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Cassell & Co Ltd v Broome (1972)Maritime, Generational and
Judicial Clashes

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I. THE ARCTIC CONVOYS OF WORLD WAR II

WHEN THE SOVIET Union entered World War II, the only way in which Britain and the United States could provide it with support in the near term was by sending it war materials. The most direct route by which these could be transported to Russia was by convoy passing through the Arctic waters. But this journey was fraught with danger. This was because, as Churchill recounted in *The Hinge of Fate*, ‘Hitler had directed the German Navy to concentrate its strength in Norway ... not only to prevent a British descent, but also to obstruct the flow of supplies and munitions to Russia’.¹ Despite the risks to which the convoys were exposed, which were greatly magnified during the summer months due to perpetual daylight, both Roosevelt and Stalin pressured Churchill to do whatever he could to transport resources until a second front could be opened.

The convoy, known as PQ17 and consisting of 34 merchant ships, represented the climax of the Anglo-American endeavours in this regard. On 27 June 1942, it sailed from Iceland bound for Russia. Its escort comprised six destroyers as

*This chapter has benefited immeasurably from documents held by the Churchill Archives Centre (specifically, the ‘Papers of Jackie Broome GBR/0014/BRME 14’ and ‘Papers of Stephen Roskill GBR/0014/ROSK 19’). These materials are on such a staggering scale that it has been impossible to take account of more than a small fraction of them within the very limited space available. I refer to the documents held by the Centre by the markers ‘[BRME box/file/page]’ and ‘[ROSK box/file/page]’. I am grateful to the Oxford Law Faculty for providing funding that allowed me to access these materials. I would like to thank the Bodleian Law Library, which provided me with electronic copies of many sources. Finally, I acknowledge the constructive comments of participants in the workshop at which a draft of this chapter was delivered. I am especially grateful to Mark Leeming and John Sackar who alerted me to certain sources that would have otherwise escaped my attention.

¹W Churchill, *The Second World War Volume IV: The Hinge of Fate* (London, Penguin Classics, 2005) 235.

well as anti-aircraft ships, submarines and various smaller vessels. The closest support was that provided by several American and British cruisers and destroyers under the command of Rear-Admiral Sir Louis Hamilton. On 1 July, Hitler's forces identified the convoy and thereafter shadowed it and attacked it from the air. A new danger was then perceived. According to Churchill, by 4 July, there 'were strong reasons'² for the Admiralty to consider that the German battleship the *TIRPITZ* – then the most powerful warship in the world – and its supporting vessels were about to intercept the convoy. Because the cruisers commanded by Rear-Admiral Hamilton were no match for these German forces, it was thought 'that the only hope of saving a proportion of the convoy lay in scattering as widely as possible before the enemy arrived'.³

Accordingly, late on 4 July, the Admiralty issued three signals to Hamilton on the direct personal orders of the First Sea Lord, Admiral Sir Dudley Pound. The first, sent at 9.11 pm, was a direction to the cruiser force to withdraw to the westward. The second, sent at 9.23 pm, instructed the convoy to disperse and proceed to Russian ports. Finally, at 9.36 pm, a signal was given for the convoy to scatter.⁴ In deciding to give the order to scatter, it appears that Pound was influenced by intelligence that had come to his attention via Commander Rodger Winn (later Lord Justice Winn)⁵ as well as discussions with his chief advisor, Lieutenant-Commander Norman Denning (a younger brother of Lord Denning).⁶ The signal to scatter was interpreted by those at sea, and could only have been interpreted, as indicating that the German surface fleet was about to attack with overwhelming force. Upon its being relayed, the merchant ships duly fanned out.

In charge of the escort was Commander John Egerton Broome, who was generally known as 'Jack' or 'Jackie'. The signals placed him on the horns of a dilemma. He had received no orders from either the Admiralty or from Hamilton. His instructions were to protect the convoy but, upon its having scattered, it could no longer be protected. In these circumstances, he proposed to Hamilton that his destroyers should join the latter's cruisers in the hope that they could keep the *TIRPITZ* occupied for long enough to give the scattering convoy a chance to escape. Hamilton acquiesced and Broome signalled to the escort accordingly.

However, the feared attack never came. It transpired that the German surface forces were still at anchor when the order to scatter was given due to Hitler, in one of his many strategic blunders, having prohibited the *TIRPITZ* from being used unless Britain's aircraft carriers had been located. Giving the order to

² *ibid* 229.

³ *ibid* 235.

⁴ *ibid* 235.

⁵ Letter from Sir John Langford-Holt to Theodore Goddard & Co (25 July 1968) [BRME 1/1/51–52].

⁶ R Brodhurst, *Churchill's Anchor: Admiral of the Fleet Sir Dudley Pound* (Barnsley, Leo Cooper, 2000) 244.

scatter was thus a mistake. The decision as to how to proceed should have been left to the naval officers who were at the scene. But because this was not done, the convoy ended up defenceless and hence vulnerable to U-boat and air attack. Most of the merchant vessels were gradually picked off. Out of the 34 ships that had left Iceland, 23 were sunk. To put this into context, more than 150 lives were lost together with huge quantities of *matériel*, including more than 200 aircraft and 400 tanks. Churchill remarked that ‘This was one of the most melancholy naval episodes in the whole of the war’.⁷

A great deal has been written about the Arctic convoys and, in particular, Convoy PQ17.⁸ These writings include a book authored by Mr David Irving entitled *The Destruction of PQ 17*, which was published in 1968 by Cassell & Co Limited. One of its distinctive features is that it attributed all or most of the responsibility for the withdrawal of the destroyers to Broome. It accused him of cowardice and indifference to the convoy’s fate. It also alleged that he had disobeyed orders by proceeding closer to German air bases in Norway than had been directed. The publication of Irving’s book triggered the proceedings – *Cassell & Co Ltd v Broome* – that are the subject of this chapter.

The case involved an extraordinary clash between the Court of Appeal and the House of Lords. The former dramatically held that it was not bound by a speech that Lord Devlin had given in *Rookes v Barnard*,⁹ with which all other members of the Appellate Committee had concurred, on the basis that it had been decided *per incuriam*. It also advised lower courts to disregard it. Any attempt to follow *Rookes* was said to be ‘bound to lead to confusion’.¹⁰ Predictably, on an appeal against the Court of Appeal’s decision, the House of Lords reprimanded the former for having had the temerity to suggest that judges were free to proceed other than according to its pronouncements. It also affirmed the correctness of the decision in *Rookes* and, accordingly, the infamous ‘categories test’, which restricts the power to award punitive damages to just three situations (ie, (1) cases involving oppressive, arbitrary or unconstitutional conduct by servants of the Government; (2) cases in which the defendant was motivated by a desire to make a profit; and (3) cases in which statute authorised their award).

II. THE PROTAGONISTS

Before delving into the details of the proceedings, it is convenient to add some colour regarding the protagonists. Broome was born in 1901 in Seattle, Washington, but

⁷ Churchill (n 1) 237.

⁸ See, eg, SW Roskill, *The War at Sea 1939–1945*, vol 2 (Uckfield, Naval and Military Press, 1956) ch 5; P Lund and H Lundlan, *PQ 17: Convoy to Hell – The Survivor’s Story* (London, Foulsham, 1968); J Broome, *Convoy is to Scatter: The Story of PQ17* (London, Futura Publications, 1972).

⁹ *Rookes v Barnard* [1964] AC 1129 (HL). Regarding *Rookes*, see Field, ch 4 of this volume.

