Case will help to clarify the issues involved. It is also definitely established that specific performance of a promise to pay a third party may be obtained at the suit of the promisee of least in some circumstances, and that a contract to pay money may be specifically enforced.

W. J. TEARLE, Case Editor—Third Year Student.

STARE DECISIS, JUDICIAL POLICY AND PUNITIVE DAMAGES

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

In *Australian Consolidated Press Limited* v. *Uren*[2] three important questions came before the Privy Council. These concerned the extent of the prerogative of justice, and in particular the jurisdiction of the Privy Council to entertain an appeal not against the formal order of the court below, but against the reasons upon which the order was based; the authority in Australia of English decisions, and in particular decisions of the House of Lords; and the place of punitive or exemplary damages in the law of tort.

Uren, a Member of the House of Representatives, brought actions against John Fairfax & Sons Pty. Limited and Australian Consolidated Press Limited, claiming that he had been defamed by articles in the *Sun-Herald* and the *Sunday Telegraph* which suggested that he was a "dupe" of "the Russian Spy, Ivan Skripov", who had "inspired (Uren and others) to ask searching questions in Parliament unsuspectingly, on secret defence establishments in Australia".[3] In the *Australian Consolidated Press Case* there were further counts concerning other allegedly defamatory publications in the *Daily Telegraph* and *The Bulletin*.

In each case the jury awarded the plaintiff very substantial damages. In the *Fairfax Case* the judge directed the jury that it was open to them to award punitive damages in addition to damages intended as compensation, and that in this connection they should consider in particular whether the defamatory material was published with a reckless disregard of the plaintiff's rights and with a view to increasing sales, circulation and profits.[4] In the *Australian Consolidated Press Case* also the jury were directed that they could if they saw fit award punitive damages, and that it would be proper for them to do so if they found that the defendant had acted maliciously or in "contumelious disregard for the rights of the plaintiff".[5]

Each case directly raised the question whether a court in New South Wales should follow observations of members of the High Court, in a series of cases,[6] on the place of punitive damages in tort, or the recent decision of the House of Lords in *Rookes* v. *Barnard*.[4] If the former, it was arguable that the directions in both cases were, on the evidence, correct. If the latter, both directions were clearly wrong, for in *Rookes* v. *Barnard*[7] Lord Devlin,

[1] (1966) 40 A.L.J.R. 124.
[2] (1966) 40 A.L.J.R. 142 (High Court); (1967) 41 A.L.J.R. 66 (Privy Council).
[3] Quoted by McTiernan, J. in the *Fairfax Case supra* at 125.
[4] Quoted by Herron, C.J. in the Full Court: (1965) N.S.W.R. 202 at 210.
[5] Quoted by Walsh, J. in the Full Court: (1965) N.S.W.R. 371 at 392.
[6] Cited and discussed *infra* 13.
[7] (1964) A.C. 1129.

with the concurrence of all the other Lords of Appeal taking part in the decision, had held that punitive damages could be awarded only in three types of case:[8]

(1) Cases of "oppressive, arbitrary or unconstitutional action by servants of the government",
(2) cases "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 planitiff", and
(3) cases in which the awarding of punitive damages is authorised by statute.

Both John Fairfax & Sons Pty. Limited and Australian Consolidated Press Limited appealed to the Full Court, arguing that *Rookes* v. *Barnard* should be followed and that therefore the trial judges' directions to the juries could not be supported. In each case the Full Court held that there should be a new trial limited to the issue of damages: Herron, C.J.[9] and Walsh, J.[10] on the ground that *Rookes* v. *Barnard* should be followed, and Wallace, J.[11] on the ground that although the decisions of the High Court should be followed, and not *Rookes* v. *Barnard*, even on that basis neither case was one in which an award of punitive damages could be justified, and accordingly the issue should not have been left to the juries.

The *Australian Consolidated Press Case* was further complicated by the fact that the appellant claimed that, largely owing to the conduct of counsel for the plaintiff, the trial of the action had so far miscarried that there should be a new trial generally. This contention was by majority overruled (Herron, C.J. and Wallace, J.; Walsh, J. dissenting).

