HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON AND EDELMAN JJ

STEVEN JAMES LEWIS APPELLANT

AND

THE AUSTRALIAN CAPITAL TERRITORY RESPONDENT

Lewis v Australian Capital Territory
[2020] HCA 26
Date of Hearing: 2 June 2020
Date of Judgment: 5 August 2020
C14/2019

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of the Australian Capital Territory

Representation

P D Herzfeld with P A Tierney for the appellant (instructed by Ken Cush & Associates)

P J F Garrisson SC, Solicitor-General for the Australian Capital Territory, with H Younan for the respondent (instructed by ACT Government Solicitor)

S P Donaghue QC, Solicitor-General of the Commonwealth, with C J Tran for the Commonwealth, intervening (instructed by Australian Government Solicitor)

CATCHWORDS

Lewis v Australian Capital Territory

Damages – Tort – False imprisonment – Where appellant convicted and sentenced to 12 months' imprisonment served by periodic detention – Where appellant breached obligations of periodic detention – Where appellant liable to arrest without warrant – Where Sentence Administration Board ("Board") required by statute to decide to cancel appellant's periodic detention – Where Board's decision was held invalid for lack of procedural fairness – Where appellant unlawfully imprisoned in full-time detention for 82 days following Board's invalid decision – Where appellant's liberty already qualified and attenuated – Where appellant's imprisonment would otherwise have lawfully occurred – Where appellant awarded nominal damages – Whether award of only nominal damages appropriate – Whether appellant entitled to substantial compensatory damages – Whether vindicatory damages available.

Words and phrases – "aggravated damages", "alternative causes", "but for", "causation", "compensatory damages", "compensatory principle", "counterfactual", "damages", "exemplary damages", "false imprisonment", "lawful authority", "liability", "loss", "material contribution", "nominal damages", "periodic detention", "relief", "substantial damages", "substitutionary remedy", "user principle", "vindication", "vindicatory damages", "wrongful act".

Crimes (Sentence Administration) Act 2005 (ACT), Ch 5.

1 KIEFEL CJ AND KEANE J. The factual and procedural background to the issue presented by this appeal is sufficiently summarised in the reasons of Edelman J. Gratefully accepting his Honour's summary of that background, and of the arguments presented by the parties, we are able to proceed directly to state our reasons for concluding that the appeal should be dismissed.

2 We agree with Edelman J that the appellant's claim for an award of substantial damages cannot be sustained. In particular, we agree that the notion that "vindicatory damages" is a species of damages that stands separately from compensatory damages draws no support from the authorities and is insupportable as a matter of principle. With one qualification, we also agree that the application of the compensatory principle articulated in cases such as *Haines v Bendall*[1] does not support an award of compensatory damages in this case because a counterfactual analysis in relation to the issue of causation reveals that the false imprisonment caused the appellant no loss that he would not have suffered had he not been falsely imprisoned. In our respectful opinion, however, the appeal should fail in any event, at a point in the analysis anterior to the application of the compensatory principle.

3 The application of the compensatory principle in this case proceeds upon the counterfactual hypothesis that if the appellant had not been falsely imprisoned he would have been imprisoned if the Sentence Administration Board lawfully performed its duty in relation to the cancellation of the appellant's periodic detention order. On this hypothesis, the appellant's position, in the events that actually happened, was no different from the position he would have been in if the Board had not acted unlawfully in cancelling his periodic detention. However, the counterfactual analysis in aid of the application of the compensatory principle is engaged only if it be accepted that the appellant suffered some real loss by the cancellation of his periodic detention and consequent imprisonment. In our respectful opinion, it cannot be accepted that the appellant suffered any real loss at all.

4 As was submitted by the Solicitor-General of the Commonwealth, which was granted leave to intervene in this Court, the invalid decision of the Board did not deprive the appellant of a moment of freedom from imprisonment that he was legally entitled to enjoy. The appellant's argument leaves entirely out of account the sentence of imprisonment which, together with the operation of the *Crimes (Sentence Administration) Act 2005* (ACT) ("the Act"), so qualified and attenuated the appellant's right to be at liberty that he suffered no real loss. The appellant is in the position of a plaintiff who has suffered an infringement of a legal right

---

1 (1991) 172 CLR 60 at 63.

which, though it entitles the plaintiff to a judgment, gives him or her "no right to any real damages at all" because no real loss has been suffered[2].

5 It would be quite wrong, in our respectful opinion, to accept that the appellant's non-compliance with the terms of his sentence was without consequence so far as his right to be at liberty was concerned. In particular, it is not to be thought that his right to be at liberty was the same as that of a person who was not subject to a sentence of imprisonment in the course of execution. The appellant's sentence was in force regardless of any action taken by the Board, whether valid or invalid, in relation to the appellant's periodic detention order. The appellant was unlawfully at large after his first failure to report for detention in that he was liable to be arrested without warrant and brought before the Board to be dealt with under the Act[3]. In addition, because the appellant had failed to report for periodic detention on more than two occasions, and the chief executive had referred the matter to the Board, the Board was required to cancel his periodic detention[4]; and the appellant had no legal basis to say or do anything that would alter that outcome.

6 In these circumstances, as will be apparent upon reference to the relevant legislation, the appellant's position was analogous to that of the plaintiff in a defamation action who, while able to establish that he or she has been defamed by the defendant, also happens to be a person of general bad reputation. The circumstance that a plaintiff has "a bad reputation which could not be made worse" is not a defence to a claim for defamation; but it is a basis for an award of only nominal, rather than substantial, damages[5]. So here, although the appellant had a complete cause of action for false imprisonment because of the unusual course of the litigation between the appellant and the respondent, his right to be at liberty was so qualified and attenuated by the effect of his sentence and the terms of the Act that the impairment of his right to be at liberty could not support an award of other than nominal damages.

---

2 *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The "Mediana")* [1900] AC 113 at 116.

3 *Crimes (Sentence Administration) Act 2005* (ACT), s 64.

4 *Crimes (Sentence Administration) Act 2005* (ACT), s 69.

5 *Hobbs v Tinling* [1929] 2 KB 1 at 17, 46. See also *Scott v Sampson* (1882) 8 QBD 491 at 503.

The legislation

7 The appellant was sentenced under the *Crimes (Sentencing) Act 2005* (ACT) ("the Sentencing Act"). By s 10(2) then in force, a court was authorised to sentence an offender to imprisonment, for all or part of the term of the sentence, if the court was satisfied that no other penalty was appropriate. Section 10(3) provided:

> "If the court sentences the offender to imprisonment, the sentence must be served by full-time detention at a correctional centre, unless –
>
> (a) the court orders otherwise; or
>
> (b) the offender is released from full-time detention under this Act or another territory law."

8 Section 11(2) of the Sentencing Act provided that if a court sentenced an offender to imprisonment for an offence:

> "The court may, in the order sentencing the offender to imprisonment, set a period of the sentence of imprisonment (a ***periodic detention period***) to be served by periodic detention."

9 Section 58 of the Act prescribed the circumstances in which an offender would be taken not to have performed periodic detention. Such circumstances included an offender failing to report to perform periodic detention without approval[6], and reporting to perform but returning a positive test sample in response to a direction under the Act to complete an alcohol and drug test[7].

10 Should an offender fail to perform periodic detention on two or more occasions, s 59 of the Act provided that the chief executive "must apply" to the Board for an inquiry under s 66. The purpose of an inquiry under s 66 was "to decide whether an offender has breached any of the offender's periodic detention

---

6 *Crimes (Sentence Administration) Act 2005* (ACT), s 58(1)(a). Approval could be granted under s 55.

7 *Crimes (Sentence Administration) Act 2005* (ACT), s 58(1)(b) and (3)(c).

obligations"[8]. The Board was authorised to conduct an inquiry under s 66 of its own motion or on an application by the chief executive[9].

11 If, after conducting the inquiry, the Board determined that the offender had breached any of his or her periodic detention obligations, s 68(2) empowered the Board to take one or more of a number of actions; but if, as occurred in the present case, the chief executive applied to the Board under s 59 for an inquiry and the Board, at the inquiry, decided that the offender had failed to perform periodic detention on two or more occasions, s 69(2) of the Act required that the Board "must, as soon as practicable, cancel the offender's periodic detention under section 68". If an offender's periodic detention were cancelled, he or she was required to serve the remainder of his or her sentence by way of full-time detention[10].

12 It should also be noted that s 64 of the Act provided that a police officer who believed, on reasonable grounds, that an offender had breached any of the offender's periodic detention obligations was authorised to arrest the offender without a warrant. Under s 64(3) the police officer was obliged to bring the offender before the Board as soon as practicable after arresting the offender.

An impairment of the appellant's right to liberty?

13 As the Court of Appeal of the Supreme Court of the Australian Capital Territory in this case said, the "illogicality" of the primary judge's view that the Board could not have been satisfied that the appellant had been afforded an opportunity to attend the inquiry at which the cancellation decision was made "cannot here be the subject of further comment"[11]. But the issue of concern here is not whether the appellant's cause of action for false imprisonment was complete. That the appellant was falsely imprisoned is the unchallengeable basis on which the matter comes before this Court. But that does not mean that the appellant suffered an impairment of his rights that can or should be reflected in an award of other than nominal damages.

---

8 *Crimes (Sentence Administration) Act 2005* (ACT), s 66(1).

9 *Crimes (Sentence Administration) Act 2005* (ACT), s 66(3).

10 *Crimes (Sentence Administration) Act 2005* (ACT), s 79(4).

11 *Lewis v Australian Capital Territory* [2019] ACTCA 16 at [10].

14 As was said by Kirby J in *Ruddock v Taylor*[12], "the principal function of the tort [of false imprisonment] is to provide a remedy for 'injury to liberty' ... Damages are awarded to vindicate personal liberty". It is the interference with the right to liberty that is vindicated by the cause of action[13], and there must be a "reasonable proportion between the amount awarded and the loss sustained" as a result of the tort[14]. An award of damages "must not exceed the amount appropriate to compensate the plaintiff for any relevant harm he or she has suffered"[15]. The appellant's argument would have it that his failure to comply with the requirements of his sentence had no consequences for his right to be at liberty unless and until the Board was able lawfully to perform its statutory duty. His argument fails to take into account both the statutory requirement upon the Board that he be placed in full-time custody to serve his sentence, and the circumstance that the appellant was, until the Board was able to carry out its function, liable to be arrested without warrant.

15 It may be accepted, as the appellant contends, that the measure of the damages to which he is entitled should reflect the infringement of his legal right not to be imprisoned unlawfully. But it is also necessary to recognise that the appellant was unlawfully at large when he was arrested. He was subject to a sentence of imprisonment for the crime he had committed, and he had no legal basis to insist on being at liberty as if he were not under sentence.

16 In *Jacka v Australian Capital Territory*[16], the Court of Appeal of the Supreme Court of the Australian Capital Territory rejected a challenge to the constitutional validity of, among other provisions, ss 68(2) and 69 of the Act. It was said that the impugned provisions were invalid because they purported to invest the Board, an organ of the executive government, with federal judicial power. In rejecting that contention, Gilmour J (with whom Penfold J and

---

12 (2005) 222 CLR 612 at 651 [141]. Compare *Plenty v Dillon* (1991) 171 CLR 635 at 645.

13 *Ashby v White* (1703) 2 Ld Raym 938 at 955 [92 ER 126 at 137].

14 *Taff Vale Railway v Jenkins* [1913] AC 1 at 7. See also *Greenlands Ltd v Wilmshurst and the London Association for Protection of Trade* [1913] 3 KB 507 at 532-533; *Knuppfer v London Express Newspapers Ltd* [1943] KB 80 at 91; *Miles v Commercial Banking Co of Sydney* (1904) 1 CLR 470 at 478.

15 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61, 66.

16 (2014) 180 ACTR 207.

Walmsley A-J agreed) made the following observations in relation to the effect of a sentence that included an order for periodic detention[17]:

> "The decision by the board that the appellant had breached his obligations by failing to perform two periods of detention triggered the mandatory cancellation of his periodic detention by the board under s 69(2). However, the appellant's rights and liabilities in that respect had already been framed by the order for his imprisonment. The manner in which he served the sentence of imprisonment already ordered was dependent upon his compliance with the statutory obligations. He was always liable to the sentence of full-time imprisonment, but permitted by virtue of the terms of the order of imprisonment to serve his sentence by periodic detention conditioned always by his performance of his periodic detention obligations.
>
> ...
>
> The offender's full-time imprisonment as a consequence of the cancellation order is pursuant to the original sentencing orders. The full-time imprisonment of the offender is the enforcement of those orders, not the cancellation order."

17 The appellant's right to be at liberty was circumscribed by the demands of justice expressed in the sentence of imprisonment to which he was subject. He was liable to arrest without warrant and to be brought before the Board, and the Board was obliged to annul his periodic detention so that he would be placed in full-time detention. The extent to which the appellant's right to be at liberty pending the cancellation of his periodic detention order as required by the Act was qualified and attenuated can be illustrated by the consideration that he could not have succeeded in a claim for a writ of habeas corpus if he had been arrested before he could be validly dealt with by the Board. The writ of habeas corpus "does not lie where a person is in execution on a criminal charge after judgment in due course of law"[18]. And in any event, it is inconceivable that a court to which an application

---

17 (2014) 180 ACTR 207 at 219 [85], 220 [92].

18 *Ex parte Williams* (1934) 51 CLR 545 at 548. See also at 549-550; *Re Officer in Charge of Cells, ACT Supreme Court; Ex parte Eastman* (1994) 68 ALJR 668 at 669; 123 ALR 478 at 480; *Re Writ of Habeas Corpus ad Subjiciendum; Ex parte Hooker* [2005] WASC 292 at [16]-[23].

for habeas corpus might have been made on behalf of the appellant would have issued an order in his favour given his history of absconding[19].

18 In the course of argument, counsel for the appellant put the appellant's case in a way which revealed the insuperable difficulty confronting the appellant's claim for an award of other than nominal damages. It was said that "until the process of law was validly applied against him so as to authorise his imprisonment, he was not *allowed* to be imprisoned". This articulation of the appellant's case squarely misstates the position that arose upon the appellant's failure to comply with the terms of his sentence. There was no question of the Board being "allowed" to imprison the appellant: under the Act, the Board was required as soon as practicable to order that the appellant be placed in full-time custody to serve his sentence. And until the Board was able to perform its function, the appellant was unlawfully at large in that he was liable to be arrested without warrant.

Conclusion

19 Even though the appellant's periodic detention order had not been validly cancelled by the decision of the Board, and consequently the appellant had indeed been falsely imprisoned when he was placed in full-time detention, an award of substantial damages, such as might be warranted in the case of a person lawfully at large who is falsely imprisoned, is not available here. The appellant was not lawfully at large when he was taken into custody. As a result he suffered no loss in terms of his right to be at liberty that might be reflected in an award of substantial, rather than nominal, damages.

20 For these reasons, we agree with the orders proposed by Edelman J.

---

19 *Ex parte Williams* (1934) 51 CLR 545 at 551.

21 GAGELER J. The appeal cannot succeed. Mr Lewis has no entitlement to compensatory damages for loss of liberty or dignity given the likelihood that he would have been lawfully imprisoned for the same period under the same conditions had the conduct which constituted his wrongful imprisonment not occurred. Lacking an entitlement to compensatory damages and having no arguable entitlement to aggravated or exemplary damages, his right to liberty is vindicated by the nominal damages he has been awarded.

22 On the topic of the non-recognition of a distinct species of "vindicatory damages" under the common law of Australia, I agree with Gordon J and have nothing to add to her Honour's reasons.

23 On the topic of the non-entitlement of Mr Lewis to compensatory damages for his wrongful imprisonment, I choose to explain my reasoning in my own words. That is in part to explain why I cannot adopt the threshold approach preferred by Kiefel CJ and Keane J and in part to expound the factual and counterfactual analyses which I consider to be involved.

The tort of wrongful imprisonment

24 "To constitute the injury of false imprisonment", as Sir William Blackstone put it, "there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention."[20] Despite the onus shifting to the defendant to negative the element of unlawfulness where the plaintiff establishes the element of detention[21], it is detention in combination with unlawfulness that constitutes the tort. Through the tort, the "right to personal liberty" is protected by the common law – not from all restraints, but from those restraints for which "lawful authority"[22] cannot be shown.

25 The right to personal liberty continues to be protected by the tort of wrongful imprisonment though liberty is vulnerable to restraint in the exercise of

---

20 Blackstone, *Commentaries on the Laws of England* (1768), bk 3 at 127.

21 *Brown v Lizars* (1905) 2 CLR 837 at 853-854; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 626; *Ruddock v Taylor* (2005) 222 CLR 612 at 631 [64], 650-651 [140].

22 *Williams v The Queen* (1986) 161 CLR 278 at 292. See also Blackstone, *Commentaries on the Laws of England* (1768), bk 3 at 127.

lawful authority. Whether a citizen or an alien[23] and whether subject to a sentence of imprisonment imposed by a court[24] or not, a person whose status or prior conduct renders that person especially vulnerable to detention in the exercise of lawful authority is not an outlaw. The person is entitled to expect that if, when, and for so long as, detention occurs in fact it will occur only in accordance with law. If the person is in fact detained for any period otherwise than in the exercise of lawful authority, the person is entitled to maintain an action for wrongful imprisonment in which the person is entitled to obtain an award of compensatory damages if the compensatory principle is satisfied.

The wrongful imprisonment of Mr Lewis

26 There is utility at the outset in identifying with precision the conduct which constituted the wrongful imprisonment of Mr Lewis and how that conduct resulted in the tortious liability of the Australian Capital Territory.

27 The sequence of events recounted by Gordon J and Edelman J can be seen to expose two pathways to tortious liability for the wrongful imprisonment of Mr Lewis having been visited on the Territory. Absent exclusion of liability by statute, the Chief Executive would have been tortiously liable to Mr Lewis for his wrongful imprisonment by reason of having taken him into custody and having kept him imprisoned under full-time detention without lawful authority. Absent exclusion of liability by statute, each member of the Sentence Administration Board would also have been tortiously liable to Mr Lewis by reason of having participated in making the invalid order for the cancellation of Mr Lewis' periodic detention which was the "direct"[25] or "proximate"[26] cause of that imprisonment by the Chief Executive. There being no issue that the Chief Executive and each participating member of the Board acted honestly and not recklessly in the reasonable belief that his or her conduct was in the exercise of a statutory function,

---

23 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 521, 528; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 19.