¹⁰ *Cassell & Co Ltd v Broome* [1971] 2 QB 354 (CA) 384 (Lord Denning MR).

was raised in England. He served in the Royal Navy during both world wars. In 1942, he was promoted to the rank of Captain. In 1943, he was awarded the Distinguished Service Medal. A skilled cartoonist and caricaturist, Broome enjoyed drawing during his spare time (his drawings include a roundabout in Oxford adorned with several signposts all of which read 'Pub'). In 1947, he transitioned to civilian life and worked primarily as a writer on naval subjects. He was apparently well off. For many years, he maintained homes in both Chelsea and Oxford and was a member of, and frequent visitor to, the Garrick Club. Voluminous papers that he deposited with the Churchill Archives Centre and the books that he wrote reveal him to have been a highly intelligent and articulate man with a good sense of humour.

As regards convoy PQ17, Broome explained that it would 'always be my gloomiest nightmare'.¹¹ He attributed responsibility for the disaster to Pound and his advisors. He described the catastrophe as 'an epic in back-seat driving by a senile maniac'¹² and referred to the First Sea Lord as 'the first chap in naval history to have scattered a convoy by remote control'.¹³ He was deeply offended by Irving's account of the relevant events. Thus, in correspondence with his friends he referred to Irving's 'malicious ignorance' and described his book in question as 'nasty'¹⁴ and 'trash'.¹⁵ He also wrote that 'Seldom has anyone shown such ill-mannered, conceited arrogance as this young author. If the BBC awarded a four-letter Oscar, it was his, outright'.¹⁶

Irving could hardly have contrasted more sharply with Broome.¹⁷ He was born in Essex on 24 March 1938, which was not long before the events involving Convoy PQ17 unfolded. His father had served in the Royal Navy, which is ironic given that many of Irving's works were anti-British. His mother had been a professional writer and illustrator. In 1957, Irving started but never completed a degree in physics at Imperial College, London. Declared medically unfit for national service, in 1960 he took employment as a steelworker. In 1961, he started reading for a degree in economics at University College, London. While studying for that degree, he worked as a night-watchman at a building

¹¹ Letter from Captain John Broome to Admiral Sir Angus Graham (19 November 1968) [BRME 1/3/10]. In his official report to the Admiralty, Broome wrote that leaving the convoy 'was the most unpleasant decision I have ever had to make' (quoted in *Broome* (n 10) 377 (Lord Denning MR)).

¹² Letter from Captain John Broome to Admiral Sir Angus Graham (19 November 1968) [BRME 1/3/10].

¹³ *ibid.*

¹⁴ Letter from Captain John Broome to Vice Admiral Sir John Hayes (8 December 1968) [BRME 1/2/20].

¹⁵ Letter from Captain John Broome to Admiral Sir Angus Cunningham (19 November 1968) [BRME 1/3/10].

¹⁶ Letter from Captain John Broome to Vice Admiral Sir John Hayes (3 January 1969) [BRME 1/2/24–25].

¹⁷ The text in this paragraph and the next draws on a letter that Irving wrote to his counsel by way of background dated 22 January 1970, which is available on Irving's website: <www.fpp.co.uk/Legal/PQ17Libel/Background220170.html> accessed 7 May 2023.

in Kensington. In order to keep himself occupied while at work, Irving started writing about World War II. The pay for this moonlighting was lucrative and he resolved to pursue a career as a professional writer. Irving's technique for securing interviews with public figures was unconventional. He would turn up unannounced in the evenings at their front door and ask if time could be made available for an interview a few days later. He apparently employed this 'personal approach technique' with Mr Justice Winn (as he then was) in connection with the research for *The Destruction of PQ 17*. Irving reports that the discussions that ensued were cordial, although this sits awkwardly with his acknowledging that the judge subsequently 'circulated a very hostile account of [his] having gate-crashed his house'.¹⁸

As for the publisher of the book, Cassell & Co, it was a large and experienced publishing house. It had earned a significant reputation as regards books on military history, having published Churchill's multi-volume classic, *The Second World War*. Cassell & Co apparently paid Irving a £2,000 (the equivalent of around £40,000 today) advance royalty for *The Destruction of PQ 17*.¹⁹ Irving apparently hoped that the work would sell half-a-million copies, which would have resulted in both he and Cassell & Co making a vast profit.²⁰

III. THE BOOK IS PUBLISHED

Irving had originally intended to call the book *The Knight's Move*. That title had been based on the name that the Germans had given to their operation to intercept the Arctic convoys. While carrying out research for the book, Irving wrote a letter to a German writer in which he said that he was 'all for attacking [Broome] because he will undoubtedly launch a Press counter-attack'.²¹ Also as part of his research, Irving visited Broome at his home in Chelsea in order to speak with him about the convoy.²² During this meeting he seemingly asked Broome if he had shot German pilots who he had plucked out of the water.²³ On 6 November 1966, Irving gave Broome a copy of the manuscript. The next day, Broome telephoned him angrily and complained that it was 'full of inaccuracies'.²⁴

¹⁸'Two Notes on my Techniques' (23 January 1970) <www.fpp.co.uk/Legal/PQ17Libel/Methods230170.html> accessed 7 May 2023. See also Irving's remarks quoted in an issue of *The Sunday Times* (the date of which is unknown) [ROSK 19/1/15].

¹⁹Letter from Captain John Broome to Vice Admiral Sir John Hayes (3 January 1969) [BRME 1/2/24–25].

²⁰*ibid* 392.

²¹*Broome* (n 10) 375 (Lord Denning MR).

²²*ibid*.

²³Letter from Captain John Broome to Vice Admiral Sir William O'Brien (29 September 1968) [BRME 1/2/76].

²⁴*Broome* (n 10) 375 (Lord Denning MR).

Irving initially offered the book to his regular publisher, William Kimber & Co. It declined to publish it on the recommendation of Captain Stephen Roskill,²⁵ who was the official naval historian (and the brother of Lord Roskill). Captain Roskill presciently wrote in his review, which the publisher showed to Irving, that²⁶

in general this book reeks of defamation and any publisher should be very cautious before issuing it. ... I am no legal expert, but I'd be surprised if the publisher of this book, as it is written, does not end up in the law courts.

William Kimber & Co told Irving that the book was²⁷

a continuous witch hunt of Captain Broome, filled with exaggerated criticisms of what he did or did not do. ... We could not possibly publish the book as it is unless you took out insurance against any writs for libel ...

These and other exchanges demonstrated, as Lord Denning would later put it, 'that Mr. Irving deliberately set out to attack Commander Broome and in spite of the most explicit warnings persisted in his attack, because it would help sell the book'.²⁸

In the event, Cassell & Co agreed to publish the book. Like Irving, it was well aware that it was defamatory and had been repeatedly warned of the possible consequences of publishing it.²⁹ For instance, on 27 December 1967 Broome wrote to Cassell & Co complaining that the intended book was defamatory. Cassell & Co responded stating that 'drastic revisions'³⁰ had been made to the text in view of his comments. In fact, and as Cassell & Co knew, none of the revisions affected the relevant paragraphs. On 16 February 1968, a director of Cassell & Co circulated an internal memorandum that stipulated that 'absolutely and positively not one single copy, on any pretext whatsoever, [was] to be removed from the house without reference to [him]'.³¹

However, Cassell & Co then changed its mind for reasons unknown, but presumably because it considered that the upside to publishing the work outweighed the downside. On 22 February 1968, it distributed 60 proof copies of the book. Insofar as the allegations against Broome were concerned, they fell into two main categories. The first accused him of disobedience. It was said that he had ignored the orders of Hamilton by taking the convoy within striking distance of the German airbases in Norway and thus exposed it to being attacked. The second group of allegations imputed cowardice.

