IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C14 of 2019

BETWEEN:

STEVEN JAMES LEWIS
Appellant

and

THE AUSTRALIAN CAPITAL TERRITORY
Respondent

HIGH COURT OF AUS
FILED
-5 DEC 2019
THE REGISTRY SYDNEY

APPELLANT'S SUBMISSIONS

PART I: PUBLICATION

1. This submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. Where a plaintiff is unlawfully imprisoned by a defendant, does the defendant escape liability for substantial compensatory damages if, but for the unlawful imprisonment, the plaintiff would have been lawfully imprisoned by the defendant?

3. If so, can the plaintiff nonetheless recover vindicatory damages?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

4. The appellant considers that notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: DECISIONS BELOW

5. Primary judge: (2018) 329 FLR 267; [2018] ACTSC 19.

6. Court of Appeal: [2019] ACTCA 16.

PART V: FACTS

(a) Background

7. On 24 January 2008, the appellant was sentenced by the Magistrates Court of the Australian Capital Territory to 12 months' imprisonment, to be served by periodic

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detention under Ch 5 of the *Crimes (Sentence Administration) Act 2005* (ACT) as it then stood. On 8 July 2008, the Sentence Administration Board cancelled the periodic detention at a meeting the appellant did not attend. He was arrested on 5 January 2009 and imprisoned for 82 days until 27 March 2009, when he was granted bail.

8. The appellant challenged the validity of the Board's decision to cancel his periodic detention. That challenge was heard by a judge of the Supreme Court of the Australian Capital Territory over three days in July and November 2009 but not decided until 1 October 2013. On that day, the primary judge gave judgment for the appellant, concluding that the Board's decision was invalid because the primary judge was not satisfied that the appellant had been given an opportunity to decide whether or not to attend before the Board.[1] There was ultimately no appeal from that decision.[2]

9. On the basis of the primary judge's decision, the appellant sought damages for false imprisonment arising from the 82 days' imprisonment. (It was ultimately not controversial that the respondent was liable for any false imprisonment: **CAB 16** [37]–[38].) The claim was heard over three days in February 2016 but not decided until 16 February 2018. For reasons published on that day [**CAB 5–88**],[3] the primary judge concluded that the decision of the Board was a nullity and that the 82 days' imprisonment was unlawful. However, his Honour held that the appellant was only entitled to nominal damages of $1. His Honour made orders to that effect [**CAB 90**].

10. On 6 April 2018, for reasons published on that day,[4] the primary judge ordered that each party bear its own costs [**CAB 92**]. After being made aware that his Honour had overlooked submissions in reply filed by the appellant, his Honour purported to "recall" the order of 6 April 2018. His Honour then reconsidered the question of costs in light

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1 *Lewis v Chief Executive, Dept of Justice and Community Safety* (2013) 280 FLR 118; [2013] ACTSC 198.

2 The appellant filed a "holding" appeal against the primary judge's dismissal of his challenge to the constitutional validity of certain provisions of the *Crimes (Sentence Administration) Act* while that issue was taken to the Court of Appeal in other proceedings: see *Jacka v Australian Capital Territory* (2014) 180 ACTR 207. Within that holding appeal, the respondent sought to cross-appeal from the primary judge's order setting aside the Board's decision. Following this Court's refusal of special leave to appeal in the *Jacka* proceedings (see *Jacka v Australian Capital Territory* [2015] HCATrans 81), the holding appeal and cross-appeal were dismissed by consent with no order as to costs.

3 *Lewis v Australian Capital Territory* (2018) 329 FLR 267; [2018] ACTSC 19.

4 *Lewis v Australian Capital Territory (No 7)* [2018] ACTSC 86.

of the appellant's reply submissions and, on 14 August 2018, for reasons published on that day, again ordered that each party bear its own costs [**CAB 94**].[5]

11. The appellant appealed the award of nominal damages to the Court of Appeal [**CAB 96–98**]. On that appeal, the respondent did not challenge the primary judge's conclusions that the decision of the Board was a nullity and that the appellant had been unlawfully imprisoned for 82 days. However, on 24 June 2019, for reasons published on that day [**CAB 100–114**] (**CA**),[6] the Court of Appeal upheld the primary judge's award of nominal damages and ordered that the appeal be dismissed with costs [**CAB 116**]. The appellant appeals from those orders to this Court by notice of appeal filed 25 October 2019 [**CAB 129–130**].

(b) The reasoning of the Court of Appeal

12. The basis for the surprising result that 82 days of unlawful imprisonment is to be compensated by an award of nominal damages of only $1 was the finding that, had the Board's invalid decision of 8 July 2008 not been made, the appellant would not have been at liberty. Rather, the appellant would have been lawfully imprisoned. The reasoning of the Court of Appeal was as follows.

13. The appellant was absent from periodic detention on 10 occasions (CA [34] [**CAB 105**]). Accordingly, s 59 of the *Crimes (Sentence Administration) Act* required the Chief Executive of the Department of Justice and Community Safety to apply to the Board for an inquiry under s 66. That application was made on 21 June 2008.

14. Section 66(4) of the Act required the Board to conduct the inquiry as soon as practicable. Section 68 gave the Board various powers if it decided that an offender had breached any of their periodic detention obligations, including cancelling the periodic detention. Section 69 was a specific provision which applied if, as here, the Chief