In the *Fairfax Case* the plaintiff appealed to the High Court[12] seeking the restoration of the jury's verdict on the ground that *Rookes* v. *Barnard* should not be followed, and that in any event the case was one in which a jury might properly award punitive damages. The High Court held unanimously that *Rookes* v. *Barnard*, so far as it dealt with punitive damages, should not be followed in Australia, and by majority (Taylor, Windeyer and Owen, JJ.; McTiernan and Menzies, JJ. dissenting) that even so the case was not one justifying an award of punitive damages. The appeal was therefore dismissed; and from that decision there has been no further appeal.

In the *Australian Consolidated Press Case*[13] the defendant appealed seeking a new trial on all the issues, which the High Court by majority granted (Taylor, Menzies, Windeyer and Owen, JJ.; McTiernan, J. dissenting). The plaintiff cross-appealed seeking the restoration of the verdict; the cross appeal was dismissed. The Court again held unanimously that its own earlier decisions should be followed in Australia, and that *Rookes* v. *Barnard* should not. A decision on the proper test to be applied in a case where punitive damages are claimed was not, however, necessary to the decision either of the appeal or of the cross appeal; their Honours held that the whole course of the trial was so unsatisfactory that there must be a new trial generally.

The defendant had therefore in the result obtained the order which it had sought, but it was dissatisfied with the Court's ruling as to punitive damages. It petitioned for special leave to appeal to the Privy Council "from so much of the decision of the High Court of Australia delivered on 2nd June, 1966, on the plaintiff's cross appeal as held that *Rookes* v. *Barnard* was wrongly

[8] *Id.* at 1226.
[9] *Fairfax* (1965) N.S.W.R. 202 at 204 ff. *Consolidated Press* (1965) N.S.W.R. 371 at 372 ff.
[10] *Fairfax supra* at 221 ff. *Consolidated Press supra* at 377 ff.
[11] *Fairfax supra* at 230 ff. *Consolidated Press supra* at 397 ff.
[12] (1966) 40 A.L.J.R. 124.
[13] (1966) 40 A.L.J.R. 142.

decided".[14] The appellant having at the Board's suggestion amended the prayer of its petition so that it related to "so much of the decision of the High Court . . . as determined as a matter of law that it was competent to award punitive damages in the case",[15] the Privy Council recommended that special leave should be granted.

The Extent of the Prerogative of Justice, and the Decision to Grant Special Leave

The appeal to the Privy Council was dismissed, and the order made by the High Court was therefore affirmed. But had the appeal been allowed, the resulting Order-in-Council must have been the same: that the High Court's order, that there should be a new trial generally, should stand. Thus, although their Lordships' answer to the question to be decided would undoubtedly in fact affect the course of the new trial, the question to be decided was in a sense a hypothetical one, and it was argued on this basis that the Privy Council had no jurisdiction. This argument seems to have been based mainly on s. 3 of the Judicial Committee Act, 1833, which reads:

> All appeals or complaints in the nature of appeals whatever, which either by virtue of this Act, or of any law, statute or custom, may be brought before His Majesty or His Majesty in Council from or in respect of the determination, sentence, rule or order of any Court, judge or judicial officer, and all such appeals as are now pending and unheard, shall from and after the passing of this Act be referred by His Majesty to the said Judicial Committee of the Privy Council, and that such appeals, causes and matters shall be heard by the said Judicial Committee, and a report or recommendation thereon shall be made to His Majesty in Council for his decision thereon as heretofore, in the same manner and form as has been heretofore the custom with respect to matters referred by His Majesty to the whole of the Privy Council or a committee thereof (the nature of such report or recommendation being always stated in open Court).

Their Lordships held[16] that the scope of the words "determination, sentence, rule or order", though no doubt wide, was for present purposes irrelevant: the purpose of the section was not to determine what classes of appeal could be dealt with by the Sovereign, but to provide merely that those appeals which he might entertain were to be dealt with in a certain way.