²⁵ Letter from Captain Stephen Roskill to Captain John Broome (12 August 1968) [BRME 1/2/91].

²⁶ *Broome* (n 10) 375 (Lord Denning MR).

²⁷ *ibid.*

²⁸ *ibid* 376 (Lord Denning MR).

²⁹ *ibid* 376–78.

³⁰ *ibid* 377.

³¹ *ibid* 378.

They insinuated that Broome had deserted the convoy and left it to be destroyed. The final sentence of the proof copies read that ‘In short, the point of error was in Commander J. E. Broome’s withdrawal of his escort destroyers, on his own initiative ...’³²

IV. PROCEEDINGS ARE ISSUED

Broome instructed a prominent London law firm, Theodore Goddard & Co. The solicitor with carriage of the proceedings was initially Mr Michael Best and, later, the senior partner, Mr Derek Clogg, who was apparently one of Broome’s former shipmates.³³ On 5 March 1968, Broome issued proceedings against both Cassell & Co and Irving. The letter giving notice of the claim stated that:³⁴

The book makes the most serious and utterly unfounded allegations ... of such gravity as, disobedience of orders, ... inadequate interpretation of signals, ... grave errors of judgment, if not incompetence ... [and] unjustifiable desertion of the convoy leaving it to its fate.

A few days later, Cassell & Co’s solicitors, Oswald Kickson, Collier & Co, responded saying that their client had decided to ‘defer publication of the book pending further research by the author’.³⁵ Additional correspondence, regarded as delaying tactics by Broome’s solicitors, ensued leading to the writ being served on 21 May 1968. Broome strongly encouraged Captain David Lawford, who had been in command of one of the escort ships and criticised in the book, to join him in suing.³⁶ Lawford, however, was by this stage an elderly and frail man, and he declined to do so. He did, however, give evidence at the trial on behalf of Broome.

On 14 June 1968, the defendants served their defences. They took a similar line. They both disputed the meaning that Broome attributed to the words in issue and alleged that their natural and ordinary meaning was true. The defence of honest opinion was also pleaded. On 7 August 1968, Cassell & Co published a hardback edition of the book, which was in substance the same as the proof copies, to the public. Its dustjacket presented the work as being based on five years of intensive research. It is unclear why Cassell & Co took this step given that it was already facing proceedings in respect of the proof copies. Presumably, however, it considered that the profits that it could make would exceed any

³² *ibid* 374.

³³ Letter from Captain John Broome to Vice Admiral Sir John Hayes (9 August 1969) [BRME 1-2/35].

³⁴ Letter from Theodore Goddard & Co to Cassell & Co Ltd (5 March 1968) [BRME 1-1/5].

³⁵ Letter from Oswald Kickson, Collier & Co to Theodore Goddard & Co (11 March 1968) [BRME 1-1/10–11].

³⁶ Letter from Captain John Broome to Captain David Lawford (10 November 1968) [BRME 1/2/114].

liability. In any event, the decision prompted Broome to issue a second claim on 23 August 1968. Pursuant to an order that was made on 18 December 1968, the two sets of proceedings were consolidated.

Broome was heavily involved in virtually all aspects of the litigation. He responded promptly and in an organised fashion to queries that his solicitors raised. He also reviewed the many documents in the case carefully and was instrumental in identifying both lay and expert witnesses. It is obvious that Broome was highly popular with many of the men with whom he served. Numerous colleagues of his, including some with whom he had evidently lost contact decades prior to the litigation, volunteered to do whatever they could to assist him and wrote to him in the warmest of terms. The Ministry of Defence was staunchly supportive of Broome's claim and permitted various officers to give evidence and to provide documents.³⁷ Broome's solicitors told him that 'for practical purposes, we only have to ask for anything and it will be given to us'.³⁸

Broome found aspects of the case frustrating. He referred sarcastically to the 'super-sonic speed'³⁹ of the litigation and evidently hoped that a settlement could be achieved. Thus, he wrote to a colleague that 'Naturally, I would much prefer [it if the claim] never reached court, but as you doubtless know, Plaintiffs have to prove unflinching determination right up to the doors of the courts – so to speak – before "settlements" are contemplated'.⁴⁰ Although Broome liked his own lawyers, he disliked the legal profession, which he referred to as being 'scruple-free'.⁴¹ On occasion, he had to 'bend [his own legal representatives] straight'.⁴² He was aghast at the inefficiency of the judicial system. He referred to 'carefree legal extravagance'⁴³ and to its being 'apparently conventional to waste costly effort'.⁴⁴

While the case was working its way towards trial, reviews of the book were published. One of these, which appeared in *The Guardian*,⁴⁵ led to a writ being issued against both the newspaper and the reviewer. On 15 April 1969, those defendants served a defence settled by (no less than) one TH Bingham.⁴⁶ It is unclear what happened to this litigation. On 23 January 1970, a paperback edition of the book was published (not by Cassell & Co, but under a licence

³⁷ See, eg, letter from Captain John Broome to Vice Admiral Sir John Hayes (3 February 1969) [BRME 1-2/24–25].

³⁸ Letter from Theodore Goddard & Co to Captain John Broome (4 October 1968) [BRME 1-1/72].

³⁹ Letter from Captain John Broome to Vice Admiral Sir John Hayes (5 March 1969) [BRME 1/2/30].

⁴⁰ *ibid.*

⁴¹ Letter from Captain John Broome to Vice Admiral Sir John Hayes (9 August 1969) [BRME 1/2/35].

⁴² *ibid.*

⁴³ Broome (n 8) 17.

⁴⁴ *ibid.*

⁴⁵ G Moorhouse, 'Abandon Convoy!', *The Guardian*, 12 September 1968.

⁴⁶ Defence [BRME 1-1/93–97].

given to another publisher⁴⁷). By this stage, Broome, Irving and Cassell & Co were on the doorstep of the court. The publication was evidently timed to coincide with the trial.

V. THE TRIAL

The trial lasted for 17 days and took place between 26 January and 13 February 1970 before Lawton J sitting with a jury.⁴⁸ Broome was represented by Mr David Hirst QC and Mr Andrew Bateson. Irving's counsel were Mr Colin Duncan QC and Mr AC Pugh while Cassell & Co instructed Mr Michael Kempster QC and Mr Edward Adeane. Both Irving and Cassell & Co persisted in their defence of truth. It was not until the start of the trial that the issue of punitive damages arose. It apparently did so as a result of further disclosure that Irving had given⁴⁹ in relation to, presumably, the publication of the paperback edition of the book. In the course of his opening submissions, Broome's counsel told Lawton J that Broome wished to seek punitive damages under the second category in *Rookes*.

The defendants objected on the basis that no claim for punitive damages had been pleaded. This prompted Broome to apply for permission to amend. In his judgment on that application, Lawton J held that any claim in this regard needed to be pleaded. He wrote that:⁵⁰

The House of Lords in *Rookes v Barnard* has clarified the law and has decreed that exemplary damages are an exceptional form of award. In these circumstances anyone who wishes to say that he is making an exceptional kind of claim for damages and not a normal one should say so in his pleading.

He gave, however, permission to amend. Broome duly pleaded that the defendants had calculated that the money that the book would make if it contained the offending passages would probably exceed any damages for which they were adjudged liable with the result that punitive damages should be awarded.⁵¹

It is worth pausing here to draw attention to three points. First, the fact that *Broome* was even a case about punitive damages was due to the accidents of litigation. Broome's lawyers might easily have decided not to advance a claim in this regard so late in the day, or Lawton J could have rejected Broome's amendment application in circumstances where it had been made after the trial had

⁴⁷ *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL) 1058.

