J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 33 of 1971

BEFORE: The Hon. Mr. Justice Luckhoo, Ag. P. (Presiding)
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Graham-Perkins, J.A.

BETWEEN - BRINKMAN DOUGLAS - APPELLANT

AND - MARJORIE BOWEN - RESPONDENT

H. G. Edwards, Q.C. and R. Taylor for the appellant.

Dr. L.G. Barnett and Hugh Small for the respondent.

March 25 - 29, April 2,3,
& July 31, 1974

LUCKHOO, Ag. P.:

In the month of October, 1969 the respondent Marjorie Bowen was unlawfully evicted by the appellant Brinkman Douglas from a building situate at 67 Constant Spring Road in the parish of St. Andrew in which she operated the business of a night club - the Q.C. Club - and resided with her family. At the time of her eviction she was in occupation of those premises as a monthly tenant under an oral agreement entered into by her as tenant and the appellant as landlord on July 17, 1967. As a result of the manner of her eviction she suffered the loss of or damage to a number of her personal belongings and articles used in connection with her business as well as loss of business. She sued the appellant for damages for (a) loss of the use and enjoyment of the house; (b) trespass to goods. The appellant did not seek to deny liability. The matter therefore came before Rowe, J. sitting

without a jury on the issue of damages only. The respondent asked for an award of special, compensatory and exemplary damages. Rowe, J. awarded the sums of $9,801.50 as special damages and $12,500 as general damages, the latter comprising $5,000 as compensatory damages and $7,500 as exemplary or punitive damages. The appellant seeks to have the award of compensatory damages reduced as being much too great. He seeks to have the award of exemplary damages set aside on the ground that this is not a case for the award of exemplary damages; alternatively, to have the award under this head reduced as being much too great.

The evidence adduced before Rowe, J. disclosed that the appellant was at all material times the owner of premises known as 67 Constant Spring Road. On a part of those premises stood a dwelling house and on the remaining part stood a Block Factory owned and operated by the appellant. That part of the premises upon which the dwelling house stood was separated from the remainder of the premises by a dividing wall and indeed there were separate titles for the two parts of the premises. On July 17, 1967 the appellant let the dwelling house to the respondent for the purpose of her carrying on therein the business of a night club - a cocktail lounge and restaurant - with the respondent and some members of her family residing in the building. The rental was agreed at £40 per month. Later on the rental was by agreement increased to £50 per month. The amount fixed as rent included payment for the provision of water and electricity by the appellant. With the approval of the appellant the respondent made certain structural alterations and additions to the building for the better conduct of the business. This included the construction of a terrace surrounded by a wall at the front of the building. The building thus converted was tastefully furnished and carpeted. The respondent's business

attracted a clientele which included professional men and it was not inappropriately named "Q.C. Club". The respondent and one of her children resided in one of the rooms in the club building. Three of her children and the manager of the club resided in an outbuilding on the premises which she caused to be furnished. In December, 1967 the respondent commenced operation of the night club. Everything seems to have gone without untoward incident until the respondent failed to pay the rent due on September 17, 1969. The respondent had been briefly absent from the premises in September, 1969. On her return she found that the electricity supply had been cut off. The rent was paid on September 20, 1969. In accepting the rent in arrear the appellant on that same day gave notice to the respondent to quit and deliver the premises by October 16, 1969. That notice was invalid as having been made for a lesser period than the rental month. On October 17, 1969, the appellant caused a bulldozer to enter the demised premises and to demolish the terrace and wall and the fence facing Constant Spring Road. A plastic sign bearing the club's name lit by fluorescent lights and mounted on a metal post was down. A piano which stood on the terrace - the terrace was used for dancing and was equipped with a bar - was found by the respondent on its side. The respondent was not present when this operation took place as she had gone to a hospital for post operation treatment. Having spent eight days in hospital she had returned but ten days before this bulldozing incident took place. Quite understandably she was most upset when she saw what had occurred and she made a report to the police. As a result Police Inspector Hart telephoned the appellant and told him of the report. The appellant's response was that he wanted his place. Inspector Hart advised him as to the proper procedure to be adopted for securing possession of the premises. The appellant told Inspector Hart that he did not agree with his advice.

Inspector Hart advised him to check with his lawyer before he did anything more. On the following day two men came and chopped down the hedge which was near to the gate of the demised premises. Both the electricity and water supplies were cut off and it was impossible for the respondent to carry on her business. The respondent locked up the club and put two men to watch the premises. She then went to stay at her sister's house.

The appellant took no further steps for a week to indicate that he would renew his assault on the demised premises. Then on Friday October 24, 1969, the appellant came to the premises. He caused the respondent's furniture to be removed. When the respondent saw what was happening she went to Half Way Tree Police Station and made a report to Inspector Hart. Again Inspector Hart telephoned the appellant and told him of the respondent's report. The appellant remained silent. Woman police constable Williams was sent with the respondent to the premises where she spoke with the appellant about his causing the respondent's belongings to be put outside of the building. His reply was that he had given the respondent notice to leave the premises on October 16, and that up to that time (October 24) she had refused to leave. The demolition continued. It rained heavily and as a result the respondent's belongings including her furniture suffered considerable damage. The bulldozing of the main building proceeded and later the out-building was demolished. Two days after the bulldozing commenced the respondent returned and removed those articles which could be salvaged.

In the meanwhile as was to be expected after the fence was demolished some articles were stolen from the premises. The appellant in the course of his testimony admitted that he caused the demised premises to be demolished in the way related above and said that his reason for so doing was that he wanted the premises. He admitted that he caused the water and electricity

supplies to be cut off. He further admitted that although he realised when he received a letter written by the respondent's solicitor that his actions were illegal he still pursued his illegal conduct and said that when he caused the destruction of the demised premises his state of mind was that he was prepared to pay for so doing though what the cost would be did not enter his mind. He denied that his actions were prompted by a desire to sell the premises and said that indeed up to the time of trial of the action nearly two years later the premises remained as it was after the demolition of the buildings had come to an end. Rowe, J. was of the view, in what he described as the exceptional circumstances of this case, the distress of the respondent must have been beyond that of ordinary human endurance. He found that the appellant knew that the notice to quit he gave the respondent was invalid and that he was made aware by Inspector Hart that his actions were illegal. He came to the conclusion that the appellant did not want his premises for any particular reason but that the appellant "in a high handed, oppressive, vindicative, wanton manner destroyed the plaintiff's means of livelihood, her house and that of her children." Rowe, J. was clearly horrified by the nature of the instrument used in the destruction of the premises for he described it as "the most cruel of destroyers the bulldozer." In making the award of $7,500 as exemplary or punitive damages he stated that this was " the most outrageous trespass, the most cold blooded disregard of anyone's rights, the most calculated misuse of personal power, the most cruel onslaught on a defenceless woman and her children without rhyme or reason that I have seen in these Courts," and that this was not a case of the poor or ignorant torn by passions acting impulsively and its recurrence must never be permitted at any time in this country.