Their Lordships held also, though without detailed discussion of the point, that special leave had been granted "under the ample powers of the prerogative";[17] this proposition is supported by a reference to *R.* v. *Bertrand*[18] in which the Privy Council spoke of "the inherent prerogative right, and on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, as far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally".

This passage, it is submitted, in fact gives little support to the proposition

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[14] (1967) 41 A.L.J.R. 66 at 69. One would have thought, with respect, that the "decision" was that, as there must be a new trial generally, the cross appeal, seeking the restoration of the verdict, must be dismissed.

[15] *Ibid.* It is difficult to see the point of this amendment. The High Court did not, and could not, decide that punitive damages could be awarded, as there was to be a new trial at which the evidence might differ from that given at the first trial. Despite the amendment, the formal result, had the appeal been allowed, must still have been the same: that the order appealed from—a general new trial—should stand. In fact the Board seems to have dealt with the appeal as if the amendment had not been made. See at 70-71.

[16] At 70.

[17] *Ibid.*

[18] (1867) L.R. 1 P.C. 250.

for which it is cited as authority. The phrase "an appellate jurisdiction" begs the question, for how is that phrase to be defined? In any event, *R.* v. *Bertrand* was itself hardly a case in which the Privy Council was asked to determine an abstract point of law. The New South Wales Supreme Court had granted a rule absolute for a new trial in a case of felony. The Privy Council was asked to reverse this order, and in fact it did so. The case involved important points of procedure in criminal cases. For this reason their Lordships overcame their usual reluctance to interfere in criminal matters, and exercised an appellate jurisdiction with a view not only to correcting the errors made below in the case before them but also to preserving "the due course of procedure generally". This is the point to which the passage cited is directed.

In fact there appears to be surprisingly little authority dealing with the extent of the prerogative of justice, and the jurisdiction of the Privy Council to entertain cases such as *Uren's*. It is suggested, however, that an argument could have been advanced to the effect that the prerogative of justice is concerned with determining the immediate rights of parties to a dispute—redressing grievances—and not abstract points of law which only indirectly affect those rights. The very ancient case of *Magoons and Premanee* v. *Dumaresque*[19] seems to be taken by Chitty[20] to be authority for some such proposition. *Nadan* v. *The King*[21] might perhaps also have been cited. Certainly the authority is extremely slender, and this point does not seem to have been argued before the Board in *Uren*. In any event, it is not dealt with in the judgment.

It was argued for the respondent that even if there was jurisdiction, the appeal should not be entertained, as a matter of discretion, in view of earlier cases[22] in which the Privy Council had refused to entertain appeals on purely hypothetical questions. The cases in which this has happened are, however, clearly distinguishable. In *R.* v. *Louw* the point of law on which leave to appeal was sought did not in fact arise on the facts of the case, and their Lordships held:

> It would be extremely inconvenient, and wholly unprecedented, to pick out of a trial some observation of the learned judges and to ask to have an appeal upon it, although the facts at the trial and the determination of the trial did not raise the question at all.[23]

This obviously could not be said of the question of the availability of punitive damages in *Uren's Case*. In *Attorney-General for Ontario* v. *The Hamilton Street Railway Company*[24] the question was whether the Board should decide some purely hypothetical questions of statutory interpretation, and it was held that it should not.

Their Lordships in *Uren's Case* distinguish[25] these two cases on the ground that the question of the availability of punitive damages was raised by the facts of the case, and its determination would have a substantial effect upon the outcome of the new trial.