⁴⁸ The trial is impressively analysed in F Houghton, 'The trial of Convoy PQ17 and the Royal Navy in Post-War British Cultural Memory' (2020) 31 *Twentieth Century British History* 197. Houghton convincingly argues that the trial was part of a 'wider social "clash of generations"' with the antagonists 'represented in reductive terms of degenerate modern "youth" versus honourable "duty and sacrifice" of an older generation' (at 200).

⁴⁹ *Broome v Cassell & Co Ltd* [1971] 1 All ER 262 (QBD) 263.

⁵⁰ *ibid* (footnote omitted).

⁵¹ The amendment is quoted in the judgment of the House of Lords: see *Broome* (n 47) 1057.

already begun. Further, if the paperback edition had not been published, punitive damages would presumably not have been sought. Secondly, it is rather surprising that Lawton J gave Broome permission to amend his pleadings. Although Broome's application had seemingly been triggered by late disclosure and the publication of the paperback edition, the trial had already begun and the question of prejudice to the defendants at being confronted with a new case at this stage of the litigation seems not to have been considered. The third point concerns the rationale for the pleading requirement. Lawton J, as observed above, asserted that the pleading requirement was justified by the 'exceptional'⁵² nature of the remedy. This, however, is not quite to the point. A claim for punitive damages should be pleaded because a person who is said to have engaged in serious wrongdoing is entitled to know precisely that which they are accused of having done in order that they are in a position to meet the allegations.⁵³

Broome gave evidence for five days.⁵⁴ He also called numerous witnesses. Indeed, he called so many that it is impractical to say more than a few words in this regard. One of his witnesses was Vice Admiral Sir John Eaton, who had been the commanding officer of one of the three destroyers that were screening the cruiser force.⁵⁵ After giving evidence, he sent Broome a letter in which he wrote: 'The best of luck Jackie and dont [*sic*] forget that all men worth drinking with will be rooting for you'.⁵⁶ Another witness was Mr Basil Elliot, who had hoisted the signal to scatter. Broome recounts that Mr Elliot had contacted him out of the blue during the trial and 'went into the witness box the next day'. His evidence, Broome said, 'was outstandingly impressive'.⁵⁷ Yet another witness was Captain John Litchfield, who had been the Executive Officer of one of the covering cruisers. Broome described him as 'a great support throughout and an excellent witness'.⁵⁸ Litchfield believed in the litigation so strongly that he offered to contribute 200 guineas towards Broome's legal costs 'if things went wrong'.⁵⁹ Captain Roskill, the Official Naval Historian, was also called. Broome wrote that he 'was very helpful throughout my case, and gave excellent evidence'.⁶⁰ Roskill had agreed to pay £1,000 towards Broome's costs.⁶¹

⁵² See the text to n 50.

⁵³ For a recent articulation of the principle, see *Kasem v University College London Hospitals NHS Foundation Trust* [2021] EWHC 136 (QB) [36]–[39]. The particular allegation in this case was one of fraud, but the principle applies to all forms of serious wrongdoing.

⁵⁴ Letter from Captain John Litchfield to Captain Broome (19 February 1970) [BRME 1-2/72–73].

⁵⁵ Note by Captain Broome regarding Vice Admiral Sir John Eaton [BRME 1-2/3].

⁵⁶ Letter from Vice Admiral Sir John Eaton to Captain Broome (9 February 1970) [BRME 1-2/8–9].

⁵⁷ Note by Captain Broome regarding Mr Elliot [BRME 1-2/11].

⁵⁸ Notes by Captain Broome [BRME 1-2/46].

⁵⁹ Letter from Captain John Litchfield to Captain Broome (22 August 1968) [BRME 1-2/52].

⁶⁰ Notes by Captain Broome [BRME 1-2/90].

⁶¹ Letter from Captain Stephen Roskill to Captain John Broome (21 August 1968) [BRME 1/2/93]. See also the letter from Mr Derek Clogg to Captain Stephen Roskill (28 November 1969) [ROSK 19/1/95].

After Broome had closed his case, the defendants invited Lawton J to rule that there was no evidence from which the jury could infer that the claim for punitive damages fell within the second category in *Rookes*. That invitation was rejected. Neither Irving nor Cassell & Co called any witnesses, and Irving himself did not go into the witness box. Lawton J's summing up took place on 16 and 17 February 1970. As regards punitive damages, he directed the jury in accordance with what Lord Devlin had said in *Rookes*. *Private Eye*, apparently considering that Lawton J's summing up was slanted in Broome's favour, parodied it.⁶² It appears that Irving sought to leave the courtroom during the summing up only to be told by one of his lawyers 'You sit here and sweat it out'.⁶³

On 17 February 1970, the jury, having deliberated for nearly five hours,⁶⁴ returned a verdict against both defendants. They awarded Broome £1,000 in compensatory damages in respect of the 60 proof copies of the book (the equivalent today of around £11,000). Counsel for Broome had apparently waived any right to punitive damages in respect of this publication. As regards the hardback edition, £14,000 in compensatory damages were awarded and £25,000 by way of punitive damages (the combined sum is the equivalent of around £443,000 today). Strikingly, therefore, the punitive element was almost double the compensatory component insofar as the hardback edition was concerned. It is also one of the largest awards of punitive damages ever made in England both at the time and today.⁶⁵

As they left the court, Broome and Irving shook hands.⁶⁶ The verdict attracted significant media attention with the BBC covering it during prime-time television.⁶⁷ Broome received around 500 letters of congratulation.⁶⁸ Irving also received a good number of letters which were, it seems, more mixed.⁶⁹ It appears that Broome, after buying a new car and an annuity, donated the damages to charity, apparently to the Churchill Archives Centre at Captain Roskill's request.⁷⁰ As for Irving, he wrote promptly to his leading counsel,

⁶² 'Mr Justice Lawandorder Sums Up', *Private Eye*, 27 February 1970. The same view was formed by Houghton (n 48) 211.

⁶³ Quoted in an unknown issue of *The Sunday Times* [ROSK 19/1/15].

⁶⁴ *Broome* (n 47) 1096.

⁶⁵ Empirical data regarding the quantum of punitive damages in the twenty-first century is given in J Goudkamp and E Katsampouka, 'An Empirical Study of Punitive Damages' (2018) 38 *OJLS* 90.

⁶⁶ An image of their shaking hands is available at <www.gettyimages.co.uk/detail/news-photo/day-lawsuit-ends-with-a-handshake-captain-john-broome-and-news-photo/830353578> accessed 7 May 2023.

⁶⁷ Letter from Vice Admiral Sir John Eaton to Captain John Broome (18 February 1970) [BRME 1/2/10].

⁶⁸ *Ibid.*

⁶⁹ Several are published on Irving's website: <www.fpp.co.uk/Legal/PQ17Libel/Mail1970.html> accessed 7 May 2023.