It was not disputed that the respondent was entitled to an award of damages which would include (a) the special damages proved (b) compensatory damages for injury to the respondent's feelings including the mental distress to which she was subjected by reason of the appellant's conduct in evicting her from the demised premises. Although challenge was, by the amended ground of appeal filed, made to the quantum of damages awarded under each of these two heads it was not contended before us that the quantum awarded in respect of special damages should be disturbed. But in regard to the award of $5,000 under the head of compensatory damages for trespass to goods it was submitted that an amount of $500 or perhaps $1,000 would be nearer the mark as any inconvenience, distress or annoyance caused the respondent by reason of the appellant's acts were matters of a transient nature. This submission was sought to be supported by reference to the awards under this head made in the cases of Pereira v. Vandiyar (1953) 1 W.L.R. 672, Kenny v. Preen (1963) 1 Q.B. 499, and Mafo v. Adams (1970) 2 W.L.R. 72. In those cases the amounts of £25, £2 and £100 were awarded in respect of the cutting off of gas and electricity, threats and deceit respectively. One has only to state the facts of the instant case in order to realise how different in degree they are from the facts in those case, and consequently to appreciate the humiliation and mental distress that must have been caused the respondent in the instant case. I would not interfere with the award made by the learned trial judge under the head of compensatory damages.

Now as to the question of exemplary damages. Mr. Horace Edwards for the appellant submitted (i) that the principles of law governing the circumstances in which exemplary damages might be awarded in Jamiaca are the same as those which have authoritatively been stated in England by Lord Devlin in Rookes v. Barnard (1964) 1 All E.R. 367 and re-affirmed by the majority of the House of Lords in Cassell & Co. Ltd. v. Broome

(1972) 1 All E.R. 801; (ii) that the instant case did not fall within any of the categories of cases laid down in Rookes v. Barnard and that therefore the award of exemplary damages in the instant case was wrong; (iii) alternatively, if the instant case was one in which exemplary damages might be awarded the amount of $7,500 awarded under that head was far too high having regard to the circumstances of the case and ought to be reduced. On the other hand Dr. Barnett for the respondent submitted (i) that the principles of law governing the circumstances in which exemplary damages might be awarded in Jamaica are those which applied in England before the case of Rookes v. Barnard was decided as that case and indeed Cassell & Co. Ltd. v. Broome were in error in limiting the award of damages under this head to the categories of cases therein stated; (ii) that in England prior to the decision in the case of Rookes v. Barnard an award of exemplary damages might be made in the circumstances of the instant case, and that consequently an award under this head in the instant case might be made in Jamaica; (iii) that in the circumstances of the instant case the amount awarded Rowe, J. was not such that this Court should feel constrained to reduce it; (iv) that, if the Court took the view that an award of $7,500 under this head was excessive in relation to the respondent's claim for trespass to goods and loss of quiet enjoyment of the building from which she was evicted, that award can be supported were the respondent's claim amended to include a claim for damages in relation to trespass to land (being part of the demised premises) and that the respondent's writ of summons and statement of claim should be amended accordingly.

Decision on the respondent's motion that amendment to the writ of summons and statement of claim be made (should it become necessary so to do) was deferred. The motion was resisted on the part of the appellant.

It appears to be common ground that in Jamaica the award of damages as a remedy in all civil wrongs is as in England the creature of the common law. Jamaica being regarded as a settled colony would have inherited the English common law in this regard. However, as Lord Diplock observed in Cassell & Co. Ltd. v. Broome (1972) 1 All E.R. at p.871 -

> "Despite the unifying effect of that inheritance on the concept of man's legal duty to his neighbour, it does not follow that the development of the social norms in each of the inheritor countries has been identical or will become so."

That this observation is sound is exemplified by the opinion of the Judicial Committee of the Privy Council in Australian Consolidated Press Ltd. v. Uren (1969) A.C. 590 delivered by Lord Morris of Borth-Y-Gest. At p. 642 of the report of that case the following passage appears -

> "Their Lordships have expressed the view that it is not open to doubt that it was generally understood in Australia, in the years before Rookes v. Barnard was decided, that the awarding of exemplary damages in libel cases was not so circumscribed as to be permissible only within the limits of the categories defined in that case. Nor have their Lordships been able to accept that the law was laid down in Australia with imperfect appreciation of what it involved."

An at p. 646 -

> "The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon mis-conceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its

> policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in Rookes v. Barnard compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable."

It cannot, however, be said that in Jamaica the common law relating to the award of damages, inherited as it was from England in 1664, has been shown to have developed in any way different from the way it has in England. Indeed the researches of counsel failed to discover any reported authority in which an award of exemplary damages was made in Jamaica save the recent case of Granville Scott v. Winfield R.M.C.A. No. 31 of 1970 (unreported) decided by this Court on October 15, 1970. That case was considered to fall within Lord Devlin's first category of cases in which an award of exemplary damages might be made. It may be observed that in Trinidad and Tobago Lord Devlin's categorization has been accepted and applied without any detailed or critical analysis by that country's Court of Appeal in Marshall v. Semper (1966) 10 W.I.R. 129 (a case of assault, wrongful arrest and false imprisonment) and Valentine v. Rampersand (1970) 17 W.I.R. 12 (a case of harassment of a tenant) while in Barbados the question is yet to be resolved. In Australia, Canada and New Zealand Rookes v. Barnard has been considered and has not been adopted as stating the law applicable to those territories in respect of the principles upon which exemplary damages might be awarded. In deciding between the relative contentions put forward on behalf of the parties in the instant case it is essential to understand what Lord Devlin essayed to do in Rookes v. Barnard as well as his reasons therefor. Before embarking upon any examination in that regard it ought to be said that this Court is not bound to accept as

