all times still hold good. "As it seems to me, the High Court in *Parker's Case*[22] has left it to an Australian State Court not to follow a decision of the House of Lords on a matter of general legal principle common to both countries if the High Court has previously expressed a contrary opinion in which it has laid down the law for Australia after a carefully reasoned consideration of what the law is, and where the State Court is of opinion that the House of Lords has misconceived that law in a fundamental matter. It does appear to me that Dixon C.J. did not intend to overrule the general propositions in *Piro's Case*[21]" (per Herron C.J. in *Uren v. John Fairfax*[23]).

Wallace J., however, felt that there was a clear conflict of law and that the court should therefore follow the High Court decisions. The court was unanimous, however, in ordering new trials on damages only in both cases, Herron C.J. holding that the case did not come under any of the categories listed by Lord Devlin in *Rookes v. Barnard*[24], Wallace J. holding that the facts did not warrant exemplary damages under High Court decisions, and Walsh J. holding that exemplary damages could not be awarded under either English *or* Australian decisions.

Both cases then went on appeal to the High Court and once again the same bench heard both appeals[25]. Whilst the court divided on whether the facts warranted exemplary damages[26], all five members of the Bench were unanimous that Australian courts should not, in the future, follow *Rookes v. Barnard*[24]. They agreed that the Australian law was well settled—exemplary damages may be awarded where the defendant "acts in contumelious disregard of the plaintiff's rights"[27]. Upon re-examination, the Australian law appeared sound and preferable to the English view. Between the hearing of the appeals before the Full Supreme Court and those before the High Court, the High Court had amplified the dictum in *Parker v. The Queen*[28]. In *Skelton v.*

20. (1964) A.C. 1129; (1964) 1 All E.R. 367.
21. (1943) 68 C.L.R. 313.
22. (1963) 111 C.L.R. 610; (1963) A.L.R. 524.
23. (1965) 83 W.N. (Pt. 2) (N.S.W.) 183 at 221.
24. (1964) A.C. 1129; (1964) 1 All E.R. 367.
25. McTiernan J., Taylor J., Menzies J., Windeyer J., Owen J.
26. Held (3-2) that exemplary damages should not be awarded.
27. *Uren v. John Fairfax* (1966) 40 A.L.J.R. 124, per McTiernan J., p. 126, per Taylor J., p. 129, per Menzies J., p. 134, per Windeyer J., p. 139.
28. (1963) 111 C.L.R. 610; (1963) A.L.R. 524.

Collins[29], the court declined to follow a House of Lords decision[30] and four judges[31] stated that the High Court was not bound by the House of Lords but recognises its high persuasive value. Other courts in Australia should follow the High Court where there is a clear conflict between a decision of the Lords and High Court upon a matter of legal principle. This differed in emphasis from the judgments of the majority of the Full Supreme Court in the two *Uren Cases*[32] who thought they should follow the House of Lords unless the High Court undertook a "carefully reasoned consideration of what the law is"[33] or "unless and until the High Court plainly states otherwise"[34].

In *Uren v. John Fairfax* and *Uren v. Australian Consolidated Press*[32], the High Court seems to make light of the fact that it is declining to follow a House of Lords decision. The judges simply review *Rookes v. Barnard*[35] and find it less satisfactory than the Australian decisions. There are no further comments on the rules of precedent.

The real test of the new rules of precedent adopted by the High Court came when Australian Consolidated Press successfully sought leave to appeal from the Privy Council on the question of exemplary damages[36]. Their Lordships "noted" the criticisms made of *Rookes v. Barnard*[35], agreed that the Australian law was well settled, stated that the Australian law was not based on unsound reasoning, and decided not to change the law as it applied in Australia. This was thus a rare occasion when the Privy Council, at least temporarily (as there were hints that the English law might change again) condoned divergence of common law rules in England and Australia. Lord Morris of Borth-Y-Gest, speaking for the Board, concluded: "The issue that faced the High Court in the present case was whether the law as it has been settled in Australia should be changed. Had the law developed by processes of faulty reasoning, or had it been founded on misconceptions, it would have been necessary to change it. Such was not the case. . . . Their lordships are not prepared to say that the High Court was wrong in being unconvinced that a changed approach in Australia was desirable."[37]

Some of the criticism made against the views expressed by Lord Devlin in *Rookes v. Barnard*[35], both by the High Court and "noted" by the Privy Council, was quite telling.

Lord Devlin stated that it was an "anomaly" that a remedy such as exemplary damages that punish rather than compensate should be part of the civil rather than criminal law. There is some merit in this view.

29. (1966) 115 C.L.R. 94.
30. *H. West & Son Ltd. v. Shephard* (1964) A.C. 326.
31. Kitto J., Taylor J., Windeyer J., Owen J.
32. (1965) 83 W.N. (Pt. 2) 183, 229.
33. per Herron C.J. at p. 221.
34. per Walsh J. at p. 226.
35. (1964) A.C. 1129; (1964) 1 All E.R. 367.