⁷⁰ Letter from Captain Stephen Roskill to Captain John Broome (28 September 1972) [BRME 1/2/105–106]; letter from Captain John Broome to Captain Stephen Roskill (8 October 1972) [BRME 1/2/107–108].

thanking him for defending him and adding that ‘unlike a wartime leader, [he was] not going to blame [his] “generals” for the defeat’.⁷¹ It is unclear whether Captain Broome was able (or sought) to enforce the judgment against Irving. The latter’s solicitors apparently told the former that he had no assets.⁷² Cassell & Co belatedly paid the compensatory damages under threat of winding-up proceedings.⁷³

VI. THE COURT OF APPEAL

In the wake of the trial, Cassell & Co was purchased by an American publishing house and instructed new solicitors.⁷⁴ It appealed on seven grounds and sought orders for a retrial.⁷⁵ The grounds of appeal are wide-ranging and hence do not lend themselves to being summarised. However, and relevantly for current purposes, three of the grounds concentrated on punitive damages.⁷⁶ In this regard, it was contended that there was insufficient evidence to justify leaving the claim to the jury, that the jury had been misdirected as to both the law and facts and that the award was excessive. Irving also appealed. Although his grounds of appeal differed from those of Cassell & Co in important respects, his arguments as concerns punitive damages were ultimately along similar lines. While the appeal was pending, settlement discussions ensued,⁷⁷ but these ultimately came to nothing. Irving was ordered to pay security of £1,500 as a condition for appealing.

On 4 March 1971, Lord Denning MR⁷⁸ and Salmon and Phillimore LJJ dismissed both appeals, which were, incredibly, heard over the course of nine

⁷¹ Letter from Mr David Irving to Mr Duncan QC (22 February 1970) <www.fpp.co.uk/Legal/PQ17Libel/Duncan220270.html> accessed 7 May 2023.

⁷² Letter from Mr Derek Clogg to Captain Stephen Roskill (18 March 1970) [ROSK 19/1/50].

⁷³ *ibid.*

⁷⁴ FA Mann, *Life and Cases: Manuscript of an Autobiography* (Göttingen, Bonn University Press, 2021) 180.

⁷⁵ Notice of Appeal [BRME 1/1/118]. While the appeal was pending, Broome issued yet further writs in respect of subsequent publications of Irving’s book: letter from Mr Derek Clogg to Captain Stephen Roskill (27 October 1970) [ROSK 19/1/4].

⁷⁶ FA Mann was Cassell & Co’s solicitor on the appeal to the Court of Appeal and House of Lords. In his autobiography, he wrote that he ‘never understood how the three passages in question [in Mr Irving’s book] could be so read as to be capable of bearing the meaning alleged’ (Mann (n 74) 180) and considered that ‘there had never been any defamation’ (*ibid* 182). He explained that many people with whom he had consulted agreed with him but that counsel who he instructed took a different view. Cassell & Co ultimately pursued only those grounds of appeal that were related to punitive damages (letter from Mr Derek Clogg to Captain Stephen Roskill (20 October 1970) [ROSK 19/1/5]).

⁷⁷ Letter from Mr Derek Clogg to Captain John Broome (10 September 1970) [ROSK 19/1/9].

⁷⁸ Broome’s solicitors were concerned that they might draw Lord Denning. It was felt that he might reduce the damages ‘as that is rather than way his mind goes’. However, they also remarked that ‘As against this, he is a man who is much concerned about his public image and would be reluctant to disturb what was so obviously a very popular win’ (letter from Mr Derek Clogg to Captain John Broome (10 September 1970) [ROSK 19/1/10]).

days. They ultimately did so on the basis that the directions of Lawton J had been adequate and because the sums awarded were not excessive in the circumstances. But the real significance of their decision lies in what they said about *Rookes*. This is addressed further below, but, in summary, they held that *Rookes* had been wrongly decided by the House of Lords and that it was not binding on them or any other court as a result. The speech of Lord Devlin (who had since retired as had all of the other members of the panel in *Rookes* save for Lord Reid) was said to have been delivered *per incuriam*. It was claimed that Lord Devlin had ignored two decisions of the House of Lords, *Ley v Hamilton*⁷⁹ and *E Hulton & Co v Jones*,⁸⁰ which were regarded as approving the jurisdiction to award punitive damages absent the shackles that Lord Devlin had placed upon them by the categories test. Juries, it was said, should be henceforward directed in accordance with the law as it had been understood prior to *Rookes*. The decision must have surprised everyone, not least Broome's solicitors, who had written to Captain Roskill in the period leading up to the appeal assuring him that 'the Court of Appeal cannot disagree with Devlin's judgment in *Rookes v. Barnard*'.⁸¹

The main reasons were given by Lord Denning and they exemplify his style. He painted a striking contrast between the litigants. He extolled the virtues of Broome (and his witnesses) and even likened him to Nelson. He referred in this regard to an instruction that Hamilton had given to Broome to keep his distance from the German airbase in Norway and wrote that the latter, by keeping the convoy moving to the east and hence shortening the voyage, 'was bolder'.⁸² Broome 'did as Nelson did'.⁸³ Conversely, Lord Denning was intensely critical of the defendants. As regards Irving, he wrote:⁸⁴

Many persons afterwards wrote about the disaster. The official historian of the war wrote about it. He did not condemn Commander Broome. Nor did Mr. Winston Churchill. The condemnation was made 20 years later by an author who knew nothing about the war because he was a small boy at the time. David Irving was determined to write 'an authentic account.' His regular publishers – William Kimber & Co. Ltd.—refused to publish it. They thought it was too dangerous. So he got Cassell & Co. Ltd. to publish it.

Lord Denning also remarked:⁸⁵

It is plain that Mr. Irving was warned from most responsible quarters that his book contained libels on Commander Broome, and yet he determined to go on with it. In order to make it a success, he was ready to risk libel actions. In the apt French phrase, he was looking for a *succès de scandale*.

⁷⁹ *Ley v Hamilton* (1935) 153 LT 384 (HL).

⁸⁰ *E Hulton & Co v Jones* [1910] AC 20 (HL).

⁸¹ Letter from Mr Derek Clogg to Captain Stephen Roskill (29 July 1970) [ROSK 19/1/27].

⁸² *Broome* (n 10) 371.

⁸³ *ibid.*

⁸⁴ *ibid* 373.

⁸⁵ *ibid* 374.

He added that the defendants' conduct was, and was obviously regarded by the jury, as being 'absolutely outrageous'⁸⁶ and 'completely shocking'.⁸⁷ He thought Cassell & Co had behaved just as badly as Irving. There is not, he said, 'much to choose between them'.⁸⁸

Turning to Lord Denning's analysis as regards the status of *Rookes*, it can be understood as having four main strands to it. First, he suggested that Lord Devlin had acted on a whim and had plucked the categories test out of thin air. He pointed out that the House of Lords in *Rookes* had not heard argument as regards the test and referred to it throughout his reasons as 'the new doctrine'. Secondly, he observed that *Rookes* had been subjected to 'devastating criticism'⁸⁹ and 'wholesale condemnation'⁹⁰ by distinguished appellate courts overseas. Thirdly, he considered that the House of Lords had awarded punitive damages in cases that fell outside Lord Devlin's categories and, since *Rookes* had been decided prior to the 1966 Practice Statement, that it had not been open to it to depart from its decisions concerned.⁹¹ Fourthly, he assessed the categories test as being 'hopelessly illogical and inconsistent'.⁹² He pointed out that it was nonsensical for punitive damages to be restricted, as per the first category, to public servants. He argued that punitive damages should be available as against a bully who acts oppressively regardless of whether they were a public servant. Analogous criticisms were made of the second category, that is to say, no reason was seen to limit it to conduct motivated by a desire to make a profit. Although Lord Denning considered that the appeal should be dismissed because the jurisdiction to award punitive damages was not restricted by the categories test, he went on to hold that, even if he had been bound by *Rookes*, the case fell squarely within the second category. There was, he observed, 'ample evidence' that the defendants had hoped to profit from their wrongdoing.⁹³

Salmon LJ's reasons were broadly similar to those of Lord Denning. He too was offended by the defendants' behaviour. They had, he said, engaged in 'outrageous conduct of an altogether exceptionally high order'.⁹⁴ He argued that the first category in *Rookes* was 'unsupported by authority' and 'difficult to reconcile ... with justice or common sense'.⁹⁵ He expressed similar sentiments as regards the second category. Salmon LJ said that he could 'find no sensible reason for putting the power to award [punitive] damages into the strait

⁸⁶ *ibid* 378.