authoritatively settling the common law of Jamaica a decision of the House of Lords on a question relating to the common law of England at some point of time after Jamaica became a settled colony. Of course, whatever the House of Lords has pronounced in the past or may pronounce in the future on any such questions will always be regarded by the Court with the greatest respect. In this connection I would refer to what I said in Barbar v. R. (unreported) (R.M.C.A. No. 81 of 1972 decided by this Court on May 31, 1973) with respect to a decision of the House of Lords on a question of the construction of a statute in pari materia with a statute enacted by the Jamaican legislature. Returning now to Rookes v. Barnard it is important to observe that Lord Devlin's first premise is that the object of damages in the usual sense of the term is to compensate. Lord Reid and Lord Diplock in Cassell & Co. Ltd. v. Broome expressed a like view though Lord Wilberforce in the same case thought that it cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less than it ought to be. Next Lord Devlin said that as far as he knew the idea of exemplary damages is peculiar to English Law. Consequently, he argued, such an award is an anomaly in the law of England. Lord Devlin then proceeded to examine a number of cases decided in the English Courts over the period of 200 years just prior to 1964 in which awards were made where, as had Lord Wilberforce himself observed in Cassell & Co. Ltd. v. Broome (at p.860), "there is no clear terminology used aggravated, exemplary, punitive, vindictive, retributory being adjectives which have been used, singly or in combination, without distinction or difference." So Lord Devlin suggested that in future a clear distinction ought to be made between compensatory (or aggravated) and punitive (or exemplary) damages the former reflecting what the plaintiff has suffered materially or in wounded feelings, the latter the jury's (or judge's) view of the defendant's motive

and conduct where they aggravate the injury done to the plaintiff. Then Lord Devlin (at p. 410) said that his examination of the authorities convinced him 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 ....."

Then Lord Devlin stated two categories of cases to which he added another category in which exemplary damages are authorised by statute. The first of these categories he said "is oppressive, arbitrary or unconstititutional action by servants of the government." He excluded from this category inter alia individuals for the reason that "though there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that would attract an award of aggravated damages yet it is different in the case of government for servants of government are also servants of the people and the use of their power must be subordinate to their duty of service." In Cassell & Co. Ltd. v. Broome it was held that this category should not be limited to servants of government in the strict sense of the word but should be extended to others, such as local government officials and the police. Cases in the second of these categories "are those in

which the defendant's conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff ..... This category is not confined to moneymaking in the strict sense but 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."

This category is, as Lord Diplock has stated in Cassell & Co. Ltd. v. Broome, of cases "where an act known to be tortious was committed in the belief that the material advantages to be gained by doing so would out-weigh any compensatory damages which the defendant would be likely to have to pay to the plaintiff." Lord Devlin's categorization in Rookes v. Barnard has been severely criticised in certain of the Commonwealth courts as well as by the English Court of Appeal in Cassell & Co. Ltd. v. Broome. That the purport of Lord Devlin's judgment on this issue has been missed or misunderstood by those courts has been amply demonstrated in the speeches of Lord Reid, Lord Morris and Lord Diplock in the House of Lords in Cassell & Co. Ltd. v. Broome. Lord Reid (at p. 837) said -

> "I must now deal with those parts of Lord Devlin's speech which have given rise to difficulties. He set out two categories of cases which in our opinion comprised all or virtually all the reported cases in which it was clear that the court has approved of an award of a larger sum of damages than would be justified as compensatory. Critics thought he was inventing something new. That was not my understanding. We were confronted with an undersirable anomaly. We could not abolish it. We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow any extension."

Then Lord Reid proceeded to deal with the criticisms levelled at the two categories of cases. He explained that the context of the first category showed that that category was never intended to be limited to Crown servants but included the police and many other persons that are exercising functions of a governmental character but that is excluded private individuals. He admitted that the distinction was illogical but stated that the real reason for that distinction was "that the cases showed that it was clearly established with regard to servants of the 'government' that damages could be awarded against them beyond any sum justified as compensation, whereas there was no case except one" (Louden v. Ryder) "that was overruled where damages had been awarded against a private bully or oppressor to an amount which would not fairly be regarded as compensatory." With respect to the second category Lord Reid, while conceding that it was not happily phrased, thought that it was clear enough to indicate that it would include an ill disposed person who committed a tort in contumelious disregard of another's right in order to obtain an advantage which would out-weigh any compensatory damages likely to be obtained by his victim but did not include the case of a person who commits a tort not for gain but out of malice. Lord Reid considered that the reason for excluding such a case from the second category is simply that firmly established authority required the House to accept that category but did not require it to go further.

Lord Diplock's speech contains many important passages in support of the conclusions reached by the House in Rookes v. Barnard on this question and it might be useful to refer to some of them. The first passage to which I would like to refer is to be found at p. 871 -

"It has not been contended that those parts of Lord Devlin's speech which expounded the rationale of the award and the assessment of exemplary damages in those cases in which they could be recovered did not serve a useful purpose which lay well within the functions of this House in its judicial capacity. It brought some order out of chaos, some light and reason into what was previously a dark and emotive branch of the common law. What has been criticised is the decision of legal policy to restrict the categories of cases in which exemplary damages may be awarded.

If the common law stood still while mankind moved on, your Lordships might still be awarding bot and wer to litigants whose kinsmen thought the feud to be outmoded - though you could not have done so to the plaintiff in the instant appeal, because defamation would never have become a cause of action. The common law would not have survived in any of those countries which have adopted it, if it did not reflect the changing norms of the particular society of which it is the basic legal system. It has survived because the common law subsumes a power in judges to adapt its rules to the changing needs of contemporary society - to discard those which have outlived their usefulness, to develop new rules to meet new situations. As the supreme appellate tribunal of England, your Lordships have the duty, when occasion offers, to supervise the exercise of this power by English courts. Other supreme appellate tribunals exercise a similar function in other countries which have inherited the English common law at various times in the past. Despite the unifying effect of that inheritance on the concept of man's legal duty to his neighbour, it does not follow that the development of the social norms in each of the inheritor countries has been identical or will become so. I do not think that your Lordships should be deflected from your function of developing the common law of England and discarding judge-made rules which have outlived their purpose and are contrary to contemporary concepts of penal justice in England, by the consideration that other courts in other countries do not yet regard an identical development as appropriate to the particular society in which they perform a corresponding function.