24 *New South Wales v TD* (2013) 83 NSWLR 566 at 568-569 [5], 579-581 [55]-[64], 584 [87]-[90], 586-587 [102]-[105], applying *Cobbett v Grey* (1850) 4 Exch 729 [154 ER 1409], and distinguishing *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58.

25 *Ruddock v Taylor* (2003) 58 NSWLR 269 at 276 [30]; *Ruddock v Taylor* (2005) 222 CLR 612 at 651-652 [143].

26 *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 629.

however, the tortious liability of each was excluded by statute and imposed instead on the Territory[27].

28 Both pathways to tortious liability for the wrongful imprisonment of Mr Lewis having been visited on the Territory arrive at the completed tort of wrongful imprisonment by aggregating the conduct of the Board in conducting the inquiry that it did and in making the order that it did with the conduct of the Chief Executive in imprisoning Mr Lewis in full-time detention as the Chief Executive did on the strength of that order. On each pathway, liability for the completed tort of wrongful imprisonment arises from the contribution each actor in fact made to how the wrongful imprisonment in fact occurred. The contribution of the Board was that of active promotion of detention[28]. The contribution of the Chief Executive was that of implementing the detention.

29 The analysis at the stage of attributing tortious liability is thus as to "how things came about" without needing to extend to "what made a difference"[29]. Counterfactual analysis enters at the subsequent stage of determining whether, and if so to what extent, the liability of the Territory gives rise to an entitlement on the part of Mr Lewis to compensatory damages.

The compensatory principle

30 The compensatory principle entitles the victim of a tort to no less and no more than "a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the ... tort had not been committed"[30].

31 No threshold of "loss" needs to be met before the counterfactual analysis mandated by the compensatory principle is applied. Whether, and if so to what extent, compensable damage – "loss or harm occurring in fact"[31] – has occurred is

---

27 *Crimes (Sentence Administration) Act 2005* (ACT), s 179; *Corrections Management Act 2007* (ACT), s 223.

28 *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 629; *Ruddock v Taylor* (2005) 222 CLR 612 at 642-644 [112]-[118].

29 See Stapleton, "Perspectives on Causation", in Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 61 at 61-62. See also Stapleton, "Unnecessary Causes" (2013) 129 *Law Quarterly Review* 39 at 39, 54-55.

30 *Haines v Bendall* (1991) 172 CLR 60 at 63.

31 *Cattanach v Melchior* (2003) 215 CLR 1 at 15 [23], quoting *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442.

determined through the application of the same analysis[32]. The outcome determines the entitlement of the victim of the tort to compensatory damages and sets the outer limit of the extent of that entitlement[33].

The compensatory principle applied to the wrongful imprisonment of Mr Lewis

32 Easily stated, the compensatory principle is not always easily applied. Here, the factual position of Mr Lewis presents no difficulty. He was deprived of liberty and suffered indignity through being taken into custody and subjected to full-time imprisonment.

33 How the counterfactual position is to be determined is not quite so straightforward. Mr Lewis argues that what is necessary is to look to the position he would have been in if the Chief Executive had not taken him into custody and had not kept him in full-time imprisonment. The Territory argues that what is necessary is to look to the position that Mr Lewis would have been in if the Board had observed procedural fairness. Underlying the difference between the two arguments is a question of principle with which neither argument comes to grips.

34 Neither argument gives adequate attention to the elements of the tort of wrongful imprisonment or to how those elements have in fact been satisfied to result in liability on the part of the Territory. The problem with Mr Lewis' argument is that it ignores the conduct of the Board which contributed in fact to the unlawfulness of Mr Lewis' detention. The problem with the Territory's argument is that it does not capture the totality of that conduct. The Board's failure to observe procedural fairness was not itself tortious conduct. The conduct of the Board that contributed in fact to the wrongful imprisonment of Mr Lewis was the totality of its conduct in holding the inquiry (at which it failed to afford procedural fairness) and in going on to make the order (which was in consequence invalid).

35 The correct approach is to look to the position that Mr Lewis would have been in had the Board not in fact conducted the inquiry that it did and had the Board not in fact gone on to make the order on which the Chief Executive in fact acted. Notwithstanding the inherently hypothetical nature of that counterfactual inquiry, the inquiry necessarily proceeds by drawing inferences from known facts to find the counterfactual position on the balance of probabilities[34].

---

32 *Harriton v Stephens* (2006) 226 CLR 52 at 104 [168], 126 [251], 130-131 [264]-[265].

33 *Haines v Bendall* (1991) 172 CLR 60 at 63.

34 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 353.

36 The fact-specific inferential nature of the requisite counterfactual inquiry is, however, subject to an important qualification. The qualification arises from the application to the determination of compensation of the same common law policy that underlies imposition of tortious liability for wrongful imprisonment whenever, but only when, there is a deprivation of liberty that cannot be justified by law. Consistent application of that policy means that compensation for wrongful imprisonment can only be determined by postulating a counterfactual in which all who had lawful capacity to contribute to a deprivation of liberty conducted themselves strictly in accordance with law. The law would be an ass were a person whose position in fact is that he or she has been deprived of liberty by unlawful conduct to be denied compensatory damages through the application of a counterfactual in which he or she would have been deprived of liberty by the same or other unlawful conduct in any event.

37 The policy of the common law therefore demands that counterfactual analysis in a case of wrongful imprisonment be undertaken on the assumption that everyone who had lawful capacity to contribute to deprivation of the plaintiff's liberty acted in strict performance of their legal duties and acted or refrained from acting in strict compliance with the conditions expressly or impliedly imposed on the exercise of their legal powers.

38 That approach to applying the compensatory principle to determine the existence and extent of any entitlement of the plaintiff to compensatory damages where wrongful imprisonment is established – of comparing the position of the plaintiff in fact with the position the plaintiff would have been in had the wrongful imprisonment not occurred and had all concerned acted strictly in accordance with law – accords with the approach of the Full Court of the Federal Court in *Fernando v The Commonwealth*[35] and with the approach of the four members of this Court who addressed the issue of compensatory damages in *CPCF v Minister for Immigration and Border Protection*[36]. The approach can be seen in earlier decisions of the Supreme Court of the United Kingdom in *R (Lumba) v Secretary of State for the Home Department*[37] and *R (Kambadzi) v Secretary of State for the Home Department*[38]. Whether the approach has been consistently understood and

---

35 (2014) 231 FCR 251 at 268-269 [81]-[89], 283-284 [167]-[169]. See also *Burgess v The Commonwealth* (2020) 378 ALR 501 at 542-545 [169]-[180].

36 (2015) 255 CLR 514 at 570 [157], 572 [164], 610-611 [324]-[325], 655-656 [511]-[512].

37 [2012] 1 AC 245 at 281-282 [93]-[96].

38 [2011] 1 WLR 1299 at 1322 [55]-[57]; [2011] 4 All ER 975 at 1000-1001.

applied in more recent decisions, in the United Kingdom[39] or elsewhere outside Australia, has no bearing on my view as to its correctness and is not within my province to determine.

39 Difficulty can arise in applying that approach to determine on the balance of probabilities what would have happened had an invalidly exercised power to detain not been exercised. It cannot simply be assumed that a power to detain that *could* have been exercised lawfully *would* have been exercised lawfully if that power had not in fact been exercised unlawfully; and it cannot simply be assumed that all conditions precedent to the enlivening of a statutory duty to detain would have been met. The difficulty is illustrated by the complexity of the counterfactual analysis in which judges at first instance in the Federal Court of Australia have on occasions correctly found it necessary to engage where an alien liable to be detained by any migration officer who held a reasonable suspicion that the alien was an unlawful non-citizen was in fact detained by a migration officer not shown to have held any suspicion at all[40] or whose suspicion was not shown to have been formed on reasonable grounds[41].

40 No difficulty of that kind arises in the present case. Once it is accepted that the counterfactual analysis is to be conducted on the assumption that all who had lawful authority to contribute to the detention of Mr Lewis acted strictly in accordance with their legal duties and in the observance of the express and implied limitations on their legal powers, the counterfactual position of Mr Lewis on the balance of probabilities cannot be in doubt given that Mr Lewis in fact failed to report for periodic detention on more than two occasions and given that the Chief Executive in fact made an application to the Board for an inquiry. Acting strictly in accordance with its statutory duties, the Board would have held an inquiry as soon as practicable in which it would have observed procedural fairness because it had a duty to do so. At the conclusion of that inquiry, the Board would have made a finding because it again had a duty to do so. The finding would in all probability have reflected the fact that Mr Lewis had failed to report for periodic detention on more than two occasions. Having made that finding, the Board would have gone on to make an order cancelling Mr Lewis' periodic detention and would have done so as soon as practicable because yet again it had a duty to do so. Based on that

---

39 cf *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238 at 2262-2263 [104]-[108]; [2019] 3 All ER 399 at 421-422, as discussed in *R (Hemmati) v Secretary of State for the Home Department* [2019] 3 WLR 1156 at 1193 [111]-[112]; [2020] 1 All ER 669 at 701-702.

40 eg *Burgess v The Commonwealth* (2020) 378 ALR 501 at 545 [180].

41 eg *Guo v The Commonwealth* (2017) 258 FCR 31 at 95-96 [229]-[235].

order, the Chief Executive would have taken Mr Lewis into custody and imprisoned him in full-time detention because the Chief Executive had a duty to do so.

41 There is no basis in the known facts to infer that the counterfactual detention of Mr Lewis would have been for a materially different period from the period for which he was in fact detained. Equally, there is no basis to infer that the counterfactual detention would have been under conditions in any way different from those under which he was in fact detained.

The result

42 In short, the proper inference to be drawn on the balance of probabilities is that, had the conduct which constituted his wrongful imprisonment not occurred, Mr Lewis would have endured the same deprivation of liberty and indignity as he in fact endured. Application of the compensatory principle yielding no compensable loss, he has no entitlement to compensatory damages. His appeal must for those reasons be dismissed with costs.

43 GORDON J. The law declares that where there is a right, there is a remedy[42]. History has shown that maxim to be an oversimplification[43]. It is, however, a reminder that, in every case, it is necessary to identify the "right" or "duty" at issue, to determine whether that "right" or "duty" has been infringed and then, where liability is established, to address the appropriate relief. Liability and relief are not to be elided. Questions of liability are *prior to* questions of relief.

44 Relief, in the form of judicial remedies, is not one-dimensional: remedies have different origins, vary in nature and have different purposes. Some remedies seek to redress the infringement of a "right" by vindication of that "right", some seek to rectify or correct the act that gave rise to the liability, while other remedies seek to address the loss or injury suffered by awarding damages. What remedy or remedies should be awarded requires an assessment of the position of the plaintiff taken as a whole. All relief is tailored to a particular situation. And the tailoring of the relief necessarily entails that remedies are granted as a package, each remedy with its different nature and purposes, sometimes overlapping, but always working together to address the liability that has been established[44].

45 This appeal is concerned with the tort of false imprisonment, a form of trespass to the person[45]. It is actionable per se, regardless of whether the victim

---

42 *Ashby v White* (1703) 2 Ld Raym 938 at 953 [92 ER 126 at 136]. See also Blackstone, *Commentaries on the Laws of England* (1768), bk 3 at 23.

43 See, eg, Kercher and Noone, *Remedies*, 2nd ed (1990) at 1; Tilbury, *Civil Remedies* (1990), vol 1 at 2-3 [1005]; Covell and Lupton, *Principles of Remedies* (1995) at 3-4 [1.4]; Witzleb et al, *Remedies: Commentary and Materials*, 6th ed (2015) at 20 [1.95]; Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (2019) at 5.

44 See, eg, *Attorney General v Blake* [2001] 1 AC 268 at 285.

45 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 274 [65]; see also *R v Deputy Governor of Parkhurst Prison; Ex parte Hague* [1992] 1 AC 58 at 162.

suffers any harm[46]. It does not require proof of special damage[47]. That is unsurprising. The tort protects and, where necessary, vindicates a person's right to freedom from interference with personal liberty as a fundamental legal right[48]. The law does not allow a defendant to escape liability by resort to counterfactual scenarios. Thus, the executive cannot render lawful what is in fact unlawful detention, by reference to how it could or would have acted if it had acted lawfully, as opposed to how it acted in fact[49]. Indeed, an action for false imprisonment lies even if the victim did not know that they were falsely imprisoned[50]. On the question of *liability* for the tort of false imprisonment, there is no role for a counterfactual analysis that would seek to replace what did in fact happen with what would otherwise have happened.

46 Any other approach would ignore the elements of the cause of action and be contrary to principle. As Lord Dyson explained in *R (Lumba) v Secretary of State for the Home Department*, if a counterfactual were used in determining liability for false imprisonment, it may lead to the outcome reached by Lord Brown in that case: namely, that the claimant was in fact lawfully detained[51]. Lord Dyson said that "the law of false imprisonment does not permit history to be rewritten in this way"[52]. Legal liability flows with no regard to any counterfactual. Those "elementary"[53] principles are concerned with *liability*.

---

46 *Huckle v Money* (1763) 2 Wils KB 205 [95 ER 768]; *Lumba* [2012] 1 AC 245 at 274 [64], citing *Murray v Ministry of Defence* [1988] 1 WLR 692 at 703; [1988] 2 All ER 521 at 529; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 569 [155].

47 *Murray* [1988] 1 WLR 692 at 703; [1988] 2 All ER 521 at 529; *Lumba* [2012] 1 AC 245 at 274 [64].

48 *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Ruddock v Taylor* (2005) 222 CLR 612 at 649 [137]; *R v Governor of Brockhill Prison; Ex parte Evans [No 2]* [2001] 2 AC 19 at 43; *Lumba* [2012] 1 AC 245 at 315 [219], 352 [341].

49 *Lumba* [2012] 1 AC 245 at 274 [62].

50 *Murray* [1988] 1 WLR 692 at 703; [1988] 2 All ER 521 at 529; *Lumba* [2012] 1 AC 245 at 282 [96].

51 [2012] 1 AC 245 at 274 [62], 352-353 [342]-[343].

52 *Lumba* [2012] 1 AC 245 at 274 [62].

53 *Lumba* [2012] 1 AC 245 at 274 [65].

47 A right to nominal damages, as one remedy, *follows from* that finding of liability[54]. That award of nominal damages marks the fact that "there [was] an infraction of a legal right"[55]. There is then a question as to whether any *other relief* should be awarded to a particular plaintiff, in their own unique situation. This, in turn, requires consideration of the nature and purpose of other forms of relief. Just as questions of liability and relief should not be elided, the varying natures and purposes of different forms of relief should not be elided or confused[56].

48 The question in this appeal is whether Mr Lewis can recover more than nominal damages for false imprisonment in circumstances where, if he had not sustained the wrong of *unlawful* imprisonment, he would have been lawfully imprisoned. Mr Lewis seeks compensatory damages or, alternatively, "vindicatory" damages.

49 These reasons will summarise Mr Lewis' position in the context of the applicable statutory regime governing his detention and then turn to explain why he is not entitled to substantial compensatory damages or "vindicatory" damages.

50 Although it will be necessary to consider a significant number of authorities, the principles to be applied can be stated shortly. The tort of false imprisonment is actionable per se. No counterfactual can or should be used to determine liability. But when assessing compensatory damages, some counterfactual analysis is necessary. It is necessary because the settled principle governing compensatory damages is that they *compensate* for loss or injury[57]. The measure is to be, as far as possible, that amount of money which will put the *injured* party in the same position they would have been in had they not sustained the wrong[58]. Put in negative terms, "a plaintiff cannot recover more than

---

54 *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The "Mediana")* [1900] AC 113 at 116; *Baume v The Commonwealth* (1906) 4 CLR 97 at 116; *Cunningham v Ryan* (1919) 27 CLR 294 at 314.

55 *The "Mediana"* [1900] AC 113 at 116, quoted in *Baume* (1906) 4 CLR 97 at 116; *Cunningham* (1919) 27 CLR 294 at 314.

56 *Lumba* [2012] 1 AC 245 at 320 [236].

57 *Haines v Bendall* (1991) 172 CLR 60 at 63 and the authorities cited there; *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 at 520 [41], 532 [84]-[85], 533 [87]-[88].

58 *Haines* (1991) 172 CLR 60 at 63 and the authorities cited there; *Amaca* (2018) 264 CLR 505 at 520 [41]; *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390 at 447 [43].

he or she has lost"[59]. That reflects the fact that the compensatory principle is one *part* of the question of relief, and that relief must be appropriate for the situation of the plaintiff. In rare cases, that counterfactual will show that imprisonment is inevitable and there was no compensable loss. In those cases, nominal damages are awarded as vindication of the infringement. This is such a case.

51 Moreover, having regard to the nature and purpose of existing remedies, there is no basis in principle, or practice, for the development of a new head of so-called vindicatory damages. The appeal should be dismissed with costs.

Facts and the statutory regime

52 Mr Lewis pleaded guilty to intentionally or recklessly inflicting actual bodily harm[60] by smashing a glass into a person's face and was sentenced to 12 months' imprisonment, to be served as periodic detention.

53 At the time[61], Ch 5 of the *Crimes (Sentence Administration) Act 2005* (ACT) ("the CSA Act") governed periodic detention. An offender was required to serve periodic detention in accordance with the obligations imposed by the CSA Act[62]. An offender was required to report for each period of detention and to perform activities or work[63]. Section 58(4) provided that an offender was taken not to have performed periodic detention, and was to have their periodic detention period extended by one week, where, among other circumstances, the offender failed to report for detention without approval[64] or gave a positive test sample of drugs or alcohol[65]. Where s 58 applied to an offender for a second or subsequent

---

59 *Haines* (1991) 172 CLR 60 at 63, citing *Parry v Cleaver* [1970] AC 1 at 13.

60 *Crimes Act 1900* (ACT), s 23.

61 Given that the issue here concerns the Sentence Administration Board's actions, the version of the legislation as at July 2008, when the decision to cancel Mr Lewis' periodic detention was made, is used.

62 CSA Act, s 42.

63 CSA Act, s 49.

64 CSA Act, s 58(1)(a).

65 CSA Act, s 58(3)(c).

detention period, the chief executive[66] had to apply to the Sentence Administration Board ("the Board") for an inquiry under s 66[67].

54 Mr Lewis breached certain obligations: he failed to report to the periodic detention centre for the periods commencing 1 February, 28 March and 4 April 2008 and he returned a positive test sample for alcohol when he reported for periodic detention on 11 April 2008.