⁸⁷ *ibid* 380.

⁸⁸ *ibid* 383.

⁸⁹ *ibid* 380.

⁹⁰ *ibid*.

⁹¹ *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

⁹² *Broome* (n 10) 381.

⁹³ *ibid* 382.

⁹⁴ *ibid* 394.

⁹⁵ *ibid* 386.

jacket which the second category in *Rookes v. Barnard* imposes'.⁹⁶ His ultimate conclusion was that 'Lord Devlin's whole approach in *Rookes v. Barnard* was based on a fundamental fallacy'.⁹⁷ He added that 'Far from punitive damages not having been approved in the House of Lords, they and the principles upon which they could form an element of an award of general damages had been explicitly approved by the House ...'.⁹⁸ As with Lord Denning, Salmon LJ considered that the facts of the case in any event fell within the second category.⁹⁹ Phillimore LJ's brief reasons similarly largely tracked those of Lord Denning, albeit they were expressed more cautiously.

On any view, the Court of Appeal's decision was incendiary.¹⁰⁰ It was a direct challenge to the authority of the House of Lords and capable of being read as being offensive and condescending. Further, it was an unnecessary challenge since all members of the Court of Appeal agreed that the case fell squarely within Lord Devlin's second category. Julius Stone observed that 'in terms of judicial tactics, this approached disastrous comedy'.¹⁰¹ Lord Devlin was reportedly left 'furious'¹⁰² by the Court of Appeal's decision. He demanded that Lord Hailsham, who had recently become the Lord Chancellor, immediately rebuke Lord Denning, to whom he apparently attributed principal responsibility for the Court of Appeal's judgment. Much to Lord Devlin's annoyance, Lord Hailsham refused publicly to criticise the Court of Appeal then and there, but made it clear to Lord Devlin that since an appeal to the House of Lords was pending, 'things could be put right'¹⁰³ in due course.

VII. THE HOUSE OF LORDS

Cassell & Co (but not Mr Irving) appealed to the House of Lords. It did so solely regarding punitive damages. The appeal was atypical in at least four respects. First, the Appellate Committee sat as a panel of seven instead of the usual five.¹⁰⁴ Secondly, the appeal was heard over the course of 13 days, which one suspects was and still is unprecedented. Thirdly, and as Lord Hailsham made plain,¹⁰⁵ the House gave permission to appeal only because of the mutinous nature of the Court of Appeal's decision. The Law Lords were clearly

⁹⁶ *ibid* 387.

⁹⁷ *ibid* 390.

⁹⁸ *ibid*.

⁹⁹ *ibid* 392–93.

¹⁰⁰ Lord Devlin wrote extra-judicially that the Court of Appeal's decision 'in less exalted circles would have caused a "demo"': P Devlin, 'Judges and Lawmakers' (1976) 39 *MLR* 1, 10.

¹⁰¹ J Stone, 'On the Liberation of Appellate Judges: How Not to Do It!' (1972) 35 *MLR* 449, 469.

¹⁰² J Sackar, *Lord Devlin* (Oxford, Hart Publishing, 2020) 216.

¹⁰³ G Lewis, *Lord Hailsham: A Life* (London, Jonathan Cape, 1998) 279. See also Sackar (n 102) 216.

¹⁰⁴ Consider the discussion in A Burrows, 'Numbers Sitting in the Supreme Court' (2013) 129 *LQR* 305, 306.

¹⁰⁵ *Broome* (n 47) 1052.

aghast at the conduct of the Court of Appeal and were concerned that future constitutions thereof might be emboldened to defy them. Fourthly, all of the Law Lords gave separate speeches. They (or at least some of them) apparently did so because it was thought that it was problematic that only a single speech had been given in *Rookes* as regards the issue of punitive damages. For example, Lord Hailsham said that ‘Whatever the advantages of a judgment of an undivided court delivered by a single voice, the result may be an unduly fundamentalist approach to the actual language employed’.¹⁰⁶

In the end, a majority of the House of Lords constituted by Lord Hailsham, Lord Reid, Lord Morris and Lord Kilbrandon dismissed the appeal on the basis that Lawton J’s directions to the jury had not been so defective as to warrant the verdict being set aside and because the punitive damages award was not excessive. However, in doing so they affirmed the decision in *Rookes* and criticised the Court of Appeal for refusing to follow it. Stone astutely remarked that the House of Lords’ judgment ‘may well be the most hostile *affirmation* of a Court of Appeal decision in our history’.¹⁰⁷ A minority comprising Viscount Dilhorne, Lord Wilberforce and Lord Diplock would have allowed the appeal. They thought that Lawton J had failed to make it sufficiently clear to the jury that they should not award punitive damages unless the compensatory damages were insufficient to achieve the goals of punishment and deterrence. The minority also considered that the award of punitive damages was excessive. Cassell & Co regarded ‘the defeat [as being] an honourable one’.¹⁰⁸ Broome’s solicitor, for his part, described ‘Hailsham’s as one of the greatest, and most astute, Judgments I think I have ever read ...’.¹⁰⁹

The House of Lords engaged with various points of considerable interest regarding punitive damages. Certain of these are addressed below. However, the significance of the House of Lords’ decision lies mainly not in what it says regarding punitive damages but concerning the doctrine of precedent. As Lord Hailsham observed, ‘What began as a single proceeding between a plaintiff and two defendants ... assumed, at the expense of two of the litigants, the dimensions of a constitutional question ...’.¹¹⁰ He then rebuked the Court of Appeal, remarking that it was not open to it ‘to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords’.¹¹¹ He added that ‘it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers’.¹¹² Lord Hailsham, in a tit-for-tat, even suggested that Lord Denning had perhaps made *per incuriam* remarks himself insofar as he wrongly thought that the paperback edition of

¹⁰⁶ *ibid* 1068; see also at 1084–85. Lord Reid expressed similar views in an interview conducted by Alan Paterson.

¹⁰⁷ Stone (n 101) 451 (emphasis in original) (footnote omitted).

¹⁰⁸ Mann (n 74) 181. Several interesting procedural developments ensued in the wake of judgment being delivered: see *ibid* 181–82.

¹⁰⁹ Letter from Mr Derek Clogg to Captain Stephen Roskill (24 February 1972) [ROSK 19/1/32].

¹¹⁰ *Broome* (n 47) 1053.

¹¹¹ *ibid* 1054.

¹¹² *ibid*.

the book had been published by Cassell & Co.¹¹³ The rest of the House of Lords substantially aligned themselves with Lord Hailsham's views on these matters.