> The fact that the courts of Australia, of New Zealand and of several of the common law provinces of Canada have failed to adopt the same policy decision on exemplary damages as this House did for England in Rookes v. Barnard affords a cogent reason for re-examining it; but not for rejecting it if, as I think to be the case, re-examination confirms that the decision was a step in the right direction - although it may not have gone as far as could be justified."

Then after referring to the original purpose in a particular society in cases of trespass for an award of exemplary damages to be made Lord Diplock continued (at p.872) -

> "So the survival into the latter half of the 20th century of the power of a jury in a civil trial to impose a penalty on a defendant simply to punish him had become an anomaly which it lay within the power of this House in its judicial capacity to restrict or to remove; though it would have been anticipating by two years the recent change in the practice of this House if to have done so would have involved overruling one of its own previous decisions.
>
> Lord Devlin's analysis of previous decisions disclosed three kinds of cases in which the courts had recognised the right of a jury to award damages by way of punishment of the defendant in excess of what was sufficient to compensate the plaintiff for all the harm occasioned to him. The categorisation was new. Its purpose has, I think, been misunderstood. No One suggests that judges, when approving awards of exemplary damages in particular cases in the past consciously differentiate between one kind of a case in which exemplary damages could be awarded and another. They dealt with them all as falling within a single nebulous class of cases in which the defendant's conduct was such as to merit punishment. The purpose of Lord Devlin's division of them into three categories was in order to distinguish between factual situations in which there was some special reason still relevant in modern social conditions for retaining the power to award exemplary damages, and

factual situations in which no such special reason still survived.

With this end in view Lord Devlin extracted from the single nebulous class which appeared to be all that had been consciously recognised as justifying an award of exemplary damages at common law, two categories of cases in which this House decided that there were special reasons why the power to award exemplary damages should be retained. These two (apart from cases where exemplary damages are authorised by statute) are generally referred to as 'the categories'. But there is also to be found in the previous cases a third category, consisting of the remainder of the single nebulous class in which this House decided that the anomalous practice of awarding exemplary damages in civil proceedings ought to be discontinued."

Then after referring to the two categories of cases Lord Diplock said (p.873) -

"The third - and rejected - category is numerically by far the largest. It consists of cases in which the manner in which the tort has been committed has attracted a whole gamut of dyslogistic judicial epithets such as wilful, wanton, high-handed, oppressive, malicious, outrageous; particularly those where the defendant's manner of doing the tortious act has been characterised by arrogance or insolence or, in the preferred Australian phrase, a contumelious disregard of the plaintiff's rights. These are nearly all cases in which 'aggravated damages' by way of compensation apart from punishment can be awarded and much of the previous confusion about exemplary damages stems from this.

Apart from this confusion or perhaps because of it, I do not doubt that it was the general understanding of English judges and of those who practised in the English courts that exemplary damages by way of punishment of the defendant as well as aggravated damages by way of compensation of the plaintiff could be awarded in cases which fall within the third category. Lord Devlin's speech in Rookes v. Barnard explicitly acknowledges this. It was an understanding which he himself had shared. He had given effect to it in his

own summing-up in Louden v. Ryder.

The decision of legal policy which this House made in Rookes v. Barnard was to retain the first two categories and to discard the third as obsolete.

In describing the two categories retained I have deliberately departed from the ipsissima verba of Lord Devlin's description of them. His statement of the categories was not intended as a definition to be construed as if it were enacted law. They were retained because this House considered that there were circumstances in which a power to award exemplary damages still served a useful social purpose and the descriptive words must be understood in the light of the social purpose which they were designed to serve."

Lord Diplock then endorsed in effect the views expressed by Lord Reid as to the ambit of the first category though he doubted that, in view of development in recent years in adapting the old remedies by prerogative writ and declaratory action to check unlawful abuse by the executive the award of exemplary damages in civil actions for tort against individual government servants might not today be a blunt instrument for that purpose. He, however, favoured the retention of the second category and had this to say about it (at p. 874) -

"To bring a case within this category it must be proved that the defendant, at the time that he committed the tortious act, knew that it was unlawful or suspecting it to be unlawful deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty. While, of course, it is not necessary to prove that the defendant made an arithmetical calculation of the pecuniary profit he would make from the torticus act and of the compensatory damages and costs to which he would render himself liable, with appropriate discount for the chances that he might get away with it without being sued or might settle the action for some lower figure, it must be a reasonable

> inference from the evidence that he did direct his mind to the material advantages to be gained by committing the tort and come to the conclusion that they were worth the risk of having to compensate the plaintiff if he should bring an action."

In respect to what he designated as the third category Lord Diplock said (at p. 874) -

> "I see no reason for restoring to English Law the anomaly of rewarding exemplary damages in the third category of cases. If malice with which a wrongful act is done or insolence or arrogance with which it is accompanied renders it more distressing to the plaintiff, his injured feelings can still be soothed by aggravated damages which are compensatory. I share the scepticism expressed by Windeyer J. in Uren v. John Fairfax & Sons Pty.Ltd. whether what was in the defendant's mind at the time he committed the tort really increases the injury to the plaintiff's feelings. I think too that an evanescent sense of grievance at the defendant's conduct is often grossly overvalued in comparison with a lifelong deprivation due to physical injuries caused by negligence. But my own equable temperament may be idiosyncratic and the law of 'aggravated damages' does not call for closer examination in the instant appeal."

Viscount Dilhouse and Lord Wilberforce, however, were of the view that the pre Rookes v. Barnard position worked well in practice and that any imposition of limits not hitherto expressed on awards before Rookes v. Barnard was decided should be left to the legislature. The question as I see it is whether it was competent for the House of Lords itself to impose limits on such awards. The House in Rookes v. Barnard and five of the law lords (who included two of those who sat in Rookes v. Barnard) in Cassell & Co. Ltd. v. Broome thought that it was. With the greatest respect I think that they are right. Be that as it may, there is little doubt that the overruled case of Louden v. Ryder stands alone as one in which exemplary damages were awarded against a private bully or oppressor.