Nevertheless the appeal from the High Court's reasons rather than its order was a most unusual proceeding, and at variance with the ordinary conception of an appeal as "the formal proceeding by which an unsuccessful party seeks to have the formal order of a court set aside or varied by an appellate

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[19] Ld. Raym. 1448.
[20] *Prerogatives of the Crown* (1820) at 29.
[21] (1926) A.C. 482 at 491.
[22] *R.* v. *Louw* (1904) A.C. 412. *Attorney-General for Ontario* v. *The Hamilton Street Railway Company* (1903) A.C. 524.
[23] *Supra* at 414.
[24] *Supra.*
[25] *Supra* at 70.

court".[26] Their Lordships suggest that it is not a precedent which will lightly or often be followed: "In circumstances which are somewhat special and are not often likely to arise their Lordships held therefore that they had jurisdiction to hear the limited matter referred to them."[27]

The Authority in Australia of Decisions of the House of Lords

In *Robins* v. *National Trust Co.*[28] Viscount Dunedin said that "It (the House of Lords) is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it."[29] In *Skelton* v. *Collins*[30] Windeyer, J. said: "This proposition is not true for the Commonwealth of Australia."[31]

The proposition has never in fact been accepted by the High Court as true for the Commonwealth of Australia. In *Webb* v. *Federal Commissioner of Taxation*[32] Isaacs, J. said[33] that although as a matter of judicial practice the High Court should follow decisions of the House of Lords, it was not technically bound to do so. In *Houston* v. *Stone*[34] the Supreme Court of New South Wales held[35] that where decisions of the High Court and of the House of Lords conflicted, the Supreme Court should follow the High Court, by whose decisions it was bound, and not the House of Lords, by whose decisions, technically, it was not. But in *Piro* v. *W. Foster & Company Limited*[36] the High Court decided that although it was not bound by decisions of the House of Lords, it would in fact always follow a decision of the House of Lords on a question of general legal principle, even where there was previous High Court authority to the contrary; and State courts were directed that they also in such circumstances should follow the House of Lords rather than the High Court.[37]

In *Parker* v. *R.*,[38] however, the High Court departed from the policy laid down in *Piro's Case*.[39] It refused to follow the recent decision of the House of Lords in *Director of Public Prosecutions* v. *Smith*[40] because in that case propositions had been laid down which, in the view of the High Court, were "misconceived and wrong". The High Court held that *Smith's Case* should not be treated as authority in Australia at all. It was not immediately clear, however, whether this pronouncement was intended as a complete reversal of the rule laid down in *Piro's Case* or merely as an isolated departure from that rule, particularly in view of the numerous cases in which the desirability of preserving the unity of the common law had been stressed.[41]

These doubts were resolved by the case of *Skelton* v. *Collins*,[42] in which the High Court refused to follow the majority decision of the House of Lords

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[26] *Commonwealth of Australia* v. *Bank of New South Wales* (1950) A.C. 235 at 294. It is true that in the *Bank Case* Lord Porter was construing s. 74 of the Constitution. But he made it clear that he was giving the word "appeal" in that section its general law meaning.

[27] At 70.

[28] (1927) A.C. 515.

[29] *Id.* at 519.

[30] (1966) A.L.R. 449.

[31] *Id.* at 478.

[32] (1922) 30 C.L.R. 450.

[33] *Id.* at 469.

[34] (1943) 43 S.R. (N.S.W.) 118.

[35] *Id. per* Jordan, C.J. at 123.

[36] (1943) 68 C.L.R. 313.

[37] *Per* Latham, C.J. at 320; Rich, J. at 326; McTiernan, J. at 335-6; Williams, J. at 342.

[38] (1963) 111 C.L.R. 610.

[39] *Supra.*

[40] (1961) A.C. 290.

[41] E.g., *Waghorn* v. *Waghorn* (1942) 65 C.L.R. 289; *Commissioner for Stamp Duties* v. *Pearse* (1953) 89 C.L.R. 51; and see *per* Walsh, J. in *Fairfax supra* at 224-5.

