CASE NOTES

TAYLOR V. *BEERE.* COURT OF APPEAL. 19 MARCH 1982 (C.A.38/80) COOKE, RICHARDSON, SOMERS JJ.

The defendant in an action for defamation appealed against the trial Judge's refusal to order a new trial after the jury awarded the plaintiff $12,500 damages. The award probably contained some exemplary damages and the point of the appeal was whether White J. had misdirected the jury when he told them that exemplary damages could be awarded.

The issue before the Court of Appeal was whether exemplary damages are available in New Zealand and if they are, whether they should be restricted in the ways indicated by the House of Lords in *Rookes* v. *Barnard* [1964] A.C. 1129, 1220 to 1233 and *Broome* v. *Cassell & Co. Ltd.* [1972] A.C. 1027, or in some other way.

The Respondent originally brought an action for defamation against the Appellant, a publisher, who had used a photograph of the Respondent and her granddaughter as an illustration in *Down Under the Plum Trees.* The book, largely a sex instruction manual for adolescents, had been classified by the Indecent Publications Tribunal as "indecent in the hands of persons under 18 years unless such persons are being instructed by a parent or professional adviser". Before the book was published the Respondent had protested, both verbally and in writing, against the use of her photograph in such a book. The Appellant apparently decided to publish and be damned.

In the Court of Appeal the Appellant's counsel agreed that the Respondent had been defamed and that some damages were appropriate. Since this case did not clearly fall within any of the categories laid down by Lord Devlin in *Rookes* v. *Barnard* the Appellant argued that the jury had been misdirected when they were told that exemplary damages were available.

Before 1964 it seemed to be settled that most damages awarded in tort cases were primarily compensatory. They were assessed with the idea of recompensing or consoling the victim for the loss or damage caused to him by the tort-feasor. But there was always another consideration which co-existed with compensation and was obviously appropriate in a minority of cases—the need to punish the defendant as well as console the plaintiff. In cases where the wrong-doing was

outrageous the jury could be invited to consider not only what the plaintiff ought to receive, but what the defendant ought to pay. Damages containing this punitive or exemplary element were awarded in cases of conscious wrong-doing where a defendant had shown contumelious disregard of another's rights.

Then came *Rookes* v. *Barnard* in which Lord Devlin attempted to disentangle the compensatory and the punitive elements in tort damages. Unravelling the cases as far back as the second half of the eighteenth century, he persuaded the House of Lords to restrict awards of exemplary damages to three limited categories. Except for cases falling within these exceptions, the House ruled, the compensatory principle alone should govern damages in tort. Punishment should be a matter for the criminal law.

Rookes v. *Barnard* has not worn well. The House of Lords was itself only tepidly enthusiastic about it when *Broome* v. *Cassell & Co. Ltd.* presented an opportunity to review it in 1972. The categories were upheld but is is possible to read semantic expansion of them in some speeches. Canada and Australia have declined to follow *Rookes* v. *Barnard,* preferring the broad principles of the common law as it was understood before 1964. The problem is that long before 1760 tort and crime were inextricably tangled. Plaintiffs used whichever approach, compensatory or punitive, that seemed likelier to bring results. The power of the State could be exerted so intermittently and with such random chance of success in most localities that both torts and crimes were for the most part subjects of privately pursued litigation. It was not until the sixteenth and seventeenth centuries in Western Europe that governments acquired the capacity—and the political ambition—to be able to claim a monopoly of criminal punishment. As punishment of criminals by an ever more energetic central government became more usual, privately pursued punishment through private criminal prosecutions and tort actions became less common. In the eighteenth century, where Lord Devlin took up the research for *Rookes* v. *Barnard,* it was possible to assert that punishment and compensation were becoming distinct and that one should be the concern of criminal law and the other of tort.