There can be no question of there being any settled practice to award exemplary damages in a case of that kind. The instant case being one of a private bully would therefore be excluded from the first category. Does it come within the second category? It is conceded that the onus of so showing (if the decision in Rookes v. Barnard is held to be applicable) is on the respondent. See Mafo v. Adams (1970) 2 W.L.R. 972 approved on this point by Cassell & Co. Ltd. v. Broome (1972) 1 All E.R. at p. 831.

The trial judge's finding that the appellant appeared to want the respondent out of the house for no particular reason, and this finding is supported by the evidence, would in my view mean that the respondent has failed to show in the words of Lord Diplock that the appellant "did direct his mind to the material advantages to be gained by committing the tort and came to the conclusion that they were worth the risk of having to compensate" the plaintiff (respondent) if she did bring an action. In that event if Rookes v. Barnard were held to govern the case the award of exemplary damages ought to be set aside. But ought Rookes v. Barnard to be held to be applicable in Jamaica? It is on this aspect of the case that the passage at p. 871 in the speech of Lord Diplock set out above is of particular relevance. Two questions seem to arise for our determination, (i) whether in the context of the Jamaican society at the present time this Court should say that those judge-made rules which the House of Lords have discarded by the decision in Rookes v. Barnard ought not to apply in Jamaica; (ii) and if not, would the instant case fall within those judge-made rules that this Court considers ought to be applied. It is only if the answer to the second question is in the affirmative that the award of exemplary damages can stand.

Like Lord Devlin, Lord Reid and Lord Diplock my own view is that the essential purpose of damages in cases of tort is compensatory. For historical reasons when in the past centuries remedies available to a wronged party were not as

efficacious as they have come to be it was considered necessary in appropriate cases for the courts to visit punitive consequences upon the wrongdoer in addition to compensating the injured party for the wrongs done him in order to deter the particular wrongdoer from repeating the wrongful act and also to act as a deterrent to those who might be similarly minded to commit wrongful acts of that nature. In this day and age it cannot truly be said that effective redress cannot now be obtained under the procedures available to a party against whom a tort has been committed. The victim can be adequately compensated without recourse to the award of exemplary damages. In the instant case for instance the respondent might well have invoked the aid of the Court, before her belongings and furniture were put outside and the destruction of the building commenced, for the remedy of an interim injunction and much damage, loss and distress avoided thereby. There was a period of some seven days between the initial acts of destruction of the terrace and wall with cutting off the electricity and water supplies and the subsequent acts of putting the respondent's goods outside and the eventual bulldozing of the house itself during which the intervention of the Court might have been sought and obtained if only in respect of the restoration of the electricity and water supplies. Why this course was not adopted is not apparent from the record of appeal. But putting that aside I can see no good reason for the Courts of Jamaica to be empowered to award exemplary damages in a case of trespass to goods or indeed in a case of trespass to land. The injured party can be adequately compensated for any humiliation or mental distress, however bad it might be, and it was reprehensible in the instant case, by an award in an appropriate sum. Normally, the more reprehensible the wrong-doer's conduct the greater would be humiliation and distress caused the victim and so the higher would be the compensating award. In turn the higher the amount of compensatory award the greater the punishment to the wrongdoer would be.

I would hold that the categorisation decided on in Rookes v. Barnard as explained in Cassell & Co. Ltd. v. Broome ought to be adopted and applied in Jamaica and that the appellant's act would fall outside of the categories of cases in which exemplary damages might be awarded. If I am wrong in holding that the categorisation decided on in those cases should be adopted and applied in Jamaica I would hold that the instant case should not fall within such judge-made rules that ought to be applied in Jamaica. I would according set aside that part of the trial judge's order which relates to the award of punitive damages.

In the result I would allow the appellant's appeal with costs to the respondent to be agreed or taxed and vary the order of the learned trial judge accordingly.

GRAHAM-PERKINS, J.A.

The factual background against which the respondents claim to damages arose has been reviewed quite adequately by the President. I do not, therefore, propose to dwell thereon, nor do I find it necessary to recite the rival submissions advanced by Mr. Edwards and Dr. Barnett. I proceed immediately to examine the vital, and indeed the only, question posed by this appeal: Should the limitations imposed on the award of exemplary damages by Lord Devlin, with the concurrence of his colleagues, in Rookes v. Barnard (1964) 1 All. E.R. 367, be held to be applicable in the courts of Jamaica? Let me say at the outset that I regard it as a matter of some considerable regret that, in a matter of such moment, I have not been able to reach the same conclusion as that arrived at by my brother Luckhoo.

I am in complete agreement with the view that "in Jamaica the award of damages as a remedy in all civil wrongs is, as in England, the creature of the common law," and that "Jamaica being regarded as a settled colony would have inherited the English common law in this regard." Indeed this is the precise premise on which my examination of the question above noted proceeds. Like the President I, too, am firmly of the view that the Court of Appeal of Jamaica is under no compelling obligation to accept a decision of the House of Lords, concerned with the development of the common law in England, as authoritatively determining the common law of Jamaica. That much, although somewhat subtlely veiled, was recognized and conceded, albeit not with any particular reference to Jamaica, by Lord Diplock when he said, in Cassell & CO. Ltd. v. Broome (1972) 1 All E. R. 801, at p. 871:

> "... it does not follow that the development of the social norms in each of the inheritor countries has been identical or will become so."

It is, I think, beyond debate that in the two centuries before Rookes v. Barnard the common law of England relating to exemplary damages enjoyed a very discernible record of historical continuity.

From Huckle v. Money (1763) 95 E.R. 768 up to Louden v. Ryder (1953) 1 All E. R. 741 there does not appear to have been any uncertainty demonstrated as to the principles governing an award of exemplary damages. In Cassell and Co. Ltd. v. Broome (supra) Viscount Dilhorne said, at pp. 854-5:

> "I agree with Lord Denning, M. R., that the pre-Rookes v. Barnard law was well stated in Mayne & McGregor on Damages (12th Edn. 1961, para. 207) - where it is said that such damages can only be given -
>
> > '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.'
>
> ... In this field there does not appear to have been any difference between Australian and English law prior to Rookes v. Barnard."