Whereas in criminal cases the penalty is always laid down in the relevant Statute or decided by the judge, the size of exemplary damages are awarded by the jury, and—as shown in respect of the libels against Mr. Uren—juries sometimes award exceptionally large sums in exemplary damages.

However, Lord Devlin conceded that precedent could not be ignored and *some* cases of exemplary damages had to be condoned. Immediately this is admitted, then Lord Devlin's argument would seem to lose force, for the categories he sets up appear to create far more "anomalies" than they destroy. As Taylor J. commented in *Uren v. John Fairfax*[38], the first category distinguishes between public and private corporations for no apparent reason, and the second category penalises profit-making but not sheer vindictiveness. If there is any merit at all in exemplary damages—and as Taylor J. pointed out, wrongs that are not crimes should be punished by courts[38]—then Lord Devlin's limitations seem to have little logic.

Other criticisms that seemed to have merit were that Lord Devlin's second category placed too great a burden on the plaintiff in proving calculation of profits by the defendant[39] and that his limitations curtailed the value of exemplary damages as a deterrent against "the abuse of power and malicious and high-handed action by persons in disregard of the rights of others"[40]. In addition, although Lord Devlin stated "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"[41], the Privy Council noted the contentions of counsel for Uren that there were House of Lords precedents supporting exemplary damages[42].

As regards the future of the law on exemplary damages, it is quite possible that the English and Australian views will converge once again —by the House of Lords modifying the restrictions laid down in *Rookes v. Barnard*[43]. While the Privy Council did not openly criticise that case, there was a clear inference that criticisms of it made both by the High Court and by Mr. Uren's counsel (led by Mr. C. Evatt, Q.C.) did not fall on deaf ears[44]. Lord Morris of Borth-Y-Gest did not treat

36. (1967) 3 W.L.R. 1338; (1967) 3 All E.R. 523—it is of interest to note that leave was granted even though the appellant—Australian Consolidated Press —did not seek any variation in the order made by the High Court. They simply sought a ruling on the law on exemplary damages that would operate at the re-hearing of the case.
37. (1967) 3 W.L.R. at 1358; (1967) 3 All E.R. 523 at 538.
38. (1966) 40 A.L.J.R. 124 at 129.
39. *Ibid*, per McTiernan J. at p. 127.
40. *Ibid*, per Owen J. at p. 141.
41. *Rookes v. Barnard* (1964) A.C. 1221; (1964) 1 All E.R. 407.
42. *Australian Consolidated Press v. Uren* (1967) 3 W.L.R. 1338 at 1355; (1967) 3 All E.R. 523 at 535.
43. (1964) A.C. 1129; (1964) 1 All E.R. 367.
44. The Board comprised five members, four of whom were Law Lords and only one of whom had sat on the bench for *Rookes v. Barnard*.

the law in England as being settled. He listed all the criticisms at great length and stated: "Their lordships do not find it necessary to record an opinion in regard to all these contentions. They might arise for consideration in some future case in England."[45] He then stated that the different, Australian view was not based on "faulty reasoning" or "misconceptions"[46]. Finally, he said: "There are doubtless advantages if, within those parts of the Commonwealth (or indeed of the English speaking world) where the law is built on common foundations, development proceeds along common lines; but development may gain its impetus from any one, and not from one only, of those parts. The law may be influenced from any one direction."[47] Little imagination is required here to detect a suggestion that Australian rejection of *Rookes v. Barnard*[43] might cause some rethinking at a later date by the House of Lords.

As a result of the articles written about Mr. Uren, it would seem that two sections of Australian law have been clarified. First, the law on exemplary damages is settled—they should be awarded where a defendant shows contumelious disregard for the rights of the plaintiff; and second, that Australian courts should follow clear principles of law set down by the High Court even where there is a contrary decision by the House of Lords and that decision has not been expressly disapproved by the High Court.

There would seem to be some grounds for arguing that exemplary damages are an anomaly and should be abandoned. But the law is sufficiently settled that only the legislature could bring about such a major change. While exemplary damages continue, however, the restrictions imposed by the House of Lords in *Rookes v. Barnard*[48] would appear to create far more problems than they solve — and there would seem to be a real possibility that the House of Lords may at some later date reconsider its views on this matter.

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45. *Australian Consolidated Press v. Uren, op. cit.* at p. 1356 and p. 536.
46. *Ibid*, p. 1358 and p. 538.
47. *Ibid* at p. 1356 and p. 536.
48. (1964) A.C. 1129; (1964) 1 All E.R. 367.

THE QUEEN v. SCOTT[1]

Criminal Law — Escape — Necessity for Concurrence of Act and Intention — Automatism — Ryan and Walker Considered.

The Victorian Supreme Court recently had occasion to consider an argument that one would have thought had been left behind in the development of the Criminal Law. They rejected a submission by the Crown that essentially amounted to a rejection of the necessity for the concurrence of act and intention as the basis of criminal liability.

[1] (1967) V.R. 276; Supreme Court of Victoria, Barry, Smith and Gillard JJ.