Patrolling the boundaries, however, has been an arduous and probably impossible as well as unnecessary task. Criminal law retains a compensatory element in some punishments, and many victims of crime wish compensation was more readily available. Payment of the most compensatory of tort damages is doubtless perceived as a punishment by many unsuccessful defendants. Judges of great learning and experience have doubted whether the separation of the two principles is desirable. Windeyer J., himself a legal historian, pre-

ferred the earlier approach to the restrictive compartments of *Rookes* v. *Barnard*. "It is general conceptions", he said, "that count in the development of the common law", *Uren* v. *J. Fairfax & Sons Pty. Ltd.* (1967) A.L.R. 25, 45. Following him, Richardson J. said in *Taylor* v. *Beere*:

> The root of tort and crime in the law of England are greatly intermingled. Even today tort law cannot be fitted neatly into a single compartment. In part this is because it serves various social purposes. It is not simply a compensation device or a loss distribution mechanism. It is a hybrid of private law and public interest issues and concerns.

The Court of Appeal unanimously decided that the common law principle which permitted exemplary damages to be awarded in appropriate tort actions still applied in New Zealand, and declined to limit it either in the way suggested in *Rookes* v. *Barnard* or in any other way. All three Judges held that exemplary damages were a useful sanction against some forms of wrong-doing that would otherwise be inadequately requited. They did not feel that in the past New Zealand juries had been too ready to award them, and considered that their social utility was a strong argument in favour of retaining them.

The appeal was dismissed.

Several further points were raised, *obiter*. There is a useful discussion by Somers J., in which Cooke J. concurs, of the correct procedure for assessing damages. The need to conceive of damages as a global sum is stressed, and there is a warning to avoid doubling up.

The succinct discussion of aggravated damages is also useful. Aggravated damages are awarded with the defendant's conduct in mind and are assessed to give adequate compensation in cases where the plaintiff's injury was exacerbated by the manner of the wrongdoing. Aggravated damages, however, must be regarded as compensatory in intent, and not punitive. If they are so understood, then the area left to exemplary damages is small. The restriction imposed in 1964 on awards of exemplary damages has made it both more difficult and important to establish a distinction between aggravated and exemplary damages. Some re-reading of previous cases has resulted: "many cases which had hitherto been regarded as suitable for the award of exemplary damages are really cases of aggravated compensatory damages", (Somers J.).

J. O. B.

RE EREBUS ROYAL COMMISSION: *AIR NEW ZEALAND* V. *MAHON (No. 2)* [1981] 1 N.Z.L.R. 618.

On December 22, 1981, the New Zealand Court of Appeal handed

the first of what will be remembered as a pair of decisions, on judicial review of Commissions of Inquiry. It was *Air New Zealand* v. *Mahon and Ors* (CA 95/81 22 December 1981), on an application for review under the Judicature Amendment Act 1972, which attacked parts of the Royal Commission report on the Mt Erebus disaster.

The applicants sought relief in the form of either an order setting aside the findings (section 4(1)), or a declaration that various findings were invalid, made in excess of jurisdiction or in circumstances involving unfairness and breaches of the rules of natural justice (section 4(2)), as well as an order quashing the Commissioner's order for costs.

The proceedings had been removed to the Court of Appeal on its own order, from the High Court as it was

> important that the complaints be finally adjudicated on as soon as reasonably possible (p. 653)

because of the magnitude of the disaster and because the criticism of some Air New Zealand officers which the report contained, was so severe as to warrant an early decision on whether their complaints were justified.

While noting that there is no right of appeal against Commission of Inquiry reports as they contain only opinions, so it could not adjudicate on the causes of the disaster, the court stated that courts must

> be ready if necessary, in relation to Commissions of Inquiry . . . to ensure they keep within the limits of their lawful powers and comply with any applicable rules of natural justice. (p. 653)

However, it was seen as inevitable that any consideration of a Commissioner's powers and natural justice must include reference to the issues and evidence at the Inquiry.