When Lord Devlin came to deal with exemplary damages in Rookes v. Barnard he made it perfectly clear that, notwithstanding the course charted in this branch of the law by many eminent judges before him, he entertained a very strong objection to the intrusion into civil proceedings of the penal sanction of exemplary damages. This was the "anomaly" that His Lordship sought to remove. But did he succeed? I quote, and with respect, adopt a passage from the judgment of Taylor, J., in Uren v. John Fairfax & Sons Pty. Ltd. (1966-67) 40 A.L.J.R. 124, at p. 129:

> "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 say 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 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."

The question may now be asked: Was it open to the House of Lords to restrict the right to exemplary damages? In my view the answer is to be found in the following passage from the speech of Viscount Dilhorne in Cassell & Co. Ltd. v. Broome (supra) at p. 854:

"As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the law is,

> not what we think it should be. If it is clearly established that in certain circumstances there is a right to exemplary damages, this House should not, when sitting judicially, and indeed, in my view, cannot properly abolish or restrict that right. This,indeed, was recognized by Lord Devlin when he said that it was not open to this House to 'arrive at a determination that refused altogether to recognize the exemplary principle'. If the power to award such damages is to be abolished or restricted, that is the task of the legislature."

At p. 837 (ibid) Lord Reid said:

> "We were confronted with an undesirable anomaly. We could not abolish it. We had to choose between confining it strictly to classes of cases where it was firmly established, although that produced an illogical result, or permitting it to be extended so as to produce a logical result. In my view it is better in such cases to be content with an illogical result than to allow an extension."

With the greatest respect to Lord Reid the foregoing passage not only demonstrates the necessity for the intervention of the legislature, but involves at its best, a more than questionable principle on which a final appellate court ought to proceed. But if it was thought that the House could not, in its judicial capacity abolish the anomaly, on what basis, it may be asked, was it competent for it to delimit the area in which that anomaly operated? Lord Reid offered no explanation. Indeed there appeared to be none.

At p. 871 (ibid) Lord Diplock said:

> "It has not been contended that those parts of Lord Devlin's speech which expounded the rationale of the award and the assessment of exemplary damages in those cases in which they could be recovered did not serve a useful purpose which lay well within the functions of

> this House in its judicial capacity ... What has been criticised is the decision of legal policy to restrict the categories of cases in which exemplary damages may be awarded."

Like Lord Reid, Lord Diplock advanced no reason for the assumption implicit in the passage just quoted.

At pp. 860-1 (ibid) Lord Wilberforce said:

> "Perhaps the opponents have, marginally, the best of it in logic but logic in excess has never been the vice of English law and I am impressed, as I think was Lord Devlin, with the fact that the principle has shown and continues to show its vitality not only in England but in Australia, Canada and New Zealand, as well (though there are special considerations there) as in the United States of America. This is shown not only by reported cases, of which Canadian provinces, Australian states, and New Zealand provide a number of modern examples, but in the daily unreported practice of the courts. Its place in the law has been endorsed by many eminent judges in terms which clearly recognize the punitive element. The principle of punitive damages has been recognized by the High Court of Australia on five occasions,by the Supreme Court of Canada and by the Supreme Court of the United States of America.
>
> To my mind the strongest argument against it is that English law already contains a heavy, indeed exorbitant, punitive element in its costs system; contrast the United States where it is the absence of this (advocate's costs not being normally recoverable) which is invoked as a justification for punitive damages. One or other must clearly be reformed, and it is Parliament alone that can do it."

For my part I entertain not the least doubt that the House of Lords in Rookes v. Barnard, manifestly driven by consideration of socio-legal policy, went beyond its judicial function in its attempt, unwarranted by authority as I will attempt to show, to adjust the common law "to the social norms of the time".

But let it be assumed, contrary to my view, that what Lord Devlin sought to do was within the competence of the House of Lords. On that assumption I proceed to an examination of the "two categories" in which his Lordship thought that an award of exemplary damages was permissible. The first of these was "oppressive, arbitrary or unconstitutional action by servants of the Government." The most careful examination of the authorities on which Lord Devlin relied for the formulation of this first category does not, on any view, disclose any foundation in principle on which that formulation can be made to rest. The cases on which Lord Devlin relied are Huckle v. Money (supra), Wilkes v. Wood (1763) 98 E.R. 489, and Benson v. Frederick (1766) 97 E.R. 1130, in each of which an award of exemplary damages was held to be right. It is the fact that in each of these cases the defendant was a servant of the Government, but it is also a fact that there is not a single word in any of the judgments that can be taken to suggest, even remotely, that the award was justified because the defendant was a servant of the Government. In Wilkes v. Wood (supra) e.g., to which Lord Devlin appears to have attached some importance, the principle on which an award of exemplary damage was said to depend was stated in terms which implied the identical idea as that conveyed in those cases in which the defendant was not a servant of the Government. Pratt, C.J., said:

> "... I have formerly delivered it as my opinion on another occasion, and I shall 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."

The principle enunciated by Pratt, C.J., certainly did not depend on the status of the defendant as opposed to the nature of his conduct. The foregoing considerations apply with equal force to the judgment, in Huckle v. Money (supra) and Benson v. Frederick (supra). It will be seen, therefore, that Lord Devlin's first category is totally unwarranted by authority.

What of the second category? This category embraced 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 plaintiff." Four of their Lordships in Cassell & Co. Ltd. v. Broome (supra) attempted, with no real conviction, to explain this second category by, inter alia, rephrasing it, modifying it and, indeed, reinterpreting it to such an extent that there must now be some real doubt as to precisely what it means. At page 874 Lord Diplock said:

> "To bring a case within this category it must be proved that the defendant, at the time when he committed the tortious act, knew that it was unlawful or suspecting it to be unlawful deliberately refrained from taking obvious steps which, if taken, would have turned suspicion into certainty. While, of course, it is not necessary to prove that the defendant made an arithmetical calculation of the pecuniary profit he would make from the tortious act and of the compensatory damages and costs to which he would render himself liable, with appropriate discount for the chances that he might get away with it without being sued or might settle the action for some lower figure, it must be a reasonable inference from the evidence that he did direct his mind to the material advantage to be gained by committing the tort and came to the conclusion that they were worth the

> risk of having to compensate the plaintiff if he should bring an action."