It is difficult to resist the conclusion that at least some of the Law Lords were not wholly successful in bringing a completely independent mind to all aspects of the appeal. Lord Hailsham had apparently already told Lord Devlin privately that he would put matters right.¹¹⁴ He then hurried to heap praise on the latter's judgment in *Rookes*. He remarked that it contained 'a most valuable and important contribution to the law of exemplary damages ...'.¹¹⁵ He also denied that Lord Devlin's speech was inconsistent with either *Ley v Hamilton* or *E Hulton & Co v Jones*.¹¹⁶ Although Lord Hailsham's reasons were elegantly crafted, expressed with great rhetorical effect and are compelling in many respects, they might be thought, insofar as they sought to support the categories test, to constitute an attempt to defend the indefensible. Lord Hailsham's biographer thought that there was 'doubtless ... some partisanship'¹¹⁷ in his speech.¹¹⁸

VIII. SUBSEQUENT EVENTS

After the House of Lords had handed down its judgment, Lord Devlin wrote to Lord Hailsham to say that he was:¹¹⁹

Heartily glad that you put down with such a firm hand (albeit with 'studied moderation') the antics of the C.A. and that you had the unanimous support of the House in doing so. There is enough permissiveness in the world today without its penetration into the doctrine of precedent. I feel that your decision which we discussed in our chat, to deal with the situation in this way has been proved entirely right. I am also of course very glad that our efforts in *Rookes v Barnard* have not in the end been relegated to the perincurial limbo; and I appreciate in particular the kind things that you said about my speech.

For his part, Lord Denning candidly admitted that he had erred. In *The Discipline of Law*, he wrote 'Yes – I had been guilty – of lese-majesty. I had impugned the authority of the House. That must never be done by anyone save the House itself. Least of all by the turbulent Master of the Rolls'.¹²⁰ One unhappy consequence of the dressing down that the House of Lords gave to

¹¹³ *ibid* 1058.

¹¹⁴ See the text to n 102.

¹¹⁵ *Broome* (n 47) 1060. See also at 1074 ('a careful and valuable decision').

¹¹⁶ *ibid* 1075–76.

¹¹⁷ Lewis (n 103) 317.

¹¹⁸ Mann expressed similar sentiments: see Mann (n 74) 182 writing that the 'case ... was characterised at every stage by an enormous amount of prejudice in favour of a gallant Captain of the Royal Navy ...'.

¹¹⁹ Sackar (n 102) 217.

¹²⁰ A Denning, *The Discipline of Law* (London, Butterworth, 1979) 313.

the Court of Appeal concerns the decision in *AB v South West Water Services Ltd*.¹²¹ In that case, the Court of Appeal was evidently so concerned to adhere to every phrase in Lord Devlin's speech in *Rookes* and the speeches in *Broome* that they managed to eke from them the 'cause of action' test. That test blighted the law for almost a decade until it was abolished by *Kuddus v Chief Constable of Leicestershire*.¹²²

As for the individual litigants, in 1972, Broome published his own account of the convoy and the litigation.¹²³ He went on to write several further books and died in 1985. *Cassell & Co Ltd v Broome* was just the beginning of Irving's involvement with the law. He was ultimately exposed as a Holocaust denier and was imprisoned in Austria for highly offensive and obviously false views that he expressed in speeches delivered in 1989. In 2000, Gray J found against Irving in another libel case. A US academic, Professor Deborah Lipstadt, had written a book entitled *Denying the Holocaust: The Growing Assault on Trust and Memory*,¹²⁴ in which she branded Irving as an apologist and partisan of Hitler and accused him of distorting evidence to suit his own agenda. Irving sued. Following a lengthy trial, Professor Lipstadt and her publisher, Penguin, succeeded in the defence of truth in respect of the principal defamatory statements.¹²⁵ Penguin published Gray J's judgment as a book.¹²⁶ Sedley LJ refused Irving permission to appeal on paper. Pill, Mantell and Buxton LJ rejected a renewed application following a hearing.¹²⁷ The case was dramatised in the movie *Denial*, which starred Rachel Weisz.

IX. REFLECTION

This section of the chapter engages with selected issues that arise as regards punitive damages in light of *Broome*.

A. The Future of the Categories Test

Critics of *Rookes* generally argue that there is little or no logical reason to limit the award of punitive damages to specific categories of case, least of

¹²¹ *AB v South West Water Services Ltd* [1993] QB 507 (CA).

¹²² *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29, [2002] 2 AC 122. Regarding *Kuddus*, see Katsampouka, ch 10 of this volume.

¹²³ Broome (n 8).

¹²⁴ D Lipstadt, *Denying the Holocaust: The Growing Assault on Trust and Memory* (London, Penguin Books, 1994).

¹²⁵ *Irving v Penguin Books Ltd* 2000 WL 362478 (QBD).

¹²⁶ *The Irving Judgment: David Irving v Penguin Books and Professor Deborah Lipstadt* (London, Penguin, 2000).

¹²⁷ *Irving v Penguin Books Ltd* 2001 WL 825074 (CA).

all those which Lord Devlin distilled.¹²⁸ However, this criticism is somewhat unfair. Lord Devlin made it clear that his preferred course was to abolish the jurisdiction to award punitive damages but that he felt unable to do so without ignoring precedent.¹²⁹ He did what he thought was the next best thing, which was to limit the power to award punitive damages to categories of case in which they had previously been awarded. He did not maintain that the categories were supportable independently of precedent. One question that arises in this regard is whether Lord Devlin was right in his reading of the authorities and whether he overlooked any of significance. A great deal of intellectual energy has been invested into answering it including,¹³⁰ of course, by the judges of the Court of Appeal and House of Lords in *Broome*. In a sense, however, this issue, while interesting, is today a somewhat sterile one. That is because there cannot be any doubt that the Supreme Court would be justified in looking at the law governing the award of punitive damages afresh. That is perhaps especially so given that the Law Commission considered that the whole area cries out for reform.¹³¹ None of this bodes well for the categories test, which is supportable, if at all, only by reference to (very dated) precedent.

B. Terminology

The labels ‘punitive damages’ and ‘exemplary damages’ are interchangeable.¹³² The Law Commission preferred the former¹³³ whereas Lord Hailsham in *Broome* endorsed the latter although he was ultimately rather non-committal.¹³⁴ The term ‘exemplary damages’ has since tended to prevail in England.¹³⁵ Which is preferable? In considering this question, it is important to observe that the two labels emphasise different aspects of the jurisdiction. The language of ‘punitive damages’ stresses its retributive purpose whereas that of ‘exemplary damages’ emphasises that an example is being made of the defendant against whom they are awarded. The fact that both are used is a manifestation of the fact that the award discharges (at least) the twin purposes of retribution and deterrence. Since the former goal is the dominant one

¹²⁸ Lord Devlin’s categories in *Rookes v Barnard* lack satisfactory rationale in principle or policy’: A Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford, OUP, 2019) 374 (footnote omitted).

¹²⁹ *Rookes* (n 9) 1125–26.

¹³⁰ See, eg, Stone (n 101) 457–59; H McGregor, ‘In Defence of Lord Devlin’ (1971) 34 *MLR* 520.

¹³¹ Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (Law Com No 247, 1997) 92.

¹³² ‘[T]he terms are synonymous’: *Kuddus* (n 122) [51] (Lord Nicholls).

¹³³ Law Commission (n 131) 104.

¹³⁴ *Broome* (n 47) 1073.

¹³⁵ See, eg, Crime and Courts Act 2013 (UK), s 34.

(if it were not, the award would not be nearly as controversial as it is), the language of ‘punitive damages’ is preferable.

C. The Functions of Punitive Damages

A closely related issue is whether it is satisfactory that punitive damages are awarded with a view to achieving multiple purposes. The multiplicity of functions makes the law governing the award more complex than it would otherwise be, but a more significant concern is that the various functions sometimes pull in different directions from each other. Consider, for example, the fact that if a tortfeasor dies before judgment is entered against them, the claimant can recover punitive damages from their estate.¹³⁶ This is consistent with the goal of deterrence but incompatible with that of retribution. Efforts to achieve one objective undermine the other. Arguably, the remedy should have a single purpose. This would prevent the pursuit of more than one goal resulting in the other being undercut and, conceivably, neither from being realised. Conversely, it might be pointed out that sentences in the criminal law are typically awarded with several ends in mind.