55 The Board conducted an inquiry under s 66 to decide whether Mr Lewis had breached any of his periodic detention obligations. That inquiry was the result of an application by the chief executive[68]. Before starting such an inquiry, the Board must give written notice to the offender[69]. On 19 April 2008, Mr Lewis signed an acknowledgement of having received a notice of inquiry relating to the alleged breaches. On or about 12 May 2008, Mr Lewis left Canberra without informing any authorities and did not report for periodic detention after that date.

56 Between 12 May and 7 July 2008, the Board sent correspondence to Mr Lewis at his mother's address. This correspondence related to the breaches of the periodic detention order and the Board's directions to Mr Lewis to attend its inquiry. Mr Lewis' mother did not pass on this correspondence to him. Mr Lewis became aware of the letters when he returned to Canberra around 7 July 2008, but he did not read them.

57 If the Board conducts an inquiry under s 66 as a result of a referral by the chief executive (as in this case), s 69 sets out the consequences of a finding by the Board that s 58 applies to an offender in relation to two or more detention periods. Section 69(2) says that "[t]he [B]oard must, as soon as practicable, cancel the offender's periodic detention under section 68" in such circumstances. That is, the statute *requires* detention in the form of full-time imprisonment.

58 The Board conducted two inquiries, because it decided that the first lacked a quorum. At its second inquiry, on 8 July 2008, the Board said:

> "The [B]oard found proved the breach of conditions and pursuant to section 68(2)(f) of the [CSA] Act, resolved to CANCEL Steven Lewis[']s PERIODIC DETENTION order."

---

66 See *Legislation Act 2001* (ACT), s 163.

67 CSA Act, s 59.

68 CSA Act, s 66(3)(b), (4).

69 CSA Act, s 67.

Mr Lewis was arrested on 5 January 2009 and imprisoned for 82 days.

Proceedings below

59 In the Supreme Court of the Australian Capital Territory, Refshauge J found Mr Lewis' imprisonment to be unlawful because the Board's decision at the second inquiry was a nullity for lack of procedural fairness. Mr Lewis then sought, among other things, damages for false imprisonment for the 82 days he spent in custody. An initial claim for exemplary damages was abandoned.

60 Refshauge J awarded only nominal damages, reflecting the fact that even if Mr Lewis had not been unlawfully detained, his lawful detention was "inevitable": the CSA Act required cancellation of the periodic detention order. If Mr Lewis' entitlement was not limited to nominal damages, Refshauge J would have assessed damages at $100,000 with no award of aggravated damages.

61 Refshauge J also refused an award of "vindicatory" damages, finding no entitlement to such a remedy under the *Human Rights Act 2004* (ACT) or otherwise. Refshauge J then said, "[i]f I am wrong and there is such a remedy, then I would still only award Mr Lewis nominal damages", for the same reasons given under the analysis of ordinary (non-vindicatory) damages.

62 Mr Lewis' appeal to the Court of Appeal of the Supreme Court of the Australian Capital Territory was dismissed. The Court held that "[t]he straightforward application of the sections of the [CSA] Act ... provides a clear pathway to a finding that imprisonment, consequent upon cancellation of the periodic detention order, was inevitable". That finding is not the subject of appeal in this Court and was key to the Court of Appeal's conclusion on damages. Their Honours agreed with Lord Dyson in *Lumba* and the Full Court of the Federal Court of Australia in *Fernando v The Commonwealth*[70] that nominal damages are the appropriate remedy where lawful detention was inevitable.

63 The Court of Appeal rejected the claim for vindicatory damages. Such damages were said to be available in defamation cases, but were nevertheless compensatory "in that [their] purpose is to vindicate the reputation harmed by the conduct giving rise to the tort". The Court noted that Mr Lewis was unable to point to authority recognising vindicatory damages as a separate head of damages. Even if there were such a head of damages, the Court said, the unlawfulness in this case was "at fairly much the lowest level". The Court continued:

> "Moreover ... the appellant was a person who was not entitled to his personal liberty as a matter of fact and law. If there be a separate head of vindicatory damages, a nominal amount would suffice to vindicate his

---

70 (2014) 231 FCR 251.

interest in having questions affecting his liberty determined in accordance with the law."

Mr Lewis' argument

64 Mr Lewis seeks substantial compensatory damages or, alternatively, vindicatory damages, for his 82 days of unlawful imprisonment when he was not entitled to his personal liberty as a matter of fact and law. Mr Lewis' argument has three strands: first, the tort of unlawful imprisonment is actionable per se and does not require proof of special damage; second, it is neither necessary nor appropriate to undertake a counterfactual analysis to see what *would* have happened but for the unlawful imprisonment; and, third, even if a counterfactual is appropriate, the correct counterfactual is a scenario in which Mr Lewis was not imprisoned at all (not one in which he was lawfully imprisoned).

Compensatory damages and the counterfactual

65 This appeal is concerned with compensatory damages. The settled principle is that they *compensate* for loss or injury, focusing on the interests of the plaintiff[71]. Those interests are addressed by awarding damages as compensation for actual loss – an award guided by the compensatory principle and the principles that have developed for such awards in specific contexts[72]. The "compensatory principle is concerned with the measure of damages required to remedy *compensable* damage" (emphasis added)[73]. As stated earlier, the measure of compensatory damages is to be, as far as possible, that amount of money which will put the injured party in the same position they would have been in had they not sustained the wrong[74].

66 The precise boundaries of the compensatory principle cannot be stated in abstract terms. What it requires will depend upon the facts and nature of each case. But that does not detract from the fact that it is a "settled principle" of damages in tort law[75].

---

71 *Haines* (1991) 172 CLR 60 at 63 and the authorities cited there; *Amaca* (2018) 264 CLR 505 at 520 [41], 532 [84]-[85].

72 *Amaca* (2018) 264 CLR 505 at 532 [85], 533 [87]-[88].

73 *Amaca* (2018) 264 CLR 505 at 520 [41].

74 *Haines* (1991) 172 CLR 60 at 63 and the authorities cited there; *Amaca* (2018) 264 CLR 505 at 520 [41].

75 *Haines* (1991) 172 CLR 60 at 63.

67 The conclusion that *liability* for false imprisonment flows with no regard to any counterfactual[76] does not logically lead to the conclusion that counterfactuals are not relevant to identification of the *loss* that is to be compensated by an award of damages. The problem with a counterfactual analysis is only at the earlier stage of determining whether the tort of false imprisonment was committed. Indeed, to refuse to consider the counterfactual scenario *when assessing damages* would be to have a court award damages while blind to the realities of the situation.

68 During the course of argument in this appeal, the need for a counterfactual in identifying the loss arising from the false imprisonment was, at times, described in terms of causation. For my part, that terminology is unhelpful. Causation is a legal concept[77] and, as Mason CJ said in *March v Stramare (E & M H) Pty Ltd*[78], "[i]n law … problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence".

69 Separate from apportionment or allocation of legal responsibility, it is necessary to identify loss in order to award compensatory damages. It is *that* inquiry which involves the use of a counterfactual. The counterfactual is the position the plaintiff would have been in had the tort not been committed.

70 If a loss is identified, the law then has to answer a question: "is that loss the loss of 'something for which the claimant should and reasonably can be compensated'"[79]? Should it be recognised by an award of compensatory damages which will put the injured party in the same position they would have been in had they not sustained the wrong, so far as is possible? And as has been stated, that question forms part of a larger question about the nature of the relief, as a whole, that a plaintiff should be granted.

71 Thus, a counterfactual is often useful in seeking to identify the loss or injury from a wrong for which a person may then be compensated. A person unlawfully imprisoned may lose wages through an inability to work while detained, or they may simply lose time. Each of these is a compensable loss – the former by an award of special damages and the latter by way of general damages. It is difficult

---

76 See [45]-[46] above.

77 *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 509. See also *The National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 591.

78 (1991) 171 CLR 506 at 509; see also at 522, 525, 530, 533-534. See also *Environment Agency v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22.

79 *Amaca* (2018) 264 CLR 505 at 532 [84], quoting *Pickett v British Rail Engineering Ltd* [1980] AC 136 at 149.

to reach that conclusion without a counterfactual. Why is the money a person would have earned in the time they were unlawfully detained something which is compensable? Precisely because they would have earned that money if they had not been unlawfully imprisoned. On the other hand, if the person would inevitably have been lawfully imprisoned for the relevant period of time, what is their loss or injury?

72 This reasoning does not allow a police officer to avoid *liability* for false imprisonment by saying that they would have arrested a suspect lawfully, if they had not done so unlawfully. Such a result would be wrong in law[80]. The counterfactual does nothing to avoid *liability*. As already noted, liability is determined without use of any counterfactual. The fact that the tort is actionable per se means that the imprisoner is liable for his or her actions without special damage being shown. The counterfactual is directed only at determining the loss for which a person is to be compensated. It helps the court to fashion an appropriate remedy. The flaw in Mr Lewis' contention is the failure to distinguish between questions of liability and remedy.

73 Nor does the use of a counterfactual in determining *compensation* embolden the executive. Any argument to the contrary elides or ignores the purpose and the nature of the relief. If the purpose of relief is to deter such behaviour, then it may include a declaration and an award of exemplary damages. Neither the declaration nor the award of exemplary damages depends on a counterfactual analysis.

74 Further, there are few cases where courts have made a finding of unlawful imprisonment that had no compensable effects. The facts of this case are exceptional, even more so than those in *Lumba* and *Fernando*. In this case a statute *required* the claimant to be detained. There was no doubt about what would have happened. Evidence given by a police officer that they *would* have arrested someone lawfully is not in the same category; that is different from a statutory process which *requires* a person to be detained.

Can compensation be assessed without a counterfactual?

75 The remaining question, then, is what to make of those cases in which Mr Lewis says tortious conduct leads to an award of damages with no counterfactual analysis. Mr Lewis points primarily to *Ashby v White*[81] and *Plenty*

---

80 *Christie v Leachinsky* [1947] AC 573.

81 (1703) 2 Ld Raym 938 [92 ER 126].

v Dillon[82] and cases dealing with torts other than false imprisonment. Mr Lewis' reliance on these cases is misplaced.

76 In *Ashby*, a person was wrongly prevented from voting. His preferred candidate was elected anyway, but damages were awarded. Mr Lewis contended that the voter suffered no consequential loss because his preferred candidate would be elected either way. But the voter in *Ashby* did lose something – the ability to vote. The counterfactual shows that, absent the wrongful deprivation of the right to vote, the voter would have voted. Whether his preferred candidate was elected is immaterial. Mr Lewis' case is different: he would have lost his liberty either way because his lawful detention was inevitable.

77 In *Plenty*, police officers trespassed on land in order to serve a summons. Mason CJ, Brennan and Toohey JJ did not discuss damages because the point was not argued[83]. Gaudron and McHugh JJ said that "once a plaintiff obtains a verdict in an action of trespass, he or she is entitled to an award of damages"[84]. Their Honours continued[85]:

> "True it is that the entry itself caused no damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land."

And later, their Honours said[86]:

> "If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official. The appellant is entitled to have his right of property vindicated by a substantial award of damages."

---

82 (1991) 171 CLR 635.

83 (1991) 171 CLR 635 at 645.

84 (1991) 171 CLR 635 at 654.

85 (1991) 171 CLR 635 at 654-655.

86 (1991) 171 CLR 635 at 655.

78 It is true that in *Plenty* there was no loss in terms of damage to the land, but there *was* a loss of the right not to be trespassed upon. The lawful presence of police officers on the land was in no way inevitable, unlike Mr Lewis' imprisonment. A counterfactual in *Plenty* would show that the police would not have been on the land.

79 Moreover, even if *Ashby* and *Plenty* were authority for the proposition that a substantial award of damages *could* be made without showing loss (and they are not), that would not mean that such an award is necessarily appropriate in *every* case. The facts of this case are exceptional. There is no reason for the Court to shut its eyes to those facts.

80 Finally, by reference to cases involving other trespassory torts[87], loss of use of goods[88], conversion[89] and, in England, the tort of misuse of private information[90], Mr Lewis submitted that "[t]hese matters demonstrate the correctness of Lord Hoffmann's observation that there is 'no uniform causal requirement for liability in tort. Instead, there are varying causal requirements, depending upon the basis and purpose of liability ... [C]ausal requirements follow from the nature of the tort'"[91]. Mr Lewis submitted that the nature of the tort of false imprisonment denies recourse to a counterfactual analysis, such that Mr Lewis could recover substantial damages even if his lawful detention was inevitable. This submission is rejected.

---

87 *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 at 288; [1979] 1 All ER 240 at 242; *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1416-1417; [1988] 3 All ER 394 at 402; *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 at 717-718; [1995] 3 All ER 841 at 845-846; *Blake* [2001] 1 AC 268 at 278; *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420.

88 *Owners of No 7 Steam Sand Pump Dredger v Owners of SS "Greta Holme" (The "Greta Holme")* [1897] AC 596; *The "Mediana"* [1900] AC 113; *Mersey Docks and Harbour Board v Owners of the SS Marpessa* [1907] AC 241; *Admiralty Commissioners v SS Susquehanna* [1926] AC 655; *The Hebridean Coast* [1961] AC 545; *Rider v Pix* (2019) 2 QR 205.

89 *Kuwait Airways Corpn v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883 at 1093-1094 [82], 1106 [129].

90 *Gulati v MGN Ltd* [2017] QB 149 at 168-169 [45]-[48].

91 *Kuwait Airways* [2002] 2 AC 883 at 1106 [128]-[129].

81 Three of the cases cited by Mr Lewis[92] concerned the question of causation in determining liability. But once liability is established, the identification of loss and the relief to be granted (including damages for that loss) are separate questions. In this case, the respondent accepts that Mr Lewis was falsely imprisoned. Questions of liability are therefore irrelevant. The dispute in this case is about the separate question of relief.

82 Moreover, none of the cases cited by Mr Lewis lead to a different conclusion on the question of relief. In cases involving trespass to land or goods, the plaintiff is entitled to what have been described as damages for use regardless of whether the plaintiff would, but for the tort, have used the land or goods[93]. The approach to the question of financial compensation for interference with rights of property was explained by Lord Lloyd (delivering the judgment of their Lordships) in *Inverugie Investments Ltd v Hackett*[94] in these terms:

> "[A] person who lets out goods on hire, or the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself ...
>
> It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the 'loss' which the plaintiff has suffered. As the Earl of Halsbury LC pointed out in *Mediana (Owners of Steamship) v Comet (Owners of Lightship)* [1900] AC 113, 117, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.
>
> In *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 Nicholls LJ called the underlying principle in these cases the 'user principle.' The plaintiff may not have suffered any *actual* loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any *actual* benefit

---

92 *Kuwait Airways* [2002] 2 AC 883 at 1106 [128]-[129]; *Chappel v Hart* (1998) 195 CLR 232 at 238 [7], 255-256 [62]-[64], 285 [122]; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642-643 [45].

93 See fnn 87, 88 above.

94 [1995] 1 WLR 713 at 717-718; [1995] 3 All ER 841 at 845. See also *Bunnings* (2011) 82 NSWLR 420 at 465 [168]-[169].

> from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both." (emphasis in original)

83 It is no answer for a wrongdoer who has deprived the plaintiff of their chair to point out that they do not usually sit in it or that they have plenty of other chairs in the room[95]. The plaintiff was deprived of their chair. That is the loss or damage. The next question is how to value that loss or damage: "the damages recoverable will be, in short, the price a reasonable person would pay for the right of user"[96]. The interference with the plaintiff's proprietary right is valued as if the plaintiff waived the tort and charged for use of their property[97]. The object of the award is not merely to compensate the plaintiff but to deny the defendant the value of the property which the defendant had improperly used or retained.

84 These authorities do not address the tort of false imprisonment. They concern relief of a different kind directed to different objectives[98]. Nor do these authorities address a circumstance of inevitability such that, if not for the wrong, a plaintiff would have been placed in the same position lawfully.

85 Further, cases dealing with equitable compensation by way of an account of profits in the context of an infringement of a trade mark[99] do not alter that conclusion. As Windeyer J said in *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd*[100], the available relief for infringement of a trade mark, reflecting the old law, was an account of profits or, alternatively, damages. Equity granted relief in the form of an account of profits – not necessarily coextensive with the acts of

---

95 *The "Mediana"* [1900] AC 113 at 117.

96 *Blake* [2001] 1 AC 268 at 278.

97 *Swordheath* [1979] 1 WLR 285 at 288; [1979] 1 All ER 240 at 242; *Stoke-on-Trent City Council* [1988] 1 WLR 1406 at 1416; [1988] 3 All ER 394 at 402; *Inverugie* [1995] 1 WLR 713 at 717-718; [1995] 3 All ER 841 at 845; *Blake* [2001] 1 AC 268 at 278.

98 *Blake* [2001] 1 AC 268 at 279; *The "Mediana"* [1900] AC 113 at 117-118; *Kuwait Airways* [2002] 2 AC 883 at 1094 [87]; see also *Ministry of Defence v Ashman* (1993) 66 P & CR 195 at 199.

99 *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 32-33; *Dart Industries Inc v Decor Corporation Pty Ltd* (1993) 179 CLR 101 at 123-125.

100 (1968) 122 CLR 25 at 32.

infringement – limited to the profits made when the defendant *knew* of the plaintiff's rights[101]. Why? Because the profits were made dishonestly and it would be unconscionable for the wrongdoer to retain them[102]. The relief was directed to a different purpose from damages. An inquiry as to damages concerns different objectives and considerations.

86 Finally, Mr Lewis' reliance on *Gulati v MGN Ltd*[103] is misplaced. In that case, it was held that on a claim for the tort of misuse of private information in England, damages could be awarded to compensate claimants for the loss or diminution of their right to control the use of that formerly private information, as well as for (and irrespective of) any distress which the claimants might justifiably have felt as a result of the information having been exploited[104]. The distinction between loss of privacy and false imprisonment was explained by Arden LJ in these terms[105]:

> "[A] person who was falsely imprisoned without knowing it, and released before he found out, suffered no harm. The factual difference between that situation and these appeals is that in this case the judge accepted that the claimants had suffered damage in that their private information had been misappropriated and had genuinely suffered considerable distress when they found out about the hacking of their phones and other activities of [the respondent]. More importantly, while damages are not awarded in a case of unlawful detention where, had the correct procedure been adopted, the claimant would have been imprisoned or detained anyway ..., the courts have awarded damages for the wrongful deprivation of liberty even though no one appreciated at the time that it was wrongful." (citations omitted)

It is clear that Arden LJ drew a distinction between cases of false imprisonment in which there is no loss, and those in which there is loss. That distinction is not helpful to Mr Lewis on the facts of this case.