If language means anything I am constrained to observe, with the greatest respect to Lord Diplock, that the foregoing passage appears to modify to an apprecaible extent the language used by Lord Devlin.

At p. 838 Lord Reid said:

> "With the benefit of hindsight I think I can say without disrespect to Lord Devlin that it (the second category) is not happily phrased. But I think the meaning is clear enough. An ill disposed person could not infrequently deliberately commit a tort in contumelious disregard of another's rights in order to obtain an advantage which would outweigh any compensatory damages likely to be obtained by his victim. Such a case is within this category. But then it is said, suppose he commits the tort not for gain but simply out of malice why should he not also be punished. Again I freely admit there is no logical reason. The reason for excluding such a case from the category is simple that firmly established authority required us to accept this category however little we might like it, but did not require us to go farther. If logic is to be preferred to the desirability of cutting down the scope for punitive damages to the greatest extent that will not conflict with established authority then this category must be widened. But as I have already said I would, logic or no logic, refuse to extend the right to inflict exemplary damages to any class of case which is not already clearly covered by authority. On that basis I support this category."

It is to be noted that whereas Lord Devlin speaks of the defendant making

a profit for himself, meaning, quite obviously, a pecuniary profit, Lord Diplock speaks of "material advantages to be gained by committing the tort", and Lord Reid speaks of obtaining "an advantage which would outweigh the compensatory damages". It is not difficult by any means to imagine cases in which a defendant could very well suffer a severe pecuniary loss and at the same time derive a material advantage from his tortious conduct. Apart, however, from this consideration, my most exhaustive researches have failed to reveal that there was any "firmly established authority" that required the House of Lords to accept the second category. In any event, I find it quite impossible to avoid the conclusion, without intending the least disrespect to Lord Reid, that the foregoing extract from his speech involves a singularly uninspiring approach in principle to what has become a particularly vexed question. It is a fact that what has become known as "the Devlin test" has caused no little difficulty in several cases in the English courts. See for example Manson v. Associated Newspapers (1965) 2 All E. R. 954.

At p. 830 Lord Hailsham said:

> "When one comes to the second category we reach a field which/more was exhaustively discussed in the case before us. It soon became apparent that a broad rather than a narrow interpretation of Lord Devlin's words was absolutely essential ..."

Whatever the interpretation sought to be placed on Lord Devlin's second category the truth is that it remains unsupported by authority. In Cassell & Co. Ltd. v. Broome (supra) Lord Hailsham said at p. 830:

> "Lord Devlin ... founded his second category on a sequence of cases begining with Bell v. Midland Ry. Co., and on the judgment of Maule, J., in Williams v. Currie and the dictum of Martin, B., in Crouch v. Great Northern Ry. Co."

In this assertion Lord Hailsham was right. It is desirable, therefore, to examine the cases on which Lord Devlin relied. In the first case, Bell v. Midland Ry. Co. (1861) 10 C.B.N.S. 287, the plaintiff had brought an action against the defendant for the wrongful destruction of access from the railway to his wharf. The jury awarded him the sum of One Thousand Pounds. Willes, J., said, at p.307:

> "I must say, that, if ever there was a case in which the jury were warranted in awarding damages of an exemplary character, this is that case. 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. If it were necessary to cite any authority for such a position, it will be found in the case of Emblen v. Myers which I cite only for illustration."

Erle, C.J., said, at p.304:

> "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 won profit, it is impossible to say the plaintiff was not entitled to ample compensation."

Byles, J., said, at p. 312:

> "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."

It is clear that the three judges who heard the arguments on the rule nisi were unanimous as to the plaintiff's entitlement to exemplary damages. What is also unmistakably clear is that in none of the three judgments

is there the faintest suggestion that an award of exemplary damages is permissible by reason only of a defendant having sought to make a profit out of his wrongful conduct. Indeed it is of more than passing interest to notice the"authority" of Emblen v. Myers (1860) 6 H. & N. 54 on which Willes, J., relied. The head note to that case, which accurately reflects the unanimous decision of the court, reads:

> "In an action for wilful negligence, the jury may take into consideration the motives of the defendant, and if the negligence is accompanied with a contempt of the plaintiff's rights and convenience the jury may give exemplary damages."

The gravamen of the decision of Pollock, C.B., Bramwell, B., and Channell, B. was "the contempt of the plaintiff's rights and convenience". There was, in that case, not a single word mentioned concerning the profit motive. Bell's case (supra), in my view, decided no more than that in the particular circumstances therein related, including, of course, the motive of gain in the defendant, an award of exemplary damages was permissible. It did not decide that an award was permissible because of the motive of gain.

I pass now to the second case on which Lord Devlin relied, namely, Williams v. Currie (1845) 1 C. B. 841, in which a tenant had brought an action for trespass against his landlord for having cut and removed certain crops before the tenancy had come to an end. In that case Coltman, J., said:

> "... acting upon the principle laid down by De Grey, C.J., in Sharp v. Brice we must allow the jury a greater degree of latitude in an action of this sort than would be proper in a case of contract."

Maule, J., said:

> "Besides, it is to be observed that this was not the case of a single act of trespass but a series of trespasses persisted in day after day and for several

> weeks and that this was done for the pecuniary profit of the defendant. When, therefore, we consider that the acts of which the plaintiff complains were not only detrimental to the plaintiff but profitable to the defendant, and that the verdict does not very much exceed the amount of actual damage proved I think we should be usurping the legitimate province of the jury if we were to interfere."

Creswell, J., who had tried the case in the first instance said:

> "I told the jury to give the plaintiff such reasonable damages for the trespass complained of, as, in their judgment would be fair compensation for the injury and inconvenience she had sustained; telling them at the same time that they were not necessarily to restrict themselves to the actual amount of the loss of crops proved by the witnesses."

It is manifest from the foregoing extracts of the judgments in Williams v. Currie that that case did not decide that an award of exemplary damages could be made only where a defendant was actuated by a profit motive. Maule, J., alone spoke of the "pecuniary profit" accruing to the defendant, but he did so in reciting the factual background on which the jury were entitled to found their verdict. He certainly cannot be interpreted as saying that the element of pecuniary profit was indispensable to the assessment of the defendant's conduct in order to pave the way for an award of exemplary damages.