The majority judgement outlines the history of the disaster and of the Commission of Inquiry describing its conclusion

> that . . . "the single dominant and effective cause of the disaster was the mistake made by those airline officials who programmed the aircraft to fly directly at Mt Erebus and omitted to tell the aircrew". He exonerated the crew from any error contributing to the disaster. (p. 655)

The grounds of appeal related mostly to the portions of the report covering what the Commissioner called 'the stance' of the airline at the Inquiry. Specifically it was claimed that the Commissioner exceeded his powers or acted in breach of natural justice, and that some of his conclusions were not supported by evidence of probative value. Counsel for the Attorney-General submitted that the court had no jurisdiction to interfere with opinions expressed in the report which were not 'findings' and bound no one; also that in any event, the conclusions were within the Commissioner's powers and arrived at without any breach of natural justice, being open to him on the evidence.

Paragraph 45 which states that the Chief Executive of Air New Zealand ordered all documents in relation to the Antarctic flights to be collected and impounded, and those not directly relevant be destroyed so that no word of the 'incredible blunder' (p. 16, i.e. the change of computer waypoint) be publicly known and paragraph 54 which described the order for the destruction of 'irrelevant documents' as 'one of the most remarkable executive decisions ever to have been made in the corporate affairs of a large New Zealand company' as it left to the same officials who were desirous of being acquitted of responsibility for the disaster 'to determine what documents they would hand over to the Investigating Committee', (p. 658) were both challenged.

It was claimed that these opinions were based on mistake of fact, not on evidence of probative value and that the Chief Executive was not given a fair opportunity to put his case in relation to them. (No distinction is made between the principles of natural justice and fairness.) It was complained that Mr Davis' evidence that he ordered that copies of existing documents be destroyed and all documents of relevance be retained in a single file was distorted in the report when it was changed into an order to destroy 'irrelevant documents', and that the description of the order as a remarkable etc. decision was 'far fetched'.

Contrary argument was that Mr Davis was fully cross-examined about his instructions and

> it was open to the Royal Commissioner to find that there were in existence documents which never found their way to that file, and that procedures were tailor-made for destruction of compromising documents. (p. 659)

Paragraphs 255(e) and (f) which state that when the co-ordinates in the Auckland computer were altered, a symbol was used which had the effect of including in information to be sent to the United States Air Traffic Controller (U.S.A.T.C.) at McMurdo Station the word 'McMurdo' instead of the actual co-ordinates of the southern-most waypoint; that this was deliberately designed to conceal from the U.S. that the flight path was changed because U.S.A.T.C. would probably lodge an objection to it; and that the explanation that those responsible thought there was only a minimal difference in distance was a concocted story to explain their mistake in failing to ensure that Captain Collins was notified of the change.

The complaint was that members of the navigation section adversely affected by these paragraphs were not given a fair opportunity of answering the allegations as they were never put directly to them. Respondents' counsel argued that the navigation section employees must have understood that their evidence was under suspicion, that they had ample opportunity to explain how and why the

mistakes occurred, and that it was for the Commissioner to assess their explanations, taking into account 'impressions individual witnesses made on him'.

Paragraph 348 which suggests that Captain Eden (director of flight operations for Air New Zealand) pressured First Officer Rhodes (accident inspector) to make either direct allegations or none at all regarding the conduct of Captain Gemmell (Flight Manager, Technical, and former Chief Pilot).

It was claimed that that paragraph makes findings of intimidation against Captain Eden without any such allegation having been put to him, and his never having been asked about his discussion with First Officer Rhodes.

Paragraphs 352-354 and 359(1) referred to the disappearance of documents

> which would have tended to support the proposition that Captain Collins had relied upon the incorrect co-ordinates

and gave rise to the possible inference that Captain Gemmell could have been involved with the disappearance.

The appellants claimed that the findings were based on a mistake of fact, or no evidence of probative value; that Captain Gemmell was given no fair opportunity to answer the implied findings; that the findings were based on information gathered by the Commissioner after the hearing and no opportunity of meeting the new material was given to Air New Zealand or Captain Gemmell.