---

101 *Colbeam* (1968) 122 CLR 25 at 34-35.

102 *Colbeam* (1968) 122 CLR 25 at 34.

103 [2017] QB 149.

104 *Gulati* [2017] QB 149 at 169 [48].

105 *Gulati* [2017] QB 149 at 168-169 [47].

The correct counterfactual

87 Mr Lewis' alternative argument is that if a counterfactual *is* to be used, the proper counterfactual scenario is not one in which he is lawfully imprisoned, but rather one in which he is not imprisoned at all. Mr Lewis submitted that using a counterfactual in which he is lawfully imprisoned treats the unlawfulness of the imprisonment as the wrong and that, instead, the wrong is "interference with liberty in breach of the right not to be confined". The question of illegality is said by Mr Lewis to go only to the absence of a *defence* to the tort.

88 This argument was accepted in *Roberts v Chief Constable of the Cheshire Constabulary*[106]. There, Mr Roberts sued for damages for false imprisonment for his detention between 5.25 am (when his detention should have been reviewed under a statute) and 7.45 am (when that review was finally undertaken and continued detention approved). Clarke LJ said[107]:

> "As a matter of general principle such a plaintiff is entitled to be put into the position in which he would have been if the tort had not been committed. It is therefore important to analyse what the tort is. The plaintiff's claim was not for damages for breach of duty to carry out a review at 5.25 am but for false imprisonment.
>
> ... [T]he reason why the continued detention was unlawful was that no review was carried out. The wrong was not, however, the failure to carry out the review but the continued detention. If the wrong had not been committed the plaintiff would not have been detained between 5.25 am and 7.45 am."

It is difficult to accept this analysis. The conclusion that Mr Roberts would not otherwise have been imprisoned runs directly counter to Clarke LJ's earlier finding that, had the review been undertaken at the correct time, Mr Roberts would have been detained[108].

89 In *Lumba*, Lord Dyson accordingly rejected Clarke LJ's reasoning in *Roberts*. His Lordship said that it was a "fallacy" not to draw a distinction between those who would otherwise have been imprisoned and those who would not[109]. In my view, Lord Dyson's reasoning is to be preferred.

---

106 [1999] 1 WLR 662; [1999] 2 All ER 326.

107 *Roberts* [1999] 1 WLR 662 at 668; [1999] 2 All ER 326 at 332.

108 *Roberts* [1999] 1 WLR 662 at 666; [1999] 2 All ER 326 at 330.

109 *Lumba* [2012] 1 AC 245 at 281 [93].

90 Mr Lewis' case is illustrative of the fallacy of not drawing the distinction. First, it is contrary to common sense to say the correct counterfactual is that Mr Lewis would not have been imprisoned, when the CSA Act required him to be imprisoned. As the Commonwealth (intervening) submitted, it would be a strange result for the law to select a counterfactual scenario which the law itself could never countenance. Second, such a decision would directly contradict the finding in the courts below that Mr Lewis' detention was inevitable. That finding is not challenged in this Court. Third, and no less importantly, it is not correct to say that the wrong at issue here is "interference with liberty in breach of the right not to be confined". There is no right not to be confined. There is a right not to be confined *wrongfully*. The tort is not made out if the detention is not wrongful.

91 If Mr Lewis had not been unlawfully imprisoned, he would have been in lawful detention. He does not claim any special damages or exemplary damages. The rejection of his claim for aggravated damages is not challenged in this Court. He sought an award of compensatory damages for non-financial loss, or what is recoverable as a component of an award of general damages[110]. And he could not identify any loss.

Parker v Chief Constable of Essex Police

92 The decision in *Parker v Chief Constable of Essex Police*[111] must be addressed separately. Mr Parker was arrested on suspicion of having committed a crime[112]. The officer who arrested Mr Parker did not personally have reasonable grounds for a suspicion justifying arrest, as required by statute[113]. The officer who was intending to make the arrest (and who did have the necessary state of mind) had been delayed in traffic. Mr Parker had therefore been unlawfully arrested[114]. The trial judge found that the relevant counterfactual was that, if the arresting officer had not made the arrest, another of the officers present would have made

---

110 *CSR Ltd v Eddy* (2005) 226 CLR 1 at 20 [39].

111 [2019] 1 WLR 2238; [2019] 3 All ER 399.

112 [2019] 1 WLR 2238 at 2241 [3]; [2019] 3 All ER 399 at 401.

113 [2019] 1 WLR 2238 at 2241 [6]; [2019] 3 All ER 399 at 402.

114 [2019] 1 WLR 2238 at 2250 [56]; [2019] 3 All ER 399 at 410.

the arrest. However, that arrest would also have been unlawful. As such, Mr Parker was not limited to nominal damages only[115].

93 On appeal, the Court of Appeal said that the correct counterfactual was identified by asking not "what would, in fact, have happened had [the arresting officer] not arrested Mr Parker" but rather "what would have happened had it been appreciated what the law required"[116]. The Court of Appeal held that only nominal damages should be awarded, reflecting the "distinction to be drawn between those who would have suffered the detriment in any event (in this case, false imprisonment) and those who would not"[117].

94 With respect, the reasoning of the trial judge in *Parker* is to be preferred. The correct counterfactual in the assessment of loss and damage is what would have happened if the tort had not been committed. The way in which the Court of Appeal framed the question assumed the conclusion of lawfulness. And the facts in *Parker* are far removed from those in Mr Lewis' appeal. No statute positively required Mr Parker to be arrested. The power of arrest was discretionary. As such, it is very difficult to say that Mr Parker's lawful arrest was "inevitable". As the trial judge found, if the unlawful arrest had not been made, the most likely outcome was that another officer would instead have arrested Mr Parker unlawfully[118]. That takes cases such as *Parker* outside the scope of the principles involved in Mr Lewis' appeal, in which detention was inevitable.

No substantial compensatory damages

95 The question then is whether Mr Lewis is entitled to a substantial award of compensatory damages for his wrongful detention, even if his detention was inevitable. Or, put in more direct terms, is he entitled to a substantial award of compensatory damages as a vindication of his basic legal values or rights? The answer is no.

96 Absent loss or injury, there is nothing to compensate. If Mr Lewis had not sustained the wrong of *unlawful* imprisonment, he would have been lawfully imprisoned. He is entitled to an award of nominal damages, vindicatory in

---

115 [2019] 1 WLR 2238 at 2256 [79]; [2019] 3 All ER 399 at 416.

116 [2019] 1 WLR 2238 at 2262 [104]; [2019] 3 All ER 399 at 421.

117 [2019] 1 WLR 2238 at 2262-2263 [108]; [2019] 3 All ER 399 at 422.

118 [2019] 1 WLR 2238 at 2256 [79]; [2019] 3 All ER 399 at 416.

nature[119], to mark that "there [was] an infraction of a legal right"[120]. He is not entitled to substantial compensatory damages because he suffered no loss or injury.

97 Mr Lewis contends that his entitlement to substantial compensatory damages to vindicate his right is supported by authority. Mr Lewis pointed to the statement of Hayne and Bell JJ in *CPCF v Minister for Immigration and Border Protection* that "the action for false imprisonment is for vindication of basic legal values"[121] and that of Gaudron and McHugh JJ in *Plenty* that an action for trespass to land "serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land", and that this right was to be "vindicated by a substantial award of damages"[122]. Similarly, Mr Lewis relied on *Ashby*, in which it was said that "[i]f the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it"[123].

98 Two things may be said about these cases. First, the fact that these cases speak of vindication does nothing to detract from the primacy of the compensatory principle in compensatory damages. The compensatory principle cannot be made to found an award where no loss has been shown. Second, an award of substantial compensatory damages is not required in order to vindicate Mr Lewis' rights. That is achieved by the finding of unlawful detention made in this case, akin to a declaration[124], together with an award of nominal damages[125]. That is the appropriate relief to address Mr Lewis' false imprisonment.

---

119 *Ashley v Chief Constable of Sussex Police* [2008] AC 962 at 985-986 [60]; *New South Wales v Stevens* (2012) 82 NSWLR 106 at 112 [26]; *Carey v Piphus* (1978) 435 US 247 at 266. See [114]-[118] below.

120 *The "Mediana"* [1900] AC 113 at 116, quoted in *Baume* (1906) 4 CLR 97 at 116.

121 (2015) 255 CLR 514 at 569 [155].

122 (1991) 171 CLR 635 at 654-655.

123 (1703) 2 Ld Raym 938 at 953 [92 ER 126 at 136].

124 Cane, "Damages in Public Law" (1999) 9 *Otago Law Review* 489 at 499; *Lumba* [2012] 1 AC 245 at 283-284 [101], 320 [236].

125 *Ashley* [2008] AC 962 at 985-986 [60]; *Stevens* (2012) 82 NSWLR 106 at 112 [26].

Alternative causes

99 Mr Lewis submitted that this case could be considered as one in which the wrong could be produced by "alternative causes". That is, Mr Lewis' deprivation of liberty was caused by the respondent's wrongful conduct, but the same harm would have been produced even absent the wrongful conduct. Adopting Hart and Honoré's analysis[126], Mr Lewis submitted that in this kind of case, "the generally accepted view is that [the] defendant's wrongful ... act has caused the harm ... despite the existence of a set of alternative conditions sufficient to produce the same harm".

100 This argument does not lead to an award of substantial compensatory damages. First, at the level of principle, as Mr Lewis' written submissions later accept (again having quoted Hart and Honoré[127]), "the law does not take a uniform approach to alternative causes" and the approach to be taken reflects judgments "about matters such as the reason for the imposition of liability and considerations of justice".

101 Second, Mr Lewis again conflates matters of liability and relief. The only conclusion which Mr Lewis ultimately draws is that "a defendant cannot escape liability to compensate the plaintiff for unlawful imprisonment which the defendant has actually inflicted by contending that, had they not done so, they would lawfully have imprisoned the plaintiff". No one disputes here that the respondent is liable for false imprisonment. But that finding does not of itself lead to the conclusion that Mr Lewis is entitled to compensatory damages. At most, the "alternative causes" analysis assists a court to determine liability. It does not show entitlement to substantial compensatory damages.

102 Third, there was no alternative cause. Mr Lewis' imprisonment was mandated by the CSA Act, the same Act purportedly relied upon by the respondent to detain him[128]. This was not a case where there was another law or policy justifying detention which was not invoked or relied upon by the respondent. As a result of the tort, the harm suffered by Mr Lewis was his deprivation of liberty. But it cannot be said that the respondent's wrongful act – the lack of procedural fairness at the hearing before the Board – produced or caused that harm. As Hart and Honoré explain[129], it is necessary to distinguish "genuine cases of alternative causation from cases where the wrongful aspect of [the] defendant's act is causally

---

126 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 249.

127 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 251.

128 See [60] above.

129 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 252.

irrelevant". What produced the harm to Mr Lewis was the operation of the CSA Act. The decision to cancel his periodic detention would have been made whether or not Mr Lewis was afforded procedural fairness. Thus, the conduct of the respondent in denying Mr Lewis procedural fairness was not an alternative cause of Mr Lewis' deprivation of liberty.

Conclusion on substantial compensatory damages

103 In this case, lawful imprisonment was inevitable. Only nominal damages should be awarded as a mark of vindication of the infringement of Mr Lewis' right not to be falsely imprisoned.

Vindicatory damages

104 If substantial compensatory damages are unavailable (as is the position), then Mr Lewis submitted that this Court should recognise that non-compensatory but "vindicatory" damages are available, as a new head of damages[130]. This submission should also be rejected. There is no need, nor is there any basis in principle, for the Court to recognise a separate head of vindicatory damages. Existing remedies are sufficient.

105 As was explained in *Lumba*, "the concept of vindicatory damages has been developed in some Commonwealth countries with written constitutions enshrining certain fundamental rights and principles and containing broadly worded powers to afford constitutional redress"[131]. The aim of the award is not merely compensation[132], nor is it punishment (though an award may have that effect)[133]. The award, not necessarily of substantial size, serves to "reflect the sense of public outrage, emphasise the importance of [a] constitutional right and the gravity of the breach, and deter further breaches"[134].

---

130 See, eg, Stevens, *Torts and Rights* (2007) at 59-91, 137-144; Varuhas, *Damages and Human Rights* (2016) at 125-129; Varuhas, "Before the High Court – *Lewis v Australian Capital Territory*: Valuing Freedom" (2020) 42 *Sydney Law Review* 123 at 136.

131 [2012] 1 AC 245 at 313 [214].

132 *Lumba* [2012] 1 AC 245 at 282 [97].

133 *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 at 336 [19]; *Taunoa v Attorney-General* [2008] 1 NZLR 429 at 540 [321].

134 *Ramanoop* [2006] 1 AC 328 at 336 [19].

106 The head of vindicatory damages recognised by some judges in *Lumba* developed from awards of such damages in Privy Council cases where the constitutional context was markedly different. Those cases concerned violations of constitutional rights, in which the relevant constitutions (of countries in the Caribbean) provided for "redress" or "relief" with "such remedy" as the court considers appropriate[135]. It is quite a stretch to say that principles developed in that setting should be recognised as part of the common law of Australia, in circumstances where the common law has adequate means of dealing with the matter already. As Lord Dyson said in *Lumba*, it would be a "big leap" to carry these principles over from public law in the Caribbean to private common law elsewhere[136].

107 Further, there is uncertainty over how vindicatory damages would work. For example, Lord Hope said in *Lumba* that an award of vindicatory damages should take account of "the underlying facts and circumstances"[137]. But in this case, the circumstances point to the conclusion that only nominal damages are appropriate. Moreover, how could a court meaningfully determine a quantum of damages which is not moored to a compensatory or punitive principle, or to the standard award of nominal damages?

108 Mr Lewis submitted that this concern is "overstated" because vindicatory damages would be available "only where ordinary compensatory damages are not available yet an award of nominal damages is inappropriate having regard to the right that has been infringed". It is not clear why *these* are the appropriate bounds of the award. If the right is so important that it warrants some separate vindication, why is that not addressed, as it may be now, by the grant of a declaration or, where appropriate, an award of aggravated or exemplary damages, combined with a compensatory award?

109 Compensatory or exemplary damages may have a vindicatory effect in some cases. Mr Lewis points to cases in which vindicatory language was used in awarding compensatory damages. For example, as stated above, Gaudron and McHugh JJ said in *Plenty* that "[t]he appellant is entitled to have his right of property vindicated by a substantial award of damages" in an action for trespass to land[138]. Similarly, Mr Lewis submitted that "a vindicatory purpose is present in the recognised head of non-compensatory exemplary damages". He cited *New South*

---

135 See *Lumba* [2012] 1 AC 245 at 316-317 [224].

136 [2012] 1 AC 245 at 283 [100].

137 [2012] 1 AC 245 at 304 [180].

138 (1991) 171 CLR 635 at 655.

Wales v Ibbett[139] in this respect, which quoted the following passage from *Kuddus v Chief Constable of Leicestershire Constabulary*[140]:

> "[I]n certain cases the awarding of exemplary damages serves a valuable purpose in restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law."

These statements do not assist Mr Lewis. The cases explain that vindication is not an alien concept to damages awards. But if a new head of damages were to be recognised, one would expect a very good reason for the law to take that step. In my view, there is no such reason. The "aim" of vindicatory damages can be and is achieved by existing heads of damages. That last statement necessitates further explanation of exemplary, aggravated and nominal damages.

110 "[E]xemplary damages may be awarded for conduct of a sufficiently reprehensible kind"[141]. They are appropriate where "the conduct of the defendant merits punishment" because it "is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he [or she] acts in contumelious disregard of the plaintiff's rights"[142]. Exemplary damages "go beyond compensation and are awarded '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'"[143]. The award also "serve[s] to mark the court's condemnation of the defendant's behaviour"[144]. In *Lamb v Cotogno*, the Court noted that the award has a "punitive aspect"[145], but may also have a compensatory

---

139 (2006) 229 CLR 638 at 649 [40].

140 [2002] 2 AC 122 at 147 [75].

141 *Lamb v Cotogno* (1987) 164 CLR 1 at 7.

142 McGregor, *Mayne and McGregor on Damages*, 12th ed (1961) at 196, quoted in *Lamb* (1987) 164 CLR 1 at 8.

143 *Lamb* (1987) 164 CLR 1 at 8, quoting *Wilkes v Wood* (1763) Lofft 1 at 19 [98 ER 489 at 498-499]. See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149.

144 *Lamb* (1987) 164 CLR 1 at 10.

145 *Lamb* (1987) 164 CLR 1 at 9. See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471; *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [15].

effect in practical terms[146]. In so far as the award is a deterrent, it serves as a deterrent both to the defendant and to others[147].

111 Exemplary damages may also have particular significance in restraining executive power. In *Ibbett*, the Court considered exemplary damages for trespass to land and said[148]:

> "The common law fixes by various means a line between the interests of the individual in personal freedom of action and the interests of the State in the maintenance of a legally ordered society. An action for trespass to land and an award of exemplary damages has long been a method by which, at the instance of the citizen, the State is called to account by the common law for the misconduct of those acting under or with the authority of the Executive Government." (footnote omitted)

The Court went on to say that it is "well established ... that an award of exemplary damages may serve 'a valuable purpose in restraining the arbitrary and outrageous use of executive power' and 'oppressive, arbitrary or unconstitutional action by the servants of the government'"[149].

112 By contrast, aggravated damages are "compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like"[150]. They are "a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the wrongdoing"[151].

113 While the same factors may be relevant to both aggravated and exemplary damages, the "difference is that in the case of aggravated damages the assessment

---

146 *Lamb* (1987) 164 CLR 1 at 9-10. See also *Gray* (1998) 196 CLR 1 at 34 [100].

147 *Lamb* (1987) 164 CLR 1 at 10; *Gray* (1998) 196 CLR 1 at 7 [15].

148 (2006) 229 CLR 638 at 648 [38].

149 *Ibbett* (2006) 229 CLR 638 at 649 [39], quoting *Rookes v Barnard* [1964] AC 1129 at 1223, 1226 per Lord Devlin.

150 *Lamb* (1987) 164 CLR 1 at 8.