[42] *Supra.*

in *H. West & Son Ltd.* v. *Shephard*.[43] Kitto, J. said:

> The position of this Court in relation to decisions of the House of Lords does not seem to me to need clarification. The Court is not, in a strict sense, bound by such decisions, but it has always recognised their peculiarly high persuasive value. Moreover the reasoning of any judgment delivered in their Lordships' House, whether dissenting or concurring, commands and must always command our most respectful attention. The Court is, of course, bound by directly apposite decisions of the Privy Council. Other courts in Australia are bound by decisions of the Privy Council, and, subject to that, are bound by decisions of this Court. I should perhaps add, though it has become obvious enough in recent years, that nothing in the judgments in *Piro* v. *W. Foster & Co. Ltd.* (1943) 68 C.L.R. 313, can have the effect of a general charter to Australian courts to act upon an assumption that this Court will treat itself as if technically bound by decisions of the House of Lords, or should be treated as having in any degree diminished the binding force of decisions of this Court.[44]

Owen, J., with whose opinion on this point Taylor, J.[45] and Windeyer, J.[46] agreed, laid down the following propositions:[47]

1. If the High Court comes to the firm conclusion that a decision of the House of Lords is wrong, it should act in accordance with its own views.
2. Where there is a clear conflict between a decision of the House of Lords and a decision of the High Court, other courts in Australia should follow the High Court.
3. Where there is no High Court decision in point, but there is a decision of the House of Lords, other Australian courts "will no doubt" follow that decision.

Windeyer, J. added that the correctness of a decision of the House of Lords was a matter for the High Court to consider for itself, especially "if the decision in England was reached after reference only to English decisions, not to the state of the law elsewhere, and seemingly to meet only economic and social conditions prevailing in England. And, too, what is said is less persuasive when law is, as it were fluid and when the conditions which it is being developed to meet are not the same in England and Australia. The law of damages, especially damages for personal injuries, is of that kind".[48]

This reasoning was followed by the High Court in the *Uren Cases*, and the judgment of the Privy Council, though surprisingly[49] it cites none of the authorities on this point, clearly recognises the High Court's right to take this course. It expressly recognises[50] that the uniformity of the common law, though important in matters of international trade, is by no means the supreme consideration, and that the development of the law may be influenced from "any one direction".

> In matters which may considerably be of domestic or internal significance the need for uniformity is not compelling. Furthermore a decision on such a question as to whether there may be a punitive element in an assessment of damages for libel must be affected by the fact, if fact it be, that in a particular country the law is well settled.[51]

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[43] (1964) A.C. 326.
[44] *Skelton* v. *Collins supra* at 457.
[45] *Id.* at 470.
[46] *Id.* at 478.
[47] *Id.* at 481-2.
[48] *Id.* at 479.
[49] Although this perhaps is no longer unusual: in *Frazer* v. *Walker* (1967) 2 W.L.R. 411, *Clements* v. *Ellis* (1934) 51 C.L.R. 217 is not mentioned.
[50] *Supra* at 73.
[51] *Ibid.*

If the development of the law in Australia had been founded upon faulty reasoning, "or had it been founded upon misconceptions, it would have been necessary to change it".[52] But as this was not the case, the High Court was entitled to follow its own prior decisions and to reject *Rookes* v. *Barnard*.

This part of the judgment is at least as important for what it implies as for what it expressly states. It impliedly sanctions the rules of precedent formulated in *Skelton* v. *Collins*[53] and applied by the High Court in the *Uren Cases*. It recognises that a question of common law may properly be resolved in one way in one jurisdiction, and otherwise in other jurisdictions; and it is interesting that *Rookes* v. *Barnard* has been accepted and applied in New Zealand[54] and in Alberta.[55]

It must follow that a decision of the Privy Council in a case from Ceylon or from New Zealand is not strictly binding upon Australian courts. Thus at least one controversy is resolved, and Australian courts are not only free, but presumably are bound, to follow *Radaich* v. *Smith*[56] and not *Isaac* v. *Hotel de Paris Ltd.*[57]

Also interesting is the apparent change in the Board's conception of its role as an appellate tribunal. After all, the question to be decided in *Uren's Case* was no more a mere matter of "domestic or internal significance" than the question relating to occupiers' liability that arose in *Quinlan's Case*.[58] The common law rules as to the liability of occupiers of land are of little relevance in England and in most other jurisdictions, where the position is largely covered by statute. The point was covered by reasoned decisions of the High Court.[59] But the Privy Council in that case had no hesitation, while accepting the actual decisions of the High Court, in rejecting the reasoning upon which they were based. This is, it is submitted, a far cry from the attitude taken in *Uren's Case* that the question was one of judicial policy for the High Court to decide and one in which the Board would not therefore interfere.