Paragraph 377, the one which took the attention of the media, was the

> pre-determined plan of deception . . . orchestrated litany of lies

paragraph.

The claim was that these findings were not based on evidence of probative value; that the affected employees were not given a fair opportunity of answering the charges; that the findings were made in excess of the Commissioner's jurisdiction.

Finally the appellants requested an order quashing the Commissioner's order for $150,000 costs against Air New Zealand.

The Court concluded generally regarding the jurisdiction of the Court to review these proceedings. Referring to the fact that the Erebus Commission was expressed to be appointed both under Letters Patent by the Governor-General, and under authority of and subject to the provisions of the Commissions of Inquiry Act 1908, the Court decided not to determine whether the Commission had statutory as well as prerogative authority for its inquiry. (This issue, as well as those of whether the findings in the body of such a report are 'decisions', whether complete absence of evidence is relevant in considering natural justice or can be redressed in these kinds of proceedings, and

whether a Commission of Inquiry can be lawfully constituted to inquiry into allegations of crime, were expressly left to the Court of Appeal decision or the Thomas Commission—the second of the pair—being heard at the date of writing.)

Those general conclusions were, first that following *Re Royal Commission on Licensing* [1945] N.Z.L.R. 665, and *Attorney-General for Commonwealth of Australia* v. *Colonial Sugar Refinery* [1914] A.C. 237, that courts in New Zealand may prevent a Commission of Inquiry whether Royal, Statutory or both, from exceeding its powers by going outside the scope of the inquiry. Second, that after *Re Royal Commission on State Services* [1962] N.Z.L.R. 96, natural justice applies to Commissions of Inquiry in a broad sense, but that what is specifically required varies with the subject matter of the inquiry. This principle being strengthened and extended by the 1980 amendment to the Commissions of Inquiry Act 1908, creating a new section 4A which provides that any person who satisfies a Commission that any evidence before it may adversely affect his interests must be given an opportunity to be heard regarding the matter to which the evidence relates. Third, that an order for costs under section 11 of the Commissions of Inquiry Act 1908 is the exercise of a statutory power of decision within the meaning of section 4(1) of the Judicative Amendment Act 1972, and hence the substance of the report was subject to judicial review. Following *Pilkington* v. *Platts* [1925] N.Z.L.R. 862, if an order for costs is made by a Commission acting without jurisdiction or failing to comply with procedural requirements, a court will

> by writ of prohibition or other appropriate remedy, prevent its enforcement. (p.665)

The Court accepted that what is reasonably incidental to the terms of a Commission of Inquiry is authorised (*Cock* v. *Attorney-General* (1909) 28 N.Z.L.R. 405) and that to a degree a Commission has a right to express its opinion of witnesses. However, it held that the Commissioner's implied powers did not go as far as the opinion expressed in paragraph 377, because it was

> scarcely distinguishable in the public mind from condemnation by a court of law. Yet it is completely without safeguards of rights to trial by jury and appeal. (p. 666)

Thus the Commissioner exceeded his jurisdiction in finding

> a wholesale conspiracy to commit perjury organised by the Chief Executive. (p. 662)

It further held that if he had had such jurisdiction, natural justice would have required that such allegations be put directly to those accused, so that finding was reached in breach of natural justice.

The Court quashed the order for costs on the grounds: first that the Commissioner's order was

> linked with and consequential upon the adverse conclusions (p. 665) (i.e. in paragraph 377)

on the stance of the airline and was effectively punitive as was

indicated by the comments made by the Commissioner in making the order, and secondly that the order was invalid as being of an amount for greater than that allowed by the scale established in 1903 (1904 Gazette 491).

Regarding paragraph 352, all parties were agreed that the findings contained therein were reached by a mistake of fact.