151 *Ibbett* (2006) 229 CLR 638 at 646 [31]. See also *Uren* (1966) 117 CLR 118 at 149.

is made from the point of view of the [p]laintiff and in the case of exemplary damages the focus is on the conduct of the [d]efendant"[152].

114 The Court has engaged with nominal damages less often. In *Baume v The Commonwealth*[153], Griffith CJ quoted with approval from the Earl of Halsbury LC in *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The "Mediana")*, where his Lordship said[154]:

> '"Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term 'nominal damages' does not mean small damages."

115 The same passage was quoted by Isaacs J in *Cunningham v Ryan*[155]. There, his Honour said that "[e]very plaintiff who establishes the *liability* of the defendant ... is entitled by law to at least *nominal damages*" (emphasis in original)[156]. Once a wrongful act is established, the entitlement to nominal damages arises in accordance with *The "Mediana"*[157].

116 Consistently with these statements, McColl JA in the Court of Appeal of the Supreme Court of New South Wales said that nominal damages are "vindicatory, not compensatory"[158]. Lord Rodger made the same point in *Ashley v Chief Constable of Sussex Police* in the House of Lords, where his Lordship said that "battery or trespass to the person is actionable without proof that the victim

---

152 *New South Wales v Ibbett* [2005] NSWCA 445 at [83], quoted with approval in *Ibbett* (2006) 229 CLR 638 at 647 [34].

153 (1906) 4 CLR 97.

154 [1900] AC 113 at 116, quoted in *Baume* (1906) 4 CLR 97 at 116.

155 (1919) 27 CLR 294 at 314.

156 *Cunningham* (1919) 27 CLR 294 at 313.

157 *Cunningham* (1919) 27 CLR 294 at 314.

158 *Stevens* (2012) 82 NSWLR 106 at 112 [26].

has suffered anything other than the infringement of his right to bodily integrity: the law vindicates that right by awarding nominal damages"[159].

117 Thus, different categories of damages have different purposes. Exemplary damages are available (at least) where there has been contumelious disregard of the plaintiff's rights. They serve to punish the defendant and to deter the defendant and others from such behaviour. They mark the court's condemnation of that behaviour. Aggravated damages compensate a plaintiff for the *way* in which damage was caused. Nominal damages mark the fact that there has been an infraction of a legal right.

118 Therefore, to the extent that vindicatory damages mark infringement of a right, that is already achieved by nominal damages. Indeed, it is difficult to see what purpose nominal damages would serve if vindicatory damages were recognised as a separate head. Nor is it necessary to award vindicatory damages in order to dissuade the executive from exceeding its powers. Were the executive to do so willingly, or in disregard of a plaintiff's rights, exemplary damages could be awarded to mark the court's disapproval of that conduct and to deter others from repeating it. Similar factors may make an award of aggravated damages appropriate in a case where compensatory damages are awarded.

119 Two further points should be added to this discussion of remedies. First, as stated earlier, a court can vindicate a right (in the sense of recognising its infringement) by issuing a declaration. A declaration can "mark in some way the importance of a breach of a public law rule even in a case where it would not be appropriate to award ... damages"[160]. That is, a declaration may itself have a vindicatory purpose and effect. And, as has been explained, so too does an award of nominal damages, which can sit alongside the declaration, or finding, of unlawful conduct as part of the appropriate relief.

120 Second, it is also possible for costs to be awarded on an indemnity basis where appropriate. This ensures that vindication of a right comes at no cost to the plaintiff. With those weapons at hand, there is no good reason to recognise vindicatory damages as a separate head.

---

159 [2008] AC 962 at 985-986 [60]. See also *Turner v New South Wales Mont de Piete Deposit and Investment Co Ltd* (1910) 10 CLR 539 at 548; *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at 300-301, 305.

160 Cane, "Damages in Public Law" (1999) 9 *Otago Law Review* 489 at 499. See also *Lumba* [2012] 1 AC 245 at 284 [101], 320 [236].

121 As Windeyer J said in *Uren v John Fairfax & Sons Pty Ltd*, "law has often used its old weapons instead of forging new ones"[161]. There is no need to forge a new weapon here.

Conclusion

122 Nominal damages recognise the infliction of a wrong on Mr Lewis. He has suffered no loss and is not entitled to an award of substantial compensatory damages. There is no reason to recognise a new head of vindicatory damages. The appeal should be dismissed with costs.

---

161 (1966) 117 CLR 118 at 148.

EDELMAN J.

Introduction

123 The appellant, Mr Lewis, was sentenced to a term of 12 months' imprisonment for recklessly or intentionally inflicting actual bodily harm on another by smashing a glass into the face of another man during a fight in Canberra[162]. His sentence was to be served by a regime, then in place in the Australian Capital Territory[163], of periodic detention on weekends. After he failed on four occasions to attend the periodic detention in the manner required he was notified by the Sentence Administration Board ("the Board") of a Board inquiry, which he also did not attend. The Board cancelled Mr Lewis' periodic detention, as it was required to do[164]. Mr Lewis was then arrested and imprisoned. In separate proceedings from those that are the subject of this appeal, Mr Lewis successfully challenged the cancellation of his periodic detention on the basis that he had been denied procedural fairness by the Board[165]. No appeal was brought from the conclusion that the decision of the Board was invalid. Mr Lewis had been granted bail pending the hearing of that challenge and was never ultimately required to serve his initial sentence of periodic detention[166].

124 In the proceedings that are the subject of this appeal, Mr Lewis sought damages from the Australian Capital Territory for false imprisonment for the 82 days of imprisonment that he had served before being granted bail. The primary judge (Refshauge J) assessed damages for a false imprisonment of this nature at $100,000 but ordered payment by the Australian Capital Territory of only nominal damages because even if Mr Lewis had not been denied procedural fairness it was inevitable that the periodic detention order would have been cancelled and that Mr Lewis would have been imprisoned full-time[167]. An appeal to the

---

162 *Crimes Act 1900* (ACT), s 23.

163 *Crimes (Sentence Administration) Act 2005* (ACT), Ch 5. That regime was replaced by a regime of intensive correction orders by the *Crimes (Sentencing and Restorative Justice) Amendment Act 2016* (ACT), s 54.

164 *Crimes (Sentence Administration) Act*, ss 68(2)(f), 69(2).

165 *Lewis v Chief Executive of the Department of Justice and Community Safety (ACT)* (2013) 280 FLR 118.

166 *Australian Capital Territory v Lewis* (2016) 311 FLR 77.

167 *Lewis v Australian Capital Territory* (2018) 329 FLR 267 at 325 [386]-[388].

Court of Appeal of the Australian Capital Territory (Elkaim, Loukas-Karlsson and Charlesworth JJ) was dismissed[168].

125 Mr Lewis appealed to this Court from the decision to award him only nominal damages. Although the 82 days of his imprisonment were fewer than the sentence that he was required to serve, and although those 82 days of imprisonment would inevitably have been imposed upon Mr Lewis even if the Board decision had not been invalid for lack of procedural fairness, he seeks substantial damages of $100,000 for the 82 days of imprisonment. Two questions arise on this appeal. First, can Mr Lewis recover substantial damages for the tort of false imprisonment simply to vindicate his rights irrespective of whether he has suffered any loss and without an award of exemplary damages? Secondly, can Mr Lewis recover substantial damages for the adverse consequences that he suffered from the same imprisonment as would have occurred lawfully even if the wrongful act had not occurred? Both questions should be answered, "no".

Background

The trial concerning the cancellation of Mr Lewis' periodic detention

126 The primary judge's finding that Mr Lewis was falsely imprisoned was based upon a conclusion that he reached, in earlier, separate reasons, that the cancellation of Mr Lewis' periodic detention should be quashed because Mr Lewis had been denied procedural fairness at the inquiry. The sequence of events that led to that conclusion was as follows.

127 Following an application by the chief executive[169] for an inquiry into Mr Lewis' breaches of his periodic detention obligations, the Board wrote to Mr Lewis with notice of the inquiry[170] and Mr Lewis acknowledged in writing his receipt of the notice. Mr Lewis subsequently departed from Canberra for work and again failed to attend periodic detention on subsequent occasions. On his return to Canberra he received, but chose not to read, correspondence from the Board relating to his further breaches and containing directions for him to attend the inquiry.

128 An initial inquiry was held at which the Board correctly concluded that it had a statutory duty to cancel Mr Lewis' periodic detention at the inquiry for failures to perform periodic detention without approval for two or more detention

---

168 *Lewis v Australian Capital Territory* [2019] ACTCA 16.

169 *Crimes (Sentence Administration) Act*, ss 59, 66.

170 As required by *Crimes (Sentence Administration) Act*, s 67.

periods[171]. However, the Board subsequently formed the view that it had been inquorate at the initial inquiry. It informed Mr Lewis of this and invited him to make submissions at a subsequent inquiry, which Mr Lewis again did not attend.

129 The primary judge found that there had been many letters sent to Mr Lewis between the time that he left Canberra and the final hearing at which his periodic detention was cancelled. However, although concluding that it was very likely that the letters received by Mr Lewis had advised him of the final hearing date, the primary judge said that he could not be certain of that fact. For that reason, the primary judge concluded that Mr Lewis had been denied procedural fairness and that the Board decision to cancel Mr Lewis' periodic detention should be quashed[172]. This conclusion of a denial of procedural fairness was described by the Court of Appeal of the Australian Capital Territory in these proceedings as illogical. But the Court of Appeal did not further address the issue because the Australian Capital Territory did not persist with an appeal from the orders setting aside the Board's decision[173].

The trial concerning false imprisonment and damages

130 Although Mr Lewis had only been released on bail pending the hearing of his challenge to the Board decision, he was not ultimately required to serve the balance of his term of imprisonment either in full-time custody, after a fresh inquiry by the Board, or under the initial sentence, with periodic detention. Mr Lewis then sought substantial damages as compensation for the 82 days that he had spent in prison. His claim was brought at common law for false imprisonment and under s 18(7) of the *Human Rights Act 2004* (ACT), which provides that "[a]nyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention". Despite initially claiming exemplary damages, Mr Lewis later accepted that there was no basis for such an award.

131 The primary judge held that no public law remedy such as "vindicatory damages" was available to Mr Lewis, including under the *Human Rights Act*. He held that the tort of false imprisonment, and remedies for that tort, were sufficient protection for the right in s 18(7) of the *Human Rights Act*. As for damages for the tort of false imprisonment, he held that the cancellation of the periodic detention order was inevitable and ordered that the Australian Capital Territory pay nominal damages of $1 to Mr Lewis for the 82 days of

---

171 *Crimes (Sentence Administration) Act*, s 69(2).

172 *Lewis v Chief Executive of the Department of Justice and Community Safety (ACT)* (2013) 280 FLR 118 at 152-153 [204]-[205].

173 *Lewis v Australian Capital Territory* [2019] ACTCA 16 at [10].

imprisonment. In the event that he was incorrect to award only nominal damages, the primary judge assessed damages for the false imprisonment at $100,000[174]. The primary judge did not specify the adverse consequences experienced by Mr Lewis during his imprisonment which would have justified an award of this size but he did refer to a number of false imprisonment cases, in which the largest award made was for $95,000 in general damages for "a very unpleasant period of 72 days in prison which significantly affected [the plaintiff]"[175]. In that case, the award of general damages was described as being made for losses including: "injury to liberty, ie the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, ie the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status"[176].

132 Mr Lewis appealed from the finding that he was entitled only to nominal damages. He submitted that he was entitled to an award of $100,000 as substantial or vindicatory damages for false imprisonment or as a separate entitlement for infringement of s 18(7) of the *Human Rights Act*. The Court of Appeal held that the inevitability of Mr Lewis' imprisonment determined the appeal.

133 Mr Lewis' appeal to the Court of Appeal was dismissed. The Court of Appeal followed the decisions of the majority of the Supreme Court of the United Kingdom in *R (Lumba) v Secretary of State for the Home Department*[177] and the Full Court of the Federal Court in *Fernando v The Commonwealth*[178], concluding that vindicatory damages were not a separate species of damages and compensatory damages were not available for the false imprisonment of a plaintiff who had suffered no loss because they could, and would, have been lawfully detained in any event. The Court of Appeal also held that it was unnecessary to determine whether s 18(7) of the *Human Rights Act* gave rise to a separate entitlement to damages because that sub-section was concerned only with compensation and the inevitability of Mr Lewis' imprisonment meant that only a nominal award could have been made.

---

174 *Lewis v Australian Capital Territory* (2018) 329 FLR 267 at 325 [388].

175 *Morro v Australian Capital Territory* (2009) 4 ACTLR 78 at 97 [68], cited in *Lewis v Australian Capital Territory* (2018) 329 FLR 267 at 325 [387].

176 *Morro v Australian Capital Territory* (2009) 4 ACTLR 78 at 93 [53], quoting from *Spautz v Butterworth* (1996) 41 NSWLR 1 at 14, in which Clarke JA was in turn quoting from McGregor, *McGregor on Damages*, 15th ed (1988) at 1026 [1619].

177 [2012] 1 AC 245.

178 (2014) 231 FCR 251.

Mr Lewis' false imprisonment and his submissions in this Court

134 The tort of false imprisonment is based upon a person's unjustified act that detains another. A person will be liable for directing the detention, without justification or excuse (including lawful authority), even if there are other acts involved in that detention[179]. The tort is actionable per se – that is, without proof that the unjustified act caused any loss or detriment.

135 The only act of detention with which the primary judge or the Court of Appeal was concerned was the decision of the Board to rescind Mr Lewis' periodic detention order. Although Mr Lewis was already subject to a term of imprisonment, that sentence of imprisonment did not preclude the possibility of false imprisonment at a different place or at a time during the sentence when he was not required to be in prison[180]. The effect of the decision of the Board was to deprive Mr Lewis of his periodic, conditional liberty, during his 82 days of full-time imprisonment. The primary judge concluded that despite Mr Lewis' sentence of 12 months' imprisonment, he was "relatively immune from restrictions" outside the periodic detention period, which ran from 7 pm each Friday evening to 4.30 pm each Sunday evening[181].

136 The premise of this appeal, on this finding of the primary judge, which was unchallenged in the Court of Appeal and in this Court, was that the unlawful act of Mr Lewis' imprisonment was attributable to the members of the Board. The *Crimes (Sentence Administration) Act 2005* (ACT) exempted the Board members from the liability that they would otherwise have incurred for their honest conduct in the reasonable belief that it was in the exercise of a function under that Act[182] and it provided that any liability that would have attached to them attaches to the Australian Capital Territory[183].

137 Mr Lewis' grounds of appeal in this Court are concerned only with the primary judge's award, upheld by the Court of Appeal, of nominal damages for his false imprisonment. The Australian Capital Territory brings no notice of contention. Mr Lewis asserts that the primary judge should have awarded him

---

179 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 631 [400], citing *Dickenson v Waters Ltd* (1931) 31 SR (NSW) 593. See also *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714, discussed in *Ruddock v Taylor* (2005) 222 CLR 612 at 653-654 [149]-[151].

180 *Hazelton v Potter* (1907) 5 CLR 445.

181 *Lewis v Australian Capital Territory* (2018) 329 FLR 267 at 293-294 [150]-[154].

182 *Crimes (Sentence Administration) Act*, s 179(2).

183 *Crimes (Sentence Administration) Act*, s 179(3).

$100,000 in damages for three reasons: first, as an award of damages simply because his right to liberty was infringed and independently of any consequences of that infringement; secondly, in a functionally identical submission but using different language, as an award of "vindicatory damages" to vindicate his right to liberty, independently of any consequences of the infringement; and thirdly, as an award of compensatory damages for the adverse consequences, or non-pecuniary loss, that he experienced by being deprived of his liberty for 82 days.

138 Mr Lewis' submissions raise fundamental questions about the operation of the compensatory principle in the assessment of damages and the function of causation where compensation is sought for loss suffered. For instance, he relied heavily upon a line of cases involving the "user principle" to submit that compensation for torts that were actionable per se always requires substantial damages even where no actual loss is suffered. And he submitted that the principle of "but for", or counterfactual, causation should have no role at all in the assessment of the substantial damages claimed for his false imprisonment or that, if it had any role, it should not be applied to preclude damages for a loss that would have occurred anyway. In order to address these submissions it is necessary to set out the essential nature of the compensatory principle, including the place of the user principle cases within that principle, as well as the nature and operation of rules of causation.

The compensatory principle

139 The general principle upon which compensatory damages are assessed is extremely well established. However, the novelty of Mr Lewis' submission and the cases that were said to support it make it necessary in this appeal to explain in some detail the operation of the compensatory principle. As it is usually stated, the principle is that "the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed"[184].

---

184 *Haines v Bendall* (1991) 172 CLR 60 at 63. See also *Robinson v Harman* (1848) 1 Ex 850 at 855 [154 ER 363 at 365]; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191, citing *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39; *Wenham v Ella* (1972) 127 CLR 454 at 471; *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 80, 98, 117, 134, 148, 161; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 362; *Clark v Macourt* (2013) 253 CLR 1 at 18 [59]; *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164 at 1208 [191]; 373 ALR 1 at 52.

140 This widely recognised statement of the compensatory principle does not explain the manner in which money is awarded to put the victim in the position they would have been in if the wrong had not occurred. That issue is resolved by legal remedies which can respond to the wrong in two ways. The first is to rectify the wrongful act. The second is to provide any further compensation needed for adverse consequences suffered by the victim. This point was clearly made by Lord Dunedin in a passage referred to with approval in this Court by Windeyer J[185] and by Dawson J[186]. His Lordship said, by reference to the notions of remoteness of damage accepted at that time, that the compensatory principle requires damages as reparation "so far as money can compensate ... for the wrongful act and for all the natural and direct consequences of the wrongful act"[187].

141 The law cannot rectify a wrongful act or omission which is not continuing, which did not involve an act that can be undone or done, and which could never have been licensed by payment of a fee. And in many cases a victim will only be concerned with, and only seek reparation for, the adverse consequences suffered as a result of the wrong. The most common form of compensatory damages is therefore those damages which respond to the losses suffered by the victim of wrongdoing. The principles concerning such compensatory damages, including the rules of mitigation and remoteness of damage, focus upon reparation for the adverse consequences, namely the loss, suffered by the victim. However, it is important to appreciate the distinction between damages in each of these categories. At times, Mr Lewis' submissions conflated the two.