It is apparent that if this attitude is consistently maintained an appeal to the Privy Council may soon become generally a pointless exercise.[60] It seems unlikely that so sudden and so complete an abdication was intended. In the meantime, practitioners will probably not find it easy to advise clients who are considering a Privy Council appeal. It is to be hoped that it will soon be made clear whether *Uren's Case* is an aberration, the beginning of a new era,[61] or something in between.

Punitive Damages

The effect of the Privy Council's decision is to affirm the law stated by the High Court in the *Fairfax Case*. Their Lordships refused to hold that "the High Court were in error in choosing to re-affirm Australian law as they held it to be rather than to adopt the view proclaimed by the House of Lords in *Rookes* v. *Barnard*".[62] A number of Australian cases is cited by their Lordships,

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[52] The frequent reference in this case to courts "changing" the law is another of its interesting aspects.

[53] *Supra*.

[54] *Truth (N.Z.) Limited* v. *Bowles* (1966) N.Z.L.R. 303, a decision of the Court of Appeal: North, P. (a member of the Board in *Uren's Case*), Turner and McCarthy, JJ.

[55] *Wasson* v. *California Standard Co.* (1965) 47 D.L.R. (2d) 71.

[56] (1959) 101 C.L.R. 209.

[57] (1960) 1 All E.R. 348.

[58] *Commissioner for Railways* v. *Quinlan* (1964) A.C. 1054.

[59] *Thompson* v. *Bankstown Corporation* (1952) 87 C.L.R. 619. *Rich* v. *Commissioner for Railways* (1959) 101 C.L.R. 135. *Commissioner for Railways* v. *Cardy* (1960) 104 C.L.R. 274.

[60] As suggested in (1967) 41 *A.L.J.* 145 at 146.

[61] *Ibid.*

[62] *Supra* at 72.

the effect of which is that "in cases of tort marked by conscious wrongdoing in contumelious disregard of another's rights it would be permissible in law for damages to include an element described broadly as being exemplary or punitive".[63]

The Australian cases cited are *Whitfield* v. *De Lauret & Co. Ltd.*,[64] *Herald and Weekly Times Ltd.* v. *McGregor*,[65] *Smith's Newspapers Ltd.* v. *Becker*,[66] *Triggell* v. *Pheeney*,[67] *Williams* v. *Hursey*,[68] and *Fontin* v. *Katapodis*.[69] It is true that all these cases "proceeded on the basis"[70] that punitive damages could be awarded in cases of tort outside the narrow categories laid down by Lord Devlin, and were available broadly in any case where it could be shown that the defendant had acted maliciously or in contumelious disregard of the plaintiff's rights.[71] It could not be said, though, that any one of these cases amounts to a reasoned consideration of the place of punitive damages in the law of tort. In none of them was this a major issue, and the judgments deal with it in a few lines.

Certainly in none of these cases is the question discussed from the point of view of the "policy of the law" at all; for example, whether the law of tort should ever punish in addition to compensating, whether a defendant should ever run the risk of punishment without the benefit of the procedural safeguards of the criminal law, whether punishment should ever take the form of a windfall to a plaintiff, or whether, on the other hand, a power to award punitive damages is necessary to maintain the strength and effectiveness of the law of tort,[72] are questions that are not considered. Nor are they considered in great detail in *Rookes* v. *Barnard* or in the *Uren Cases*. Lord Devlin would limit the power to award punitive damages because in his opinion the purpose of the law of tort is compensation, not punishment,[73] but he recognises that the "exemplary principle" is too deeply rooted to be eradicated altogether and that in some cases punitive damages can serve a useful purpose in maintaining the strength of the law:[74] an argument relied on also by Menzies, J.[75] Windeyer, J. points out that in fact fault has been at least as important as compensation in the development of the law of tort,[76] and that in any case to eliminate "punitive" damages and award only compensatory damages "aggravated" by the defendant's motives is not to eradicate the exemplary principle but merely to disguise it.[77]