Paragraph 359(1) was disposed of by the intimation of counsel for the Airline Pilots Association that it was not suggested that it conveyed the impression that Captain Gemmell received the bags and brought them back from Antarctica, and the moderating effect of the Commissioner's statement in paragraph 360:

> However, there is not sufficient evidence to justify any findings on my part that Captain Gemmell recovered documents from Antarctica which were relevant to the fatal flight and which he did not account for to the proper authorities.

The majority disposed of the allegation of intimidation against Captain Eden as not a very serious one, while the minority expressed the view that it was outside the terms of reference of the Commissioner and hence outside his authority,

> a regrettable addition to the Report. (p. 651)

Of the other paragraphs attacked, the majority was not prepared to hold that the applicants had made out a sufficiently strong case to justify the courts interfering.

Thus, despite media implications, the effect of this decision is limited to the declaration that the findings in paragraph 377 were made in excess of jurisdiction, and in breach of natural justice, and an order quashing the $150,000 costs order. No passage in the report was quashed, and all judges agreed that reputations were "vindicated and the interests of justice met" (p. 652) by the quashing of the costs order.

J. O'C.

Y v. *Y*: JUNE 1981. (AUCKLAND M. 145/80) BARKER J.

The importance of this case lies more in the attitude of the judge than in any area of substantive law.

Briefly—Mrs Y was appealing a lower court order that gave custody of their two children to Mr Y. The children were a boy and girl aged six and four respectively. This was an ordinary enough appeal except that Mrs Y was a lesbian. She was not a 'militant' lesbian and had not been involved in a relationship for almost a year. There was evidence that the daughter had become psychologically disturbed as a result of a year's care from the father. However most of the evidence at the

hearing concerned Mrs Y's behaviour and possible future associations.

Mr Justice Barker awarded custody to the mother and said 'a homosexual relationship is a factor for the trial judge to weigh in the balance, not because of the suggestion of immorality, but because the relationship could be relevant if it were likely to affect the children adversely.' But later he stressed that 'one must guard against magnifying the issue of homosexuality as it applies to the capacity of performing the duties of a parent.'

This judgement seemed monumental in its impact. The court—always the last to catch up with social trends had said that homosexuality per se did not disqualify parents from custody of their children.

The decision of Chilwell J. in *D* v. *D (High Court, Auckland, 15 June 1981, M 689/80)* made similar impact. The mother had been living with a transexual (female to male) with three of her five daughters and the transexual's child S. The court heard evidence on the psychosexual development of the children, as they had been exposed to an abnormal male figure in the house for a year. Their development was shown to be quite normal. Custody was accordingly given to the mother.

These decisions would seem to herald the beginning of a 'new age of enlightenment' in the courts when the alternate life-styles of the parents will not be relevant except as to how it affects their parenting ability. Yet in the Rotorua District Court Mr J. Maxwell [unreported *G* v. *G* FP 320/80] gave the custody of two children to the father when the mother was involved in a lesbian relationship. Although Maxwell J. had *Y* v. *Y* and *D* v. *D* cited to him he chose to follow Lord Wilberforce in*Re D*[1977] 1 All E.R. 145 saying 'whatever new attitudes Parliament or public tolerance may have chosen to take as regards the behaviour of consenting adults over 21, inter se, these should not entitle the courts to relax, in any degree the vigilance and severity with which they regard the risk of children, at critical ages being exposed or introduced to ways of life, which, as this case illustrates, may lead to severance from normal society, to psychological stresses and unhappiness and possibly even to physical experiences which may scar them for life'.

He then said that 'the community still does not accept a lesbian relationship as part of the normal living style of people.' He felt that to award custody to the mother would be against the 'unimpeachable Mr G.'.

This decision seems seriously at odds with the decisions of Mr Justice Barker and Chilwell—and the oft cited section 23 Guardian-

ship Act—i.e. the conduct of the parents is only relevant insofar as it affects the welfare of the child.

It would be a pity if having come so far the judiciary allow themselves to distinguish these important cases merely of their own views of what amounts to 'public morality': regardless of the welfare of the children.

K. G. G.