D. Reservations regarding Punitive Damages

In *Broome*, the House of Lords expressed considerable antipathy regarding punitive damages. Lord Hailsham queried whether granting them was ‘ever permissible’.¹³⁷ Lord Reid, echoing remarks that Lord Devlin had made in *Rookes*,¹³⁸ asserted that punitive damages were anomalous¹³⁹ and that the jurisdiction to award them involved a ‘form of palm tree justice’.¹⁴⁰ These and cognate remarks may well have encouraged at least some judges to be particularly cautious in both awarding and assessing punitive damages. However, excessive caution in this regard animated by doubts as to whether the remedy ought to be recognised is inappropriate. The jurisdiction’s existence has been confirmed, and it is quite wrong in these circumstances that it be hobbled on account of reservations about whether punitive damages should be a part of private law. If the remedy is considered undesirable, the logical course is for it to be abolished rather than restricted. Whether or not this step should be taken is, of course, intensely controversial.

¹³⁶ Law Commission (n 131) 90.

¹³⁷ *Broome* (n 47) 1060.

¹³⁸ *Rookes* (n 9) 1221, 1227.

¹³⁹ *Broome* (n 47) 1086–87, 1090. For doubts regarding this claim, see Lord Wilberforce’s comments at 1114 and J Goudkamp and E Katsampouka, ‘Punitive Damages and the Place of Punishment in Private Law’ (2021) 84 *MLR* 1257.

¹⁴⁰ *Broome* (n 47) 1087.

E. The Pleading Requirement

In *Broome*, Lord Denning considered that a claim for punitive damages did not need to be pleaded and that it was hence unnecessary for Broome to have amended his pleadings to assert an entitlement in this regard.¹⁴¹ Phillimore LJ agreed and described the suggestion that a claim for punitive damages had to be pleaded as ‘ridiculous’.¹⁴² Although the necessity to plead a claim for punitive damages might not have been established at the time, this approach is directly contrary to basic requirements of fairness. A person against whom serious allegations are made is entitled to know precisely what it is they are said to have done so that they are aware of the case that they have to meet. In the House of Lords, Lord Hailsham disagreed with the Court of Appeal. He rightly said that ‘There is much to be said for the view that a defendant against whom a claim of this kind is made ought not to be taken by surprise’.¹⁴³

It is true that evidence might emerge, or the defendant might otherwise engage in conduct, during the course of a trial which justifies or adds to a claim for punitive damages. It is clearly impractical, as Lord Denning and Phillimore LJ evidently considered, to amend the pleadings every time some relevant new fact emerges, especially at the end of the proceedings. But this is a world away from suggesting that there should be no pleading requirement as regards punitive damages at all. Although this controversy has been overtaken by the fact that the pleading requirement is now enshrined in the Civil Procedure Rules,¹⁴⁴ the reason for the requirement are worth bearing in mind.

F. Relationship with Compensatory Damages

In *Broome*, the House of Lords emphasised the importance of the ‘if but only if’ test that Lord Devlin had articulated in *Rookes*. Pursuant to that test, punitive damages can be awarded only if the compensatory damages are insufficient to punish and deter. Note that the test assumes, therefore, that compensatory damages serve a punitive function. Indeed, in *Broome* Lord Reid remarked that ‘compensatory damages are always part of the total punishment’.¹⁴⁵ This claim appears to be significantly overstated. Although some rules that govern the award of compensatory damages might well be animated by retributive impulses,¹⁴⁶ the proposition that such damages are ‘always’ granted in order to punish is incorrect. Many if not most compensatory awards have no retributive edge to them

¹⁴¹ *Broome* (n 10) 378.

¹⁴² *ibid* 399.

¹⁴³ *Broome* (n 47) 1083.

¹⁴⁴ CPR 16.4(1)(c).

¹⁴⁵ *Broome* (n 47) 1089. See also Lord Morris’s remarks at 1096 to like effect.

¹⁴⁶ See Goudkamp and Katsampouka (n 139).

and are made merely with restoration in mind. There is, ordinarily, no punitive component to damages granted in respect of lost wages, the cost of repairing damaged property, medical expenses that have been incurred and so on.

Further, observe that the House of Lords' endorsement of the 'if but only if' test is fundamentally incompatible with its claim that punitive damages are anomalous. As has just been observed, the assumption that is baked into the 'if but only if' test is that compensatory damages have a punitive element to them. But if that is right, it cannot be the case that punitive damages, because of their retributive agenda, are aberrant and pollute the purity of the civil law. This frank inconsistency between the 'if but only if' test and the assertion that punitive damages are anomalous, which appears to have gone unnoticed by all of the judges in *Rookes* and *Broome*, suggests significant instability in the intellectual foundations of, at least, punitive damages.

G. Joint Tortfeasors

It has long been clear that, in the case of a joint tort where the defendants are sued together, only a single sum can be awarded. In other words, it is impermissible to award different amounts against the various defendants. In *Broome*, the House of Lords held that this rule applied to punitive damages. This raised an issue as to how the punitive damages should be assessed. The Court of Appeal considered that the award should be fixed by reference to the more blameworthy defendant. Lord Denning pointed out that the scope for unfairness in this regard is minimised since the least blameworthy defendant, if he or she is called on to pay the award, can recover contribution.¹⁴⁷ Salmon LJ seemed to prefer the same rule on the basis that it is fair to impose the risk of suffering excessive punishment on joint tortfeasors. He memorably remarked that 'The moral may be that you must be as careful in choosing your companions in tort as you are in choosing your companions when you go out shooting'.¹⁴⁸ In the House of Lords, Lord Hailsham saw things differently. He held that the damages must be the lowest sum that would be appropriate to award against the least culpable defendant.¹⁴⁹ On the one hand, this makes sense given that it is unjust to impose on a given defendant more punishment than they deserve. On the other hand, it ensures that the goals of awarding punitive damages will not be discharged since the more culpable tortfeasor (or tortfeasors) will receive less punishment than they merit. They will receive none where one of the joint tortfeasors is undeserving of punishment. Neither the approach of the Court of Appeal nor that of the House of Lords is satisfactory. The *only* way of ensuring that the goals of awarding

¹⁴⁷ *Broome* (n 10) 383.

¹⁴⁸ *ibid* 393.

¹⁴⁹ *Broome* (n 47) 1063. See also Viscount Dilhorne's remarks at 1105, those of Lord Wilberforce at 1118 and Lord Diplock's comments at 1131.

punitive damages are not frustrated is for joint tortfeasors to be held severally liable for the remedy. Where there are joint tortfeasors, there is no good reason why each defendant should not be held separately liable for punitive damages and for the award to be tailored so that it is proportionate to their individual circumstances.

X. CONCLUSION

It is no overstatement to say that the *Broome* saga represents one of the most extraordinary episodes in the history of the common law. The litigation pitted a gallant member of the establishment against a younger, brazen agitator. The sensational trial resulted in a momentous event of World War II being relived. Most strikingly of all, however, the proceedings involved a clash between the appellate courts that was and remains unprecedented. One cannot help but feel that the House of Lords ended up retaining the categories test at least partly because of the extraordinarily undiplomatic way in which the Court of Appeal sought to remove it. Despite being subjected to devastating criticism from almost every other quarter, that rule remains part of English law to the present day.