It is not surprising that these "policy" questions were not further discussed. The exemplary principle was firmly established by authority,[78] and the question was not whether it should be abolished, but what scope it should be allowed to have, or as Menzies, J. put it,[79] where the line should be drawn. The discussion of "policy" in the *Uren Cases*, therefore, centred around a comparison between the line drawn in *Rookes* v. *Barnard* and the line previously

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[63] *Id.* at 71.
[64] (1920) 29 C.L.R. 71.
[65] (1928) 41 C.L.R. 254.
[66] (1932) 47 C.L.R. 279.
[67] (1951) 82 C.L.R. 497.
[68] (1959) 103 C.L.R. 30.
[69] (1962) 108 C.L.R. 177.
[70] (1967) 41 A.L.J.R. at 71.
[71] It is clear also, of course, that before *Rookes* v. *Barnard* this view was also generally accepted in England. See *E. Hutton & Co.* v. *Jones* (1910) A.C. 20 at 24-5; *Loudon* v. *Ryder* (1953) 2 Q.B. 202.
[72] For a summary of the arguments *pro* and *contra* see Street, *Principles of the Law of Damages* (1962) at 34-6.
[73] *Rookes* v. *Barnard supra* at 1221.
[74] *Id.* at 1223, 1225-6.
[75] *Supra* at 136.
[76] *Id.* at 137.
[77] *Id.* at 138.
[78] See *Rookes* v. *Barnard supra* at 1225-6.
[79] *Supra* at 136.

drawn in Australia, and the justification of the latter by authority and in principle.[80] The position as it now stands in Australia can, it is suggested, be summarised in the following propositions:

1. The issue of punitive damages should not be left to the jury unless there is evidence upon which a reasonable jury could find that, according to the test laid down in the cases prior to *Rookes* v. *Barnard*, such an award should be made. There must be evidence of positive misconduct.[81]

2. A jury is entitled to award the plaintiff punitive damages when there is evidence that the defendant acted with the utmost degree of malice, high-handedly, vindictively or with a contumelious disregard for the plaintiff's rights.[82]

3. A distinction, not always clearly observed in the past,[83] should be drawn between punitive or exemplary damages and aggravated compensatory damages. Punitive damages are awarded not to compensate the plaintiff for loss or injury, but to punish the defendant, or make an example of him, for misconduct; aggravated damages are intended to compensate the plaintiff for the additional injury caused to his feelings by the fact that the defendant has acted maliciously or recklessly. This distinction was stressed by Lord Devlin,[84] and a majority at least of the High Court accepted it, though not without scepticism as far as libel cases are concerned, in the *Fairfax Case*.[85]

Given that the notion of fault is too deeply embedded to be removed root and branch,[86] the approach of the High Court is, it is submitted, sounder in principle and considerably less anomalous in result than the approach of the House of Lords. It is difficult to see why malicious wrongdoing by a servant of the government is more reprehensible than malicious wrongdoing by anyone else, and in any case "servants of the government" requires definition.[87] It is equally difficult to see why the law should look with greater disfavour "on wrongs committed with a profit-making motive than upon wrongs committed with the utmost degree of malice or vindictively, arrogantly or high-handedly, with a contumelious disregard for the plaintiff's rights".[88] Menzies, J. stresses the value that punitive damages can have in curbing "the malice and arrogance of some defamatory publications."[89] Windeyer, J. expresses what seems, with respect, well justified scepticism concerning the notion, in cases of defamation, of aggravated damages free from any element of punishment and any consideration of the deserts of the defendant, and concerning the justification of that notion in terms of the greater hurt suffered by the plaintiff when a defamatory publication is made with malice than when it is not.[90] One would expect that the degree of hurt suffered would depend far more upon factors such as the gravity of the libel and the extent of its dissemination than upon the motives of the defendant.