As to the third case on which Lord Devlin relied, Crouch v Great Northern Railway Co. (1856) 11 Ex. 742, all that I need to observe is that nowhere in the judgment of Martin, B., does there appear the vaguest hint that exemplary damages are allowable only in those cases "in which the defendant's conduct has been calculated by him to make a profit for himself."

In the result I am compelled to the conclusion that Lord Devlin's first and second categories do not constitute a pronouncement, sanctioned either by principle or by precedent, as to the common law of England or of Jamaica. I would hold that the Rookes v. Barnard (supra) should not be held to be applicable to Jamaica. Indeed, there has not been evident in the "progress" of the common law in Jamaica any consideration of socio-legal policy that ought to compell the courts of this country to follow Rookes v. Barnard.

It is difficult, I think, not to sympathise with the view advanced by Windeyer, J., in Uren v. John Fairfax & Sons Pty. Ltd. (supra) at p. 138, where he said:

> "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 feel ourselves dealing more in words than in ideas. Telling the jury ... 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."

Ultimately, however, I would adopt without reservation the following observations of Lord Wilberforce at pp. 859-860 in Cassell & Co. v. Broome (supra):

> "I deal first with that portion of the judgment (Lord Devlin's) which analyses damages in tort cases

> into 'compensatory' damages, a subhead of which is said to be 'aggravated' damages and punitive damages ...
>
> This analysis is powerful and illuminating and undoubtedly represents a valuable contribution to English judicial thought on the subject but it has its dangers in practical application, as the present case only too well shows. English law does not work in an analytical fashion; it has simply entrusted the fixing of damages to juries on the basis of sensible, untheoretical directions by the judge with the residual check of appeals in the case of exorbitant verdicts. That is why the terminology used is empirical and not scientific."

For my part I would leave the matter of damages to "sensible, untheoretical directions" by judges.

As to the case now under review, I have not the least doubt that on its particular facts as recited by Luckhoo, P. (Acting), an award of exemplary damages was eminently justified and, indeed, necessary, I would, therefore, dismiss the appeal. I do not regard the figure awarded by Rowe, J., under this head as unreasonable.

EDUN, J.A.:

Devlin J. (as he then was) in explaining to the jury in Loudon v Ryder (1953) 1 AER 741 how they should approach the question of damages, put forward three heads of damages: (i) the assault itself (ii) the circumstances of the assault, the way in which the plaintiff was treated; and (iii) punitive damages. On the third head he had this to say:

> "The punitive damages are rather like imposing a fine as if you were a bench of magistrates and you wanted to impose a fine which made it quite clear what view you took of a wanton and wilful disregard of the law or for somebody else's rights, and wished to make it quite plain that you marked the seriousness of the offence, if it was a serious offence, and so to show the defendant that he cannot do that sort of thing with impunity. That is the way in which you can regard that, if you take that view. Think of it as a fine which has got to hit the defendant hard if he has disregarded the rights of others and must show that that sort of conduct does not pay. ..."

That very same judge (now Lord Devlin) had this to say about the decision in Loudon v Ryder (supra) in Rookes v Barnard (1964) 1 AER 367 at p.412:

> "Loudon v Ryder ought, I think, to be completely overruled. The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly have awarded even in the outrageous circumstances of the case; and I see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such.
>
> This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled 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 exemplified, conveniently be defined as crimes. I do not care for the idea that in criminal matters 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."

I have great admiration for a judge whose chief purpose in the administration of justice is to make the law clearer, systematically more consistent and more easily applicable to facts. By the wealth of his experience he has had now to adjust opinions formerly expressed by himself. On this same question of "punitive" and "exemplary" damages, in Cassel & Co. Ltd. v Broome (1972) 1 AER 801, Lord Reid had this to say, at p.837:-

> "Those who sat in Rookes v Bernard thought that the loose and confused use of the words like 'punitive' and 'exemplary' and the failure to recognise the difference between damages which are compensatory and damages which go beyond that and are purely punitive had led to serious abuses, so we took what we thought was the best course to limit those abuses. Theoretically we might have held that as purely punitive damages had never been sanctioned by any decision of this House (as to which I shall say more later) there was no right under the English law to award them. But that would have been going beyond the proper function of this House. There are many well established doctrines of the law which have not been the subject of any decision by this House. We thought we had to recognise that it had become an established custom in certain classes of case to permit awards of damages which could not be justified as compensatory, and that that must remain the law. But we thought and I still think it well within the province of this House that that undesired anomaly should not be permitted in any class of case where its use was not covered by authority. In order to determine the classes of case in which this anomaly had become established it was of little use to look merely at the words which had been used by judges because, as I have said, words like 'punitive' and 'exemplary' were often used with regard to damages which were truly compensatory. We had to take a broad view of the whole circumstances."

Lord Morris of Borth-y-Gest, had this to say at p.848:-

> "..... Logical analysis forces the conclusion therefore that in the result there would in a civil action have been punishment for conduct not particularised in any criminal code and that such punishment had taken the form of a fine not receivable by the state but as a sort of bonus by a private individual who would apart from it be solaced for the wrong done to him. There may be much to be said against a system under which a fine becomes payable in a civil court without any safeguards which protect those charged with crimes ....."

In the instant case, the learned trial judge awarded the plaintiff/respondent damages under three separate heads: (i) special damages, $9,801.50 (ii) compensatory, $5,000.00 and (iii) punitive, $7,500.00. In his reasons for awarding punitive damages he used such words, the effect of which, in my view, showed a consideration that was separate and apart from compensating the plaintiff and amounted to nothing else but the imposition of a fine. For those reasons and in keeping in line with the opinions of learned and experienced judges in recent cases, I would allow the appeal and delete from the judgment the sum of $7,500.00 awarded under the head of punitive damages.

I have had the benefit of reading the judgment in this case of the learned acting President. I agree with his reasons and conclusions. If in a given case, the award of compensatory damages is questioned as being either too low or too high, the important consideration ought to be not to look at the mere use of words but at the facts and circumstances of the case. I venture to add that in future if the categories of damages are made simpler, the principles of law applicable to the award of damages will be more easily understood, less complicated in their application to facts and considerably less expensive in litigation.