Compensation to rectify a wrongful act

142 Courts have power to make specific orders to rectify, as far as reasonable, an actual or anticipated wrongful act or omission where it is appropriate and possible to do so by preventing it continuing or by ordering that the wrongful act or omitted act be undone or done. For instance, orders can be made to attempt to rectify a wrongful act by: specific performance of a duty that was breached in order to give "complete relief"[188]; restraining future infringement "to give effect to a clear right" by restraining interference with rights, by requiring the grant of a right

---

185 *O'Brien v McKean* (1968) 118 CLR 540 at 557.

186 *Johnson v Perez* (1988) 166 CLR 351 at 386.

187 *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 661. Compare, as to "natural and direct", *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty ("The Wagon Mound (No 2)")* [1967] 1 AC 617.

188 *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 297; *Turner v Bladin* (1951) 82 CLR 463 at 472.

or, exceptionally, by ordering action to undo the act[189]; requiring the defendant to deliver up a chattel that is "unique" or of "special or peculiar value" or to hold it on constructive trust to do "full justice"[190]; or requiring a trustee to replace an asset dissipated from the trust[191].

143 In many cases, however, the interference with the defendant's liberty that comes from a specific order will not be necessary because it will be adequate to award the monetary equivalent of the specific action that would rectify the wrongful act. These damages have been described as a "substitutionary remedy"[192] or "substitutive compensation"[193]. For instance, rather than ordering specific performance it will sometimes be appropriate for the defendant to pay the difference between the value of the promised performance and the performance received as the "monetary equivalent of the value to the buyer of the performance of the contract by the seller"[194]. This "appears as a 'loss' only by reference to an unstated *ought*"[195]. Again, rather than ordering delivery up of chattels in equity[196]

---

189 *Burns Philp Trust Co Pty Ltd v Kwikasair Freightlines Ltd* (1963) 63 SR (NSW) 492 at 499; *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 31 [33].

190 *Dougan v Ley* (1946) 71 CLR 142 at 153; *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 45 [128].

191 Scott, Fratcher and Ascher, *Scott and Ascher on Trusts*, 5th ed (2007), vol 4 at 1715 §24.11.3; *Application of Kettle* (1979) 423 NYS 2d 701 at 702.

192 Dobbs, *Law of Remedies*, 2nd ed (1993), vol 1 at 279 §3.1.

193 Elliott and Mitchell, "Remedies for Dishonest Assistance" (2004) 67 *Modern Law Review* 16 at 24-25.

194 *Clark v Macourt* (2013) 253 CLR 1 at 21 [67]. See also at 31 [109]: "the economic value of the performance of the contract". See also *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617; *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272 at 287 [15].

195 Fuller and Perdue, "The Reliance Interest in Contract Damages: 1" (1936) 46 *Yale Law Journal* 52 at 53 (emphasis in original). See *Clark v Macourt* (2013) 253 CLR 1 at 7 [11], 19 [61], 30 [107]; *Moore v Scenic Tours Pty Ltd* (2020) 94 ALJR 481 at 493 [64]; 377 ALR 209 at 223.

196 Or at common law after the passage of the *Common Law Procedure Act 1854* (17 & 18 Vict c 125), s 78. See *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 at 650; [1963] 2 All ER 314 at 318-319.

it will often be a sufficient remedy for the tort of detinue at common law for the wrongdoer to pay the value of the chattel taken[197] or, for trespass, the value of the chattel obtained from the land[198]. And rather than ordering specific replacement of a trust asset it will often be sufficient for a court to make an order for payment of money as "substitutive performance" of the trustee's duty to maintain trust assets[199].

144 Where the wrongful act concerns a matter for which an injunction or specific performance could have been ordered then, at least since *Lord Cairns' Act*[200], courts of equity have also had power, in lieu of an injunction or specific performance, to attempt to rectify the wrongful act by ordering the defendant to pay an amount which would have made the act lawful: such "damages 'in substitution' for specific performance must be a substitute, giving as nearly as may be what specific performance would have given"[201]. Separately from damages in substitution for specific performance or injunction a similar approach was taken at common law and in equity with awards of damages based on a "user principle"[202]. Well-established examples of the user principle are: (i) trespass to

---

197 *Gollan v Nugent* (1988) 166 CLR 18 at 25-26. See also *Cohen v Roche* [1927] 1 KB 169 at 181.

198 *Martin v Porter* (1839) 5 M & W 351 [151 ER 149]; *Morgan v Powell* (1842) 3 QB 278 [114 ER 513].

199 *Interactive Technology Corporation Ltd v Ferster* [2018] EWCA Civ 1594 at [15]-[21]. See also *Matter of Rothko* (1977) 43 NY 2d 305 at 322; *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at 732-733 [168]-[170]; *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1 at 66-67 [348]-[349].

200 *Chancery Amendment Act 1858* (21 & 22 Vict c 27), s 2.

201 *Wroth v Tyler* [1974] Ch 30 at 59; *Semelhago v Paramadevan* [1996] 2 SCR 415 at 426 [16]. As to injunctions, see *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 815; [1974] 2 All ER 321 at 341, quoting *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 870: "a preferable equivalent for an injunction and therefore an adequate substitute for it".

202 *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1416; [1988] 3 All ER 394 at 402.

land[203], with damages based on the use of land in cases of wayleaves[204] and mesne profits[205]; (ii) the conversion or detinue of goods, with awards of a reasonable hiring charge for the use of the goods[206]; and (iii) breach of rights of confidence and intellectual property infringements with reasonable licence fees and reasonable royalties for the use of the confidential information or intellectual property rights[207].

145 In these cases based upon the user principle the remedy attempts to rectify the wrongful act by requiring payment of an amount that would have made the use lawful. As Fletcher Moulton LJ famously expressed the basic principle in relation to patents, "if you want to use it your duty is to obtain ... permission" and if permission is not obtained damages are payable for what "could have reasonably been charged for that permission"[208]. In short, "[r]ecompense is given to the wronged property owner that requires the wrong to be seen as righted, by requiring a price or hiring charge to be paid for the wrongful use"[209]. It "suggests a

---

203 Initially doubted where there was an absence of any damage to the plaintiff: *Hilton v Woods* (1867) LR 4 Eq 432 at 441-442.

204 *Jegon v Vivian* (1871) LR 6 Ch App 742 at 762-763; *Phillips v Homfray* (1871) LR 6 Ch App 770 at 781; *Eardley v Granville* (1876) 3 Ch D 826 at 832.

205 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 39.

206 *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246 at 254-255; *Gaba Formwork Contractors Pty Ltd v Turner Corporation Ltd* (1991) 32 NSWLR 175 at 184-188.

207 *Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104 at 124; *Pearce v Paul Kingston Pty Ltd* (1992) 25 IPR 591 at 592; *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840 at 856; [1992] 3 All ER 257 at 271-272; *Bailey v Namol Pty Ltd* (1994) 53 FCR 102 at 111-112; *Nominet UK v Diverse Internet Pty Ltd [No 2]* (2005) 68 IPR 131 at 138-139 [30]-[31]; *Winnebago Industries Inc v Knott Investments Pty Ltd [No 4]* (2015) 241 FCR 271.

208 *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157 at 165. See also *General Tire & Rubber Co v Firestone Tyre & Rubber Co Ltd* [1975] 1 WLR 819 at 826; [1975] 2 All ER 173 at 179; *Ramset Fasteners (Aust) Pty Ltd v Advanced Building Systems Pty Ltd* (1999) 164 ALR 239 at 267 [64].

209 *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 at 468 [177].

ratification of the tortious [or otherwise wrongful] acts"[210]. In each of these instances of a user principle award, the damages are awarded even if the plaintiff has suffered no actual detriment, including no loss of an opportunity that would have been exercised to license the use of the land, goods, information or intellectual property rights[211].

146 It is "strained and artificial"[212] to describe a person who may be no worse off as a result of the wrong as having suffered a loss in these cases involving the user principle. A loss, in any meaningful sense, must involve some adverse effect experienced by the plaintiff either on their mind, on the way they conduct their business or live their life, or on their financial position[213]. The mere infringement of a right, independently of its consequences for the plaintiff, is not something that is experienced in the real world. Hence, it has been recognised for more than a century that damages awards based on the user principle are not concerned with actual loss to the plaintiff: in many of these cases "if the ordinary principle [of loss] was applied the plaintiff would be entitled to no damages at all"[214]. As Lord Shaw famously said in the context of infringement of a patent in *Watson, Laidlaw, & Co Ltd v Pott, Cassels, & Williamson*[215]:

---

210 *Bailey v Namol Pty Ltd* (1994) 53 FCR 102 at 112, quoting Wells, "Monetary Remedies for Infringement of Copyright" (1989) 12 *Adelaide Law Review* 164 at 168.

211 *LED Builders Pty Ltd v Eagle Homes Pty Ltd* (1999) 44 IPR 24 at 74 [188]; *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 WLR 2370 at 2386-2387 [49]; *Winnebago Industries Inc v Knott Investments Pty Ltd [No 4]* (2015) 241 FCR 271 at 288 [47]. Cf *Aristocrat Technologies Australia Pty Ltd v DAP Services (Kempsey) Pty Ltd* (2007) 157 FCR 564 at 568-569 [26]-[28].

212 *Attorney General v Blake* [2001] 1 AC 268 at 279.

213 "[I]s the claimant factually worse off ... as a result of the wrong?": Stevens, *Torts and Rights* (2007) at 61. See also *Berry v CCL Secure Pty Ltd* [2020] HCA 27 at [28].

214 *Whitwham v Westminster Brymbo Coal and Coke Company* [1896] 2 Ch 538 at 540. See also *Penarth Dock Engineering Company Ltd v Pounds* [1963] 1 Lloyd's Rep 359 at 361-362; *Bilambil-Terranora Pty Ltd v Tweed Shire Council* [1980] 1 NSWLR 465 at 486 [76]; *Kuwait Airways Corpn v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883 at 1094 [87]. See also American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011), vol 2 at 35 §42, Comment f.

215 1914 SC (HL) 18 at 31.

> "wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire. If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: 'Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better for the exercise.'"

A striking example is *Inverugie Investments Ltd v Hackett*[216], where the defendant trespassers ejected the plaintiff lessee from 30 apartments within a hotel complex. The lessee was in no worse a position, and might even have benefitted from his ejection, because the apartments had very low levels of occupancy and the expenses of running the apartments may have exceeded the income. Delivering the advice of the Privy Council, Lord Lloyd upheld the award of a reasonable rent of $1,813,269 despite accepting that the lessee had suffered no "*actual* loss"[217].

147 The lack of any actual loss in many of these user principle cases has led numerous Australian and English courts to describe these damages awards as restitutionary[218]. This approach gains support from the need for the defendant to have taken the opportunity to use the land, goods, information or monopoly right. As Lindley LJ described it in *Whitwham v Westminster Brymbo Coal and Coke Co*[219], "the defendants have had [the land] for their own benefit". The user fee is required because "the advantage acquired by the defendant is one that should properly have been the subject of negotiation and payment"[220]. It is not awarded

---

216 [1995] 1 WLR 713; [1995] 3 All ER 841.

217 *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 at 718; [1995] 3 All ER 841 at 845-846 (emphasis in original).

218 *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 at 505, 507; *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361 at 1369; [1993] 3 All ER 705 at 714; *Ministry of Defence v Ashman* (1993) 66 P & CR 195 at 200-201; *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432 at 440; *Gondal v Dillon Newsagents Ltd* [2001] RLR 221 at 228; *Kuwait Airways Corpn v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883 at 1094 [87]; *Port Stephens Shire Council v Tellamist Pty Ltd* (2004) 135 LGERA 98 at 151 [193]; *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390 at 435-436 [3].

219 [1896] 2 Ch 538 at 541.

220 American Law Institute, *Restatement of the Law Third, Restitution and Unjust Enrichment* (2011), vol 2 at 4-5 §40, Comment b.

for the "mere non-return of goods that lie idle"[221], nor for land that was not in the defendant's possession[222], nor for confidential information that was taken but not for the opportunity of use[223]. And the damages are increased if the wrongful act confers special value upon the defendant[224].

148 The best analysis, following Lord Lloyd in *Inverugie*[225], is that whilst there is a restitutionary "element" to the award of damages, it should not be seen exclusively in those terms; rather, the award is one manner by which a wrongful act is rectified. It is also wholly independent from the separate award of disgorgement of a defendant's profits[226]. In seeking to rectify the wrongful act, the user fee, which is often calculated by a hypothetical negotiation between a willing licensor and a willing licensee, usually focuses upon both the reasonable value of the wrongful acts to the defendant and their reasonable price to the claimant. As Lord Reed expressed the point more recently, without the user fee award the defendant will be permitted to take "something for nothing, for which the owner was entitled to require payment"[227], so that "there is a sense in which it can be said that the damages in those cases 'may be measured by reference to the benefit gained by the wrongdoer from the breach', provided the 'benefit' is taken to be the

---

221 *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 at 468 [179]. See also *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864 at 870.

222 *Powell v Aiken* (1858) 4 K & J 343 at 349 [70 ER 144 at 146]: "those who enjoy the benefit of property are accountable for the profits", cited in *Anderson v Bowles* (1951) 84 CLR 310 at 320.

223 *Marathon Asset Management LLP v Seddon* [2017] ICR 791 at 867 [281]-[282].

224 *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1990) 24 NSWLR 499 at 507.

225 [1995] 1 WLR 713 at 718; [1995] 3 All ER 841 at 845. See also *Winnebago Industries Inc v Knott Investments Pty Ltd [No 4]* (2015) 241 FCR 271 at 277 [14]: a restitutionary "aspect".

226 *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1 at 12 [9]; *Atlantic Lottery Corp Inc v Babstock* 2020 SCC 19 at [24].

227 *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 at 671 [30]. See also *Atlantic Lottery Corp Inc v Babstock* 2020 SCC 19 at [57]-[58].

objective value of the wrongful use"[228]. To adapt a famous example from Lord Halsbury, suppose that a person removed a chair from my room for 12 months and locked it in storage. If the absence had no adverse effect on me, perhaps because a colleague substituted an identical spare chair of theirs, then damages would be nominal; despite the deprivation of use, no user claim is countenanced where the defendant obtains no opportunity for use from the deprivation[229]. In contrast, as Lord Halsbury said, user damages are payable if the person "kept it" – that is, took my chair for the opportunity of their own use[230].

149 There will be many instances in which neither a specific nor a monetary court order can rectify a wrongful act. For instance, a past act of assault cannot be rectified by any specific award and it would be nonsensical for user fee damages to be awarded where the wrongful act is neither one from which the defendant obtained any valuable opportunity for use nor one that could have been licensed by permission from the plaintiff. Although a plea of "leave and licence"[231] is a justification[232] in cases of trespass to land, in cases of assault consent can be "insufficient to make application of force to another person lawful and sometimes consent is not needed to make force lawful"[233]. It is therefore unsurprising that no decision has awarded a reasonable licence fee as damages for assault based upon the user principle. Indeed, the less likely it is that a wrongful act is a type of act for

---

228 *One Step (Support) Ltd v Morris-Garner* [2019] AC 649 at 685 [79]. See also *Attorney General v Blake* [2001] 1 AC 268 at 283-284.

229 *Dimond v Lovell* [2002] 1 AC 384, below at [167]. See also *Meters Ltd v Metropolitan Gas Meters Ltd* (1911) 28 RPC 157 at 165; *Brandeis Goldschmidt & Co Ltd v Western Transport Ltd* [1981] QB 864 at 869-870; *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 at 467-468 [178]-[179].

230 *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The "Mediana")* [1900] AC 113 at 117.

231 *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 311, citing *Kavanagh v Gudge* (1844) 7 Man & G 316 [135 ER 132], *Wood v Manley* (1839) 11 Ad & E 34 [113 ER 325], and *Plenty v Dillon* (1991) 171 CLR 635 at 647.

232 *Plenty v Dillon* (1991) 171 CLR 635 at 647.

233 *Marion's Case* (1992) 175 CLR 218 at 233.

which a permission could be lawfully negotiated, the more doubt has been expressed as to the availability of this measure of damages[234].

Compensation for the consequences of a wrong

150 In the vast majority of damages cases in the law of torts the focus of the compensatory principle, with its goal of putting the plaintiff in the position they would have been in if the wrongful act had not occurred, is upon rectifying the consequences of the wrong rather than rectifying the wrongful act itself. Lord Shaw described this focus upon compensation for consequences as the principle of "restoration" in contrast with the user principle of "price or hire"[235]. There are a number of reasons that the vast majority of the cases focus upon restoration of consequential loss. First, as explained above, there are many cases in which neither a specific nor a monetary court order can rectify the wrongful act. Secondly, there are many cases where the plaintiff's only interest is to rectify the adverse consequences, or damage, caused by the wrong. These cases will necessarily include all those where the wrong is only actionable upon proof of loss. Thirdly, even when an order of the court aims to rectify a wrongful act the compensatory principle can also require damages as recompense for consequential damage, or loss, caused by the wrong if the award would not otherwise fully compensate for the loss. A central issue on this appeal concerns causation of that consequential loss.

151 Causation is a concept that establishes a link between a physical event and a physical outcome. Where a claim is brought for compensation for loss, the causal question asks whether the defendant's wrongful act was necessary for the loss: "did the defendant's act make a difference" to that outcome[236]? That question is posed as a counterfactual: would the loss have lawfully[237] occurred without the defendant's wrongful act? In other words, would the plaintiff have suffered the same loss but without a violation of their rights? If the loss would not otherwise have occurred then, subject to other legal issues including remoteness of

---

234 Compare *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 851 [101], 884 [248] with 866-867 [173].

235 *Watson, Laidlaw, & Co Ltd v Pott, Cassels, & Williamson* 1914 SC (HL) 18 at 29-30, 31. See also *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC* [2020] UKSC 24 at [218]; [2020] Bus LR 1196 at 1256-1257.

236 Moore, *Causation and Responsibility* (2009) at 84.

237 *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485 at 498-499.

damage[238], it is easy to see why the defendant should be responsible for the loss. Conversely, if the defendant's act made no difference to the outcome, because "but for" the act of the defendant the loss would have occurred lawfully, then the defendant's act was not a cause of the loss and the defendant's responsibility for that loss becomes more difficult to justify.

152 Causation of loss, in this strict sense, is not always required for a defendant to be responsible for losses arising from a wrongful act. In exceptional cases, a defendant can be held responsible for a loss if their actions materially contributed to a loss which would have occurred in any event. A well-established example is where a defendant's fraudulent misrepresentation is a factor that induces an adverse decision resulting in loss even if that decision would have been made in any event[239]. In order to include these exceptional cases within the test for the required link this Court has sometimes described the link required for imposition of responsibility as requiring the act to have "caused or materially contributed"[240] to the loss. The extension of responsibility in exceptional cases based on material contribution was traced by four members of this Court in *Strong v Woolworths Ltd*[241] to a Scottish decision in which several factories had contributed to the polluted state of a river. In that case, liability for nuisance did not require the act of any single factory to have been necessary for the nuisance[242]. As French CJ, Hayne and Kiefel JJ said in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees*

---

238 *Swan v The Queen* (2020) 94 ALJR 385 at 390 [24]; 376 ALR 466 at 472-473, citing *Timbu Kolian v The Queen* (1968) 119 CLR 47 at 68-69, in turn quoting Pollock, *The Law of Torts*, 6th ed (1901) at 36.

239 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483; *Barton v Armstrong* [1976] AC 104 at 118-119; *Gould v Vaggelas* (1984) 157 CLR 215 at 236, 250-251; *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340 at 366.

240 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at 62 [70], quoting *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41 at 47. See also *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 142-143; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412.

241 (2012) 246 CLR 182 at 192-193 [22], referring to Steel and Ibbetson, "More Grief on Uncertain Causation in Tort" (2011) 70 *Cambridge Law Journal* 451 at 453.

242 *Duke of Buccleuch v Cowan* (1866) 5 M 214.

Pty Ltd[243], a material contribution has been said to "require only that the act or omission of a wrongdoer play some part in contributing to the loss".

Substantial damages simply to vindicate a right

153 Mr Lewis' submissions concerning "substantial damages to vindicate a right" and "vindicatory damages" drew heavily from, but modified, the arguments of leading English and Australian academic writers[244]. His submissions also relied heavily upon the line of cases concerning the user principle, regarding remedies to rectify wrongful acts, but he sought to reinterpret those cases to draw a larger point from them. He asserted that substantial damages were always available for false imprisonment, as a tort that is actionable per se, "simply because the plaintiff's right not to be imprisoned was in fact infringed". The argument that substantial damages are available simply for the infringement of a right has been described as seeking "to overhaul the orthodox compensatory principle"[245] and as "seeking to alter the whole of our conventional understanding of damages ... [by] a radical, novel, and fascinating re-interpretation of the law"[246]. The argument should not be accepted.

154 As explained above, the award of damages based on a user fee is commonly made to rectify wrongdoing where a wrongdoer has taken the benefit of a valuable opportunity in cases such as infringements of property rights, confidential information or intellectual property. An example, relied upon by Mr Lewis, is a case where damages were upheld for infringement of the plaintiff's right to private information, separately from any distress caused, where the defendant had "helped itself, over an extended period of time, to large amounts of personal and private

---

243 (2013) 247 CLR 613 at 635 [45]. See also Stapleton, "Unnecessary Causes" (2013) 129 *Law Quarterly Review* 39 at 45-46.

244 Particularly Stevens, *Torts and Rights* (2007) at 59-91, 137-144; Varuhas, *Damages and Human Rights* (2016) at 62-63; Varuhas, "Before the High Court – *Lewis v Australian Capital Territory*: Valuing Freedom" (2020) 42 *Sydney Law Review* 123. Compare Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law* (2019) at 172-176, 181-191.

245 *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655 at 726 [208].

246 Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 46.

information and treated it as its own to deal with as it thought fit"[247]. But user fee damages are not payable every time that a right is infringed.

155 A user fee award is not appropriate as a means of rectifying wrongdoing unless the defendant has obtained an opportunity from the plaintiff by a wrongful act which the plaintiff could have licensed. As a matter of principle, a user fee award could not be available for the false imprisonment of Mr Lewis for which the Australian Capital Territory was responsible. It would be incoherent for Mr Lewis to be awarded damages as a means to attempt to rectify the wrongful act of his imprisonment by requiring payment of a user fee when his consent was irrelevant to the lawfulness of the act and his imprisonment by statute could never have been a matter the subject of a monetary payment for permission.

156 A reinterpretation of the user fee cases, in the manner that Mr Lewis submitted, to apply such damages to all torts that are actionable per se, in all circumstances, would mean that, even without loss, for all these torts nominal damages could never be awarded and rules of causation of loss, remoteness of damage, and mitigation of loss would never apply[248]. Yet, it has long been understood that when a right is violated but no loss is caused a court can award nominal damages to acknowledge "an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed"[249]. Hence, as Lord Griffiths said in the leading speech in *Murray v Ministry of Defence*[250], a person who is falsely imprisoned in a room but suffers no loss because they were released before realising that the door had been locked is only entitled to nominal damages.

157 Mr Lewis' approach to damages would also raise new and novel questions of principle. An example of the novel issues of principle that would arise is the manner in which these damages would be calculated if they were available

---

247 *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch) at [132]. Upheld in *Gulati v MGN Ltd* [2017] QB 149. Permission to appeal was refused by the Supreme Court: *Gulati v MGN Ltd* [2016] 1 WLR 2559.

248 Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 46-48.

249 *The "Mediana"* [1900] AC 113 at 116, quoted in *Baume v The Commonwealth* (1906) 4 CLR 97 at 116 and *Cunningham v Ryan* (1919) 27 CLR 294 at 314, and cited in *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 611 [325].

250 [1988] 1 WLR 692 at 701-703; [1988] 2 All ER 521 at 528-529; *Gulati v MGN Ltd* [2017] QB 149 at 168-169 [47].

independently of consequences and were not based upon a user fee for the use for which consent could have been given. The quantum of such damages would be entirely at large. Since the award would not be one of general damages to compensate for the general deprivation of experience for a period of limited liberty of movement and choice the extent and manner of the deprivation would not be relevant. As Mr Lewis accepted in oral submissions, independent of all such consequences the award should be the same whether he was imprisoned in conditions of luxurious comfort or appalling depravity. Similarly, on Mr Lewis' submission the award should be the same if he were imprisoned for 82 days or 820 days.

158 The proposed quantification in this case is a good illustration. Mr Lewis relied upon the assessment by the primary judge that the consequences to Mr Lewis of the wrongful imprisonment would require compensation of $100,000 if nominal damages had not been appropriate. Yet, he also relied upon the decisions of Lord Hope, Lord Walker and Lady Hale in *R (Lumba) v Secretary of State for the Home Department*[251] where, in the minority on this issue, each would have made awards of damages for acts of false imprisonment, of £1,000 or substantially lower, for an imprisonment that would have occurred in any event[252]. Indeed, even where damages compensate for actual loss, such as the non-pecuniary consequence of an actual loss of liberty of movement for 59 days of unlawful imprisonment that would not otherwise have occurred and which was unaccompanied by any damage to reputation, humiliation, shock or injury to feelings, English law prior to *Lumba* had awarded general damages of only £5,000[253].

159 As a matter of authority, Mr Lewis' submissions also have no support. Apart from the cases concerning the user principle, Mr Lewis relied upon the decision of this Court in *Plenty v Dillon*[254], and three leading English decisions: *Ashby v White*[255], *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The "Mediana")*[256], and *Rees v Darlington Memorial Hospital*

---

251 [2012] 1 AC 245.

252 [2012] 1 AC 245 at 304 [180] (Lord Hope, substantially lower than £1,000), 308 [195] (Lord Walker, £1,000), 315 [217] (Lady Hale, £500).

253 *R v Governor of Brockhill Prison; Ex parte Evans [No 2]* [1999] QB 1043. Upheld on appeal: [2001] 2 AC 19.

254 (1991) 171 CLR 635.

255 (1703) 2 Ld Raym 938 [92 ER 126]; (1703) 1 Bro PC 62 [1 ER 417].

256 [1900] AC 113.

NHS Trust[257]. Properly understood, none of these decisions supports the award of substantial damages simply for the infringement of the plaintiff's rights.

Plenty v Dillon

160 The issue in this Court in *Plenty v Dillon*[258] concerned whether police officers were liable for the tort of trespass to land when, without authority to do so, they entered Mr Plenty's land to serve a summons upon his daughter despite Mr Plenty having expressly revoked any consent for police to enter his land. This Court held that the police officers had committed a trespass. Although the quantum of damages was not an issue before the Court, Mason CJ, Brennan and Toohey JJ said that "the plaintiff is entitled to some damages in vindication of his right to exclude the defendants from his farm"[259]. Similar remarks were made by Gaudron and McHugh JJ, who also referred to the "sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official". They said that Mr Plenty was entitled to "have his right of property vindicated by a substantial award of damages"[260].

161 Nothing in either set of reasons in *Plenty v Dillon* required that the substantial damages to which Mr Plenty was entitled should be an amount which was fixed for the violation of his rights without reference to any of the consequences of the trespass. To the contrary, the reference by Gaudron and McHugh JJ to the sense of injustice felt by plaintiffs such as Mr Plenty was to the consequences of the tort to Mr Plenty and within the community. Indeed, after the case was remitted to the Supreme Court of South Australia the damages were assessed at $122,000, which was comprised of $100,000 for a depressive illness suffered by Mr Plenty as a consequence of the trespass, together with other consequential awards including aggravated damages, for the distress and humiliation Mr Plenty suffered, and exemplary damages, for the "contumelious disregard" of the right held by Mr Plenty and the "sense of injustice" to which Gaudron and McHugh JJ referred[261].

---

257 [2004] 1 AC 309.

258 (1991) 171 CLR 635.

259 (1991) 171 CLR 635 at 645.

260 (1991) 171 CLR 635 at 655.

261 *Plenty v Dillon* (1997) 194 LSJS 106 at 112.

Ashby v White

162 *Ashby v White*[262] was a landmark English case from which emerged the modern tort of misfeasance in public office. A constable of Aylesbury refused to permit the plaintiff to vote in the parliamentary election of 1702 on the grounds that he was not a settled inhabitant of the borough and had not contributed to the church or to the poor. The plaintiff brought an action on the case against the defendants and obtained a verdict in his favour from the jury with damages of £5. The defendants sought to arrest the judgment in the Court of King's Bench. The three judges in the majority held that the plaintiff could not bring the action for reasons including that he was still entitled to have his vote counted by the committee of elections[263]; that the decision as to whether he had a right to vote was to be determined by Parliament[264]; and that he had alleged no damage[265]. Holt CJ dissented on the ground that the plaintiff had a right and a privilege to vote, the denial of which was an injury, and that "an injury imports a damage, when a man is thereby hindred of his right"[266].

163 Mr Lewis submitted that the dissenting reasoning of Holt CJ had been upheld by the House of Lords and thus established that substantial damages were available for the mere infringement of a right despite the absence of loss. This submission is incorrect for several reasons. First, although the result in the Court of King's Bench was reversed by the House of Lords, the House of Lords was not acting as a judicial body and did not adopt the reported reasoning of Holt CJ. In particular, the Lords Committees' report to the House of Lords did not describe the basis of the action as merely the right to vote. The report said that "it is the Fraud and the Malice that entitles the Party to the Action" and it described the plaintiff's vote as "the Thing he has lost"[267]. It was also observed in the Lords Committees' report that there are many rights for which there is no remedy at

---

262 (1703) 2 Ld Raym 938 [92 ER 126]; (1703) 1 Bro PC 62 [1 ER 417].

263 (1703) 2 Ld Raym 938 at 943 [92 ER 126 at 130].

264 (1703) 2 Ld Raym 938 at 942, 947 [92 ER 126 at 129, 132].

265 (1703) 2 Ld Raym 938 at 943 [92 ER 126 at 129].

266 (1703) 2 Ld Raym 938 at 955 [92 ER 126 at 137]. See also *The Judgements Delivered by the Lord Chief Justice Holt in the Case of Ashby v White and Others, and in the Case of John Paty and Others* (1837) at 14.

267 Timberland, *The History and Proceedings of the House of Lords* (1742), vol 2 at 85, 91.

common law although remedies are provided in other courts[268]. In any event, in reaching its conclusion the House of Lords, not sitting as a judicial committee[269], also heard opinions from nine judges of the Court of King's Bench but "little weight was given to reasoning or eloquence. It was ... a mere party question."[270] The result of the vote in the House of Lords was also the subject of a resolution by the House of Commons in 1704 that it is the sole right of the House of Commons to determine all matters relating to the election of its members[271].

164 Secondly, as Wright J said in his advice to the House of Lords in *Allen v Flood*[272], the decision of Holt CJ, "for which the case has passed into the common stock of legal knowledge", was that for every legal right there was a legal remedy or action, *ubi jus, ibi remedium*. But the maxim is little more than a tautology if it means only that an action (a "legal remedy to assert, maintain, and vindicate [the right]"[273]) can be brought whenever the law recognises a legal right (there as "a part of his freehold"[274]) to support an action. On the other hand, if remedy and right are given broader meanings then the proposition for which Mr Lewis relied upon the decision is wrong. Deprivation of a person's right to vote does not, by itself, give rise to a remedy. In 1819, the Lord Chief Justice responded to a submission that Holt CJ had held that the mere refusal of a person's right to vote would give the person the right to bring an action against the returning officer by saying that "if [Holt CJ] did so express himself, I am bound to deliver my opinion that he was mistaken"[275]. It may be, however, that contrary to Lord Raymond's

---

268 Timberland, *The History and Proceedings of the House of Lords* (1742), vol 2 at 80.

269 See *Appellate Jurisdiction Act 1876* (39 & 40 Vict c 59).

270 Campbell, *The Lives of the Chief Justices of England*, 3rd ed (1874), vol 2 at 431. See also Jaffe, "Suits against Governments and Officers: Sovereign Immunity" (1963) 77 *Harvard Law Review* 1 at 14.

271 *Ashby v White* (1703) 1 Bro PC 62 at 64, note [1 ER 417 at 418]. See also *Parliamentary Elections Act 1770* (10 Geo III c 16) ("*Lord Grenville's Act*").

272 [1898] AC 1 at 65.

273 *The Judgements Delivered by the Lord Chief Justice Holt in the Case of Ashby v White and Others, and in the Case of John Paty and Others* (1837) at 9.

274 *The Judgements Delivered by the Lord Chief Justice Holt in the Case of Ashby v White and Others, and in the Case of John Paty and Others* (1837) at 4.

275 *Cullen v Morris* (1819) 2 Stark NP 577 at 588 [171 ER 741 at 745]. See also *Williams v Lewis* (1797) Peake Add Cas 157 [170 ER 229]; *Harman v Tappenden* (1801) 1 East 555 [102 ER 214] and the cases reported in it at 1 East 555 at 563,

report of the case, Holt CJ had indeed required that the right be wilfully infringed before being actionable[276]. In any event, the action that developed from *Ashby v White*, an action for misfeasance in public office, now requires proof of fault and damage[277].

165 Thirdly, any suggestion that there must be a remedy for the infringement of a right still does not require the remedy to be an award of substantial damages. Hence, in *Neville v London "Express" Newspaper Ltd*[278], Viscount Haldane, in the minority in concluding that the tort of maintenance could be actionable without proof of loss, referred to the statement by Holt CJ and added that the "damage" in these cases "may be substantial, but may also amount to what is merely nominal".

The "Mediana"

166 The decision in *The "Mediana"*[279] also does not support Mr Lewis' submission. In that case, the defendants' ship, the *Mediana*, had negligently collided with, and sank, one of the plaintiffs' lightships, the *Comet*. The damages awarded to the plaintiffs, a not-for-profit Harbour Board, included general damages for a period of 74 days during which the Harbour Board were unable to use the *Comet* to perform their statutory duty of lighting the approaches to the river Mersey. Their Lordships held that the case fell within a principle that the House of Lords had enunciated in a case several years earlier[280]. In that earlier case, which

---

note (a)2 [102 ER 214 at 217]; *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* [2003] 2 AC 1 at 34-36.

276 *Allen v Flood* [1898] AC 1 at 65; *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* [2003] 2 AC 1 at 34-38. This is supported by an original manuscript of most of his decision that was published in 1837. See *The Judgements Delivered by the Lord Chief Justice Holt in the Case of Ashby v White and Others, and in the Case of John Paty and Others* (1837) at 23 ("the mayor or bailiffs did well know"), 30 ("defrauding and hindering").

277 *Northern Territory v Mengel* (1995) 185 CLR 307 at 347; *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* [2003] 2 AC 1.

278 [1919] AC 368 at 392.

279 [1900] AC 113.

280 *The "Mediana"* [1900] AC 113 at 115, 120, 121.

had concerned compensation for the consequences of the wrongdoing, the Lord Chancellor had said in the leading speech[281]:

> "This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights, which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrongdoer."

The minimum value to a plaintiff of the consequential inconvenience arising from its lost ability to conduct such not-for-profit operations has been roughly assessed by methods including the interest on the capital value of the ship or the depreciation cost of maintaining and operating the ship[282]. The facts of *The "Mediana"* were different in one respect: the Harbour Board had maintained a spare lightship, the *Orion*, for the very purpose of use in the event that one of their lightships was not able to be used. The Harbour Board's ability to conduct their primary operations was not compromised. The Lord Chancellor recognised that an award of general damages might be a "trifling amount" where there has really been no damage[283], but the House of Lords upheld the award of substantial damages despite the use by the Harbour Board of the spare lightship.

167 One reason for the substantial award of damages in *The "Mediana"*, despite the absence of any apparent actual loss to the Harbour Board in their usual operations, may have been that the use of the spare lightship was disregarded on the basis that the Harbour Board had effectively self-insured by maintaining that spare and the benefits of insurance are generally disregarded in calculating damages. As Lord Brampton observed, the calculation of damages should not be affected by the prudence of the Harbour Board in building and maintaining this spare at great expense[284]. In the Court of Appeal, with which the Lord Chancellor agreed, A L Smith LJ had remarked that a tortfeasor cannot say that no loss is suffered because the victim "stood your own insurers with regard to the [spare] lightship, and although this cost you money, you must use that ship for my benefit

---

281 *Owners of No 7 Steam Sand Pump Dredger v Owners of SS "Greta Holme" (The "Greta Holme")* [1897] AC 596 at 602.

282 *Mersey Docks and Harbour Board v Owners of the SS Marpessa* [1907] AC 241; *Admiralty Commissioners v SS Chekiang* [1926] AC 637; *The Hebridean Coast* [1961] AC 545. See also *Rider v Pix* (2019) 2 QR 205 at 217-218 [36]-[39].

283 [1900] AC 113 at 118.

284 [1900] AC 113 at 123.

in mitigating the damages which I should otherwise have to pay for my misfeasance"[285]. Another possible explanation, adopted in one later decision, is that the measure of loss in *The "Mediana"*, the calculation of which was not in issue in that case, was based upon the value and convenience to the Harbour Board of keeping a spare lightship[286]. In effect, the defendants' negligence deprived the Harbour Board of that convenient part of their operations concerning maintenance of security. Whatever the explanation, the important point is that the measure of damages in that case was concerned with true loss, in the sense of the adverse consequences to the plaintiffs caused by the wrongdoer defendants. The need to focus upon loss in such cases is clear from a more recent decision in which the House of Lords unanimously refused a plaintiff's claim for the hire cost of a car following an automobile accident caused by the defendant's negligence. The plaintiff had not suffered any loss. No cost of hiring the substitute car was incurred because the agreement with the hire company was unenforceable[287].

Rees v Darlington Memorial Hospital NHS Trust

168 Finally, the decision in *Rees v Darlington Memorial Hospital NHS Trust*[288] also provides little or no support for Mr Lewis' submission. In that case, a majority of the House of Lords held that although English law did not permit recovery of additional costs for a disabled parent in raising a child who was born after the defendant's act of negligence in a sterilisation operation, a "conventional award" of damages should be made in all cases of children born as a result of such negligence. That conventional award was £15,000. Whether or not such an award would be made in Australian law, where the common law in this area differs from England[289], the award of £15,000 was not made for the mere infringement of the claimant's rights. Rather, the difference between the majority and the minority of the House of Lords in that case turned upon whether a compensable loss was thought to have been suffered.

169 In the majority, although Lord Bingham said that the award was not "compensatory", it appears that he meant by this only that the award for the loss would not depend upon the particular circumstances of each individual claimant.

---

285 *The Mediana* [1899] P 127 at 137.

286 *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 662, 665-666, 669. See *The "Mediana"* [1900] AC 113 at 122 (Lord Shand).

287 *Dimond v Lovell* [2002] 1 AC 384.

288 [2004] 1 AC 309.

289 *Cattanach v Melchior* (2003) 215 CLR 1.

The judges in the majority still saw the award of damages as responding to the consequences of the wrongdoing, which was the mother's lost "opportunity to live her life in the way that she wished and planned"[290]. There was no dispute that this adverse consequence had been caused by the defendant's negligence in performing the sterilisation. The question was whether this adverse consequence, which was actually experienced, counted as a loss and, if so, how it should be quantified. As the English Court of Appeal subsequently held, the damages in *Rees* were not an award based merely upon the infringement of the claimant's rights, or breach of the claimant's autonomy, irrespective of consequences[291].

Vindicatory damages

170 Mr Lewis' submission that he is entitled to substantial damages independently of any consequences to him is not made any more compelling by the addition of the label "vindicatory damages". This submission, which amounted to the same point as his submission that substantial damages were available to vindicate a right, but with a different title, was that substantial damages were available not to compensate but to "vindicate" the plaintiff's right to liberty or "to recognise the value of the right of every human being not to be imprisoned".

171 The association between damages and vindication probably originated in defamation cases. It was once thought to be legitimate for a jury to be directed that since they could not give public reasons to address the consequential damage to the plaintiff's reputation the members of the jury could instead "give a very big sum, which will indicate what [they] think"[292]. In a subsequent false imprisonment case, where the damages were sought for the consequences to the plaintiff's reputation of the false imprisonment, Slade J described such an award as being made to "vindicate" a plaintiff by making it "clear that there was no stain of any kind upon his character"[293]. The suggested reduction of damages where a judge sits

---

290 *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309 at 317 [8], referring also to *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 114: "[t]hey have lost the freedom to limit the size of their family". See also [2004] 1 AC 309 at 319 [17] (Lord Nicholls), 350 [125] (Lord Millett), 356 [148] (Lord Scott).

291 *Shaw v Kovac* [2017] 1 WLR 4773 at 4790-4792 [78]-[84]; [2018] 2 All ER 71 at 87-89.

292 *Rook v Fairrie* [1941] 1 KB 507 at 515.

293 *Hook v Cunard Steamship Co Ltd* [1953] 1 WLR 682 at 686; [1953] 1 All ER 1021 at 1024.

without a jury was later rejected in England[294], but the description of compensatory damages as performing a function of "vindication" remains. However, the function that it describes is part of the goal of redressing loss[295].

172 Damages awards to vindicate a plaintiff's reputation, whether the impaired reputation is consequent upon defamation or false imprisonment, are concerned with loss. They focus upon the consequences of publication upon the plaintiff's reputation including any diminution in the regard with which the plaintiff is held by others and any isolation of the plaintiff[296]. The award "looks to the attitude of others to the [plaintiff]" and "must not exceed the amount appropriate to compensate the plaintiff for any relevant harm he or she has suffered"[297]. Hence, putting exemplary damages to one side, if the plaintiff's general reputation was so poor prior to the publication that the statement or implication could do no further injury then this element of "vindication" would require only nominal damages[298]. The same is true of infringement of a right by an act of assault or false imprisonment where no loss is suffered: "the law vindicates that right by awarding nominal damages"[299]. And if nominal damages are insufficient to serve the purpose of "restraining the arbitrary and outrageous use of executive power and in vindicating the strength of the law" then exemplary damages can be awarded[300]. There is no place for a separate species of vindicatory damages.

173 Mr Lewis also relied upon a line of decisions, primarily from the Privy Council, where substantial damages were said to have been awarded solely

---

294 *Associated Newspapers Ltd v Dingle* [1964] AC 371 at 400-401, 407, 408-409, 419. But compare *Purnell v BusinessF1 Magazine Ltd* [2008] 1 WLR 1 at 13 [27] and *Cairns v Modi* [2013] 1 WLR 1015 at 1025 [30]-[32].

295 See also *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 602, Murphy J describing these compensatory damages as aggravated.

296 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 71.

297 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61, 66. See also *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 347-348 [60], 349-350 [67]-[68].

298 *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 73 [33], 89 [89].

299 *Ashley v Chief Constable of Sussex Police* [2008] AC 962 at 985-986 [60]. See also *New South Wales v Stevens* (2012) 82 NSWLR 106 at 112 [26].

300 *New South Wales v Ibbett* (2006) 229 CLR 638 at 649 [40], referring to *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 at 147 [75].

to "vindicate" constitutional rights[301]. Although the award made in each of these cases was expressed to be made as damages "to uphold, or vindicate, the constitutional right which has been contravened"[302], the awards were not made without regard to the consequences of the breach. Indeed, the justification given for the award of these damages beyond compensation for loss was "to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches"[303]. As Lord Hope observed, giving the reasons of the Privy Council in one of these cases, a declaration on its own might be sufficient to vindicate the right[304] but, where it was not, the award of substantial damages was likely "in financial terms to cover much the same ground as an award by way of punishment" even if that was not its object[305]. These "vindicatory damages" are thus "closely linked ... to punitive and exemplary damages"[306]. In any event, however, neither English law nor Australian law has generally accepted such a vindication principle as establishing a new species of vindicatory damages in the law of torts. And, in the United States, the Supreme Court has held that where there is no proof of actual damage the abstract value of a constitutional right is vindicated by an award of nominal damages only, in accordance with ordinary principles of the law of torts[307].

---

301 *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328; *Merson v Cartwright* [2006] 3 LRC 264; *Inniss v Attorney General* [2009] 2 LRC 546; *Subiah v Attorney General* [2009] 4 LRC 253; *Takitota v Attorney General* [2009] 4 LRC 807.

302 *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 at 335 [18]. See also *Merson v Cartwright* [2006] 3 LRC 264 at 273 [18]; *Inniss v Attorney General* [2009] 2 LRC 546 at 555 [22]; *Subiah v Attorney General* [2009] 4 LRC 253 at 258 [11]; *Takitota v Attorney General* [2009] 4 LRC 807 at 814-816 [14]-[16].

303 *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 at 336 [19].

304 *Inniss v Attorney General* [2009] 2 LRC 546 at 555 [21].

305 *Inniss v Attorney General* [2009] 2 LRC 546 at 555-556 [25].

306 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 283 [100].

307 *Carey v Piphus* (1978) 435 US 247; *Memphis Community School District v Stachura* (1986) 477 US 299. See also *New York State Rifle & Pistol Association Inc v City of New York, New York* (2020) 140 S Ct 1525 at 1535.

174 An attempt to develop such a new species of damages in English domestic law was made by the appellants in the Supreme Court of the United Kingdom in *R (Lumba) v Secretary of State for the Home Department*[308]. In that case the appellants were two foreign nationals who were detained pending deportation for lengthy periods of time by the blanket application of an unpublished policy. A majority of the House of Lords held that their detention was unlawful and was therefore a false imprisonment. However, six of the nine judges held that only nominal damages should be awarded for the false imprisonment because even without the unlawful application of the unpublished policies it was inevitable that the appellants would have been detained. In a judgment with which the other judges in the majority on this issue agreed[309], Lord Dyson said:

> "The implications of awarding vindicatory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit it to such torts? And why limit it to torts committed by the state? I see no justification for letting such an unruly horse loose on our law. In my view, the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved; (ii) where appropriate, a declaration in suitable terms; and (iii) again, where appropriate, an award of exemplary damages."

175 Even the approach of the minority on this issue in *Lumba* (Lords Hope and Walker and Lady Hale) does not support Mr Lewis. They did not justify a substantial award of vindicatory damages on the basis merely of an infringement of the appellants' rights, irrespective of consequences. Rather, their justifications depended upon considerations that were very closely associated with exemplary damages. Lords Hope and Walker both described the conduct of the officials as "a serious abuse of power" and "deplorable", and held that this required damages that were more than nominal[310]. Similarly, Lady Hale would have awarded substantial

---

308 [2012] 1 AC 245.

309 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 283-284 [101]. See at 321 [237] (Lord Collins), 321 [238] (Lord Kerr), 351 [335] (Lord Phillips), 360 [361]-[362] (Lord Brown and Lord Rodger).

310 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 303 [176], 308 [194]-[195].

damages of £500 to recognise the breach by the State and "to encourage all concerned to avoid anything like it happening again"[311].

176 The approach of the majority on this issue in *Lumba* was followed by the Full Court of the Federal Court in *Fernando v The Commonwealth*[312]. It was also addressed by four members of this Court in *CPCF v Minister for Immigration and Border Protection*[313]. In that case, the majority decision in *Lumba* was referred to with approval by Kiefel J[314] and Keane J[315]. In their joint dissenting reasons, Hayne and Bell JJ, who would have held that detention was unlawful, said that nominal damages were "open" in a case where a form of lawful detention was available and would have been effected but, citing *Lumba*, said that the absence of any "substantial loss" did not require the conclusion that only nominal damages may be awarded[316]. It is unnecessary to assess the competing views expressed by the parties concerning these obiter dicta passages in this joint judgment, nor to assess the competing views concerning whether the correctness of *Lumba* had been in dispute and the consequential weight of the reasoning on this point generally in *CPCF*[317]. For the reasons above, the decision of the majority on this issue in *Lumba* was correct.

Substantial damages for consequences not caused by wrongdoing

177 Mr Lewis' alternative submission was that the Australian Capital Territory was responsible for a genuine loss that he had suffered from the 82 days of imprisonment, namely the non-pecuniary damage including loss of liberty and injury to dignity and feelings for which the primary judge had assessed general

---

311 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 315 [217].

312 (2014) 231 FCR 251.

313 (2015) 255 CLR 514.

314 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 611 [324]-[325].

315 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 655-656 [511]-[512].

316 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 569-570 [155], [157].

317 *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at 1016 [28]; 372 ALR 555 at 562.

damages at $100,000. Mr Lewis put this submission in two different ways. First, he argued that the "correct counterfactual" for assessing causation of loss is that rather than imprisoning the plaintiff unlawfully "the plaintiff is not imprisoned at all". Alternatively, Mr Lewis argued that the "but for" or counterfactual approach should not apply at all. He submitted that the question in this case should not be whether the wrongdoer's acts were necessary for the loss but whether the wrongdoer's acts were "sufficient in combination with other conditions to produce the harm"[318]. Neither argument should be accepted.

178 As explained above, the test for causation of loss asks whether the wrongful act was necessary for the loss. The "but for" or counterfactual approach "directs us to change one thing at a time and see if the outcome changes"[319]. The change is the removal of the wrongful act. If the loss would lawfully have occurred but for the wrongful act then the wrongful act was not necessary for the loss. The counterfactual approach thus involves a hypothetical question where no other fact or circumstance is changed other than those which constituted the wrongful act[320].

179 Although the parties characterised the wrongful act as the denial of procedural fairness by the Board, the relevant act of the Board that caused the false imprisonment was the invalid decision of the Board to cancel Mr Lewis' periodic detention. The lack of procedural fairness was the reason why the decision was invalid and incapable of being a justification for the Board's action. The correct method of framing the counterfactual is therefore to ask whether Mr Lewis would lawfully have been subject to the same imprisonment but for the decision of the Board made in denial of procedural fairness. The answer to that question is "yes". The primary judge and the Court of Appeal concluded that such imprisonment, by a valid decision, was inevitable.

180 Mr Lewis' first argument on this point involved a novel test for causation where the counterfactual was not a hypothetical in which only the wrongful acts had not occurred. Instead, he treated the counterfactual as involving a hypothetical in which all the facts that would be necessary for the plaintiff's imprisonment, whether wrongful or not, were removed. On that counterfactual, the plaintiff would

---

318 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 249.

319 *Bostock v Clayton County, Georgia* (2020) 140 S Ct 1731 at 1739.

320 *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639 at 659 [83], 662 [101]; *Martinez v Griffiths* [2019] NSWCA 310 at [36].

not be imprisoned at all. Such a counterfactual would be disconnected from the wrongful acts and would assume the answer to the very question being asked.

181 Mr Lewis submitted that without this novel counterfactual approach there could almost never be substantial damages for false imprisonment. He instanced the decision of the Court of Appeal of England and Wales in *Parker v Chief Constable of Essex Police*[321]. In that case, the police force of the Chief Constable of the Essex Police had concluded that Mr Parker and two other male suspects should be arrested simultaneously. A problem arose because the three men were located in different places and the officer who was to arrest Mr Parker, and who was aware of the evidence, was detained in traffic. In her place, Mr Parker was arrested by a surveillance officer, PC Cootes. The arrest, and consequent detention, of Mr Parker was unlawful because PC Cootes did not personally have reasonable grounds for the necessary suspicion to justify an arrest. The Court of Appeal, overturning the trial judge, held that Mr Parker was entitled only to nominal damages because the arrest would have occurred in any event. The Court said that the counterfactual test "is not what would, in fact, have happened had PC Cootes not arrested Mr Parker but what would have happened had it been appreciated what the law required"[322].

182 If the counterfactual approach in *Parker* were applied generally then it would, as Mr Lewis submitted, result in nominal damages in most cases of honest but unlawful imprisonment. Mr Lewis is correct that the Court of Appeal in *Parker* applied the wrong counterfactual approach. The correct counterfactual approach, which removes only the wrongful act, does not require the court to ask what would have happened if it had been appreciated what the law required. But Mr Lewis is not correct to treat the counterfactual as assuming that all acts necessary for the plaintiff's imprisonment had not occurred. The proper approach, taken by the trial judge in *Parker*, involves asking whether the loss would lawfully have been suffered but for the wrongful acts of PC Cootes. Damages should have been nominal only if[323] without the wrongful acts of PC Cootes the arrest would otherwise have been lawfully made, as it should have been. Thus, the Supreme Court of the United Kingdom described *Parker* as a case where "had things been

---

321 [2019] 1 WLR 2238; [2019] 3 All ER 399.

322 *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238 at 2262 [104]; [2019] 3 All ER 399 at 421.

323 Contrary to the factual finding at trial: *Parker v Chief Constable of Essex Police* [2017] EWHC (QB) 2140 at [153].

done as they should have been, the claimant could and would have been arrested lawfully"[324].

183 An example of the correct application of the counterfactual approach is the approach taken by Lord Dyson in *Lumba* to the earlier decision of the Court of Appeal in *Roberts v Chief Constable of the Cheshire Constabulary*[325]. Mr Roberts was falsely imprisoned by the police between 5.25 am and 7.45 am. The wrongful act which caused the false imprisonment during that time was a two hour and 20 minute delay in conducting a review of his detention as required by statute. The Court of Appeal held that Mr Roberts was entitled to substantial damages even though he would have been lawfully imprisoned but for the delay in conducting the review. In *Lumba*, Lord Dyson disagreed with the result of the Court of Appeal in that case and said that substantial damages should not have been awarded because but for the wrongful act Mr Roberts would still have been lawfully detained[326]. Similarly, in the Full Court of the Federal Court in *Fernando v The Commonwealth*[327] the reasoning applied by Besanko and Robertson JJ to conclude that only nominal damages should be awarded was "to consider what could and would have happened had the [wrongful act] not been committed".

184 Mr Lewis' second argument also should not be accepted. He is correct that there are cases where liability for damage is imposed where acts of wrongdoing are merely, in the language of Hart and Honoré, "sufficient in combination with other conditions to produce the harm" which would have occurred even if the wrongdoer had acted lawfully[328]. An example given by Mr Lewis is a case where property is jointly destroyed by multiple fires all of which were sufficient to destroy the property but the defendant wrongdoer only caused one of the fires[329]. The short answer to Mr Lewis' submission is that the existence of these exceptional circumstances cannot justify abolishing the causal requirement that the wrongdoing must be necessary for the loss. If a loss would have lawfully occurred even without the wrongful act then exceptional justification is required before responsibility can be imposed on a defendant who merely contributed to the

---

324 *R (Hemmati) v Secretary of State for the Home Department* [2019] 3 WLR 1156 at 1193 [112]; [2020] 1 All ER 669 at 702. For the insufficiency of "could have" see *Kuchenmeister v Home Office* [1958] 1 QB 496 at 512.

325 [1999] 1 WLR 662; [1999] 2 All ER 326.

326 [2012] 1 AC 245 at 281 [93].

327 (2014) 231 FCR 251 at 268 [86].

328 Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 249.

329 *Anderson v Minneapolis, St P & S S M Ry Co* (1920) 179 NW 45 at 49. See also *Swan v The Queen* (2020) 94 ALJR 385 at 390 [25]; 376 ALR 466 at 473.

manner in which the damage occurred. Mr Lewis did not point to any exceptional justification in this case. None exists.

Conclusion

185 The appeal should be dismissed with costs.