The main difficulty with the High Court's approach seems to be that it will probably give rise to much uncertainty and many appeals in libel actions, and indeed in any case of tort in which the plaintiff asks for an award of punitive damages. A judge who has to decide whether there is evidence justifying a direction to the jury that they may, if they see fit, award punitive

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[80] *Id. per* Taylor, J. at 129 ff.; Owen, J. at 140 ff.
[81] *Id. per* Taylor, J. at 128; Windeyer, J. at 139; Owen, J. at 140.
[82] *Id. per* McTiernan, J. at 127; Taylor, J. at 132; Menzies, J. at 136; Windeyer, J. at 139; Owen, J. at 141-2.
[83] See *Herald & Weekly Times* v. *McGregor supra* at 362-3.
[84] *Rookes* v. *Barnard supra* at 1221 and 1229-30.
[85] *Supra per* Taylor, J. at 129; Windeyer, J. at 137-8; Owen, J. at 140.
[86] *Id. per* Windeyer, J. at 136-8.
[87] As, especially in a federation, does "unconstitutional"; see *per* Taylor, J. *id.* at 130-1.
[88] *Id.* at 132.
[89] *Id.* at 136.
[90] *Id.* at 137-8.

damages, is not faced with an easy task.

How difficult in fact the task can be is well illustrated by the different views taken by the Justices of the High Court on the facts of the *Australian Consolidated Press Case*. They all agreed that there was nothing meriting punishment in the libels alleged in the first two counts. But on the third and fourth counts, which concerned the allegation that the plaintiff was a "dupe" of Ivan Skripov, McTiernan[91] and Menzies,[92] JJ. held that the evidence justified an award of punitive damages; Windeyer, J.[93] held that it did not; Taylor, J.[94] was disposed to think that it did not; and Owen, J. [95] "felt some doubt" about it, but found it unnecessary to decide. In view of the unanimity as to the applicable law, such disagreement as to its application to the facts of the case surely justifies the expectation that the number of appeals in libel actions will not diminish. It may well be that plaintiffs will find it wise, except in the clearest cases, not to ask for punitive damages, but to seek instead aggravated compensatory damages; and it may well make very little difference to the size of the verdicts obtained.[96]

Uren's Case has resolved two areas of uncertainty: the authority in Australia of English decisions, and in particular the attitude to be taken by an Australian court faced with inconsistent English and Australian decisions; and the law to be applied in considering a claim for punitive damages in a case of tort. But by its method of resolving these questions, the Privy Council has, it is suggested, created a new area of uncertainty: the attitude that the Privy Council will in future adopt to Australian appeals, especially to appeals in which a decision of the High Court is challenged. It is to be hoped that this uncertainty will quickly be dispelled.

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LOCUS STANDI TO CHALLENGE DECISIONS AND RULES OF DOMESTIC BODIES

NAGLE v. *FEILDEN*

There has been a gradual trend in administrative law towards loosening the requirements for *locus standi* which must be established by a plaintiff claiming equitable relief where he is affected by the decision of a domestic tribunal. Initially, the courts would not intervene in this type of situation unless the plaintiff's proprietary rights were affected (for example, by an invalid expulsion), and this was later extended to situations where the plaintiff could point simply to his contractual relations with the other members of the domestic body, and show his livelihood was interfered with by the body's decision. Now it appears, in England at least, that a plaintiff may be granted equitable relief by way of declaration and/or injunction where no such contractual relationship exists, provided that his right to earn his livelihood is substantially affected by the decision of the domestic tribunal. This proposition

[91] *Supra* at 143.
[92] *Id.* at 145.
[93] *Id.* at 152.
[94] *Id.* at 143.
[95] *Id.* at 154.
[96] See *per* Windeyer, J. in the *Fairfax Case supra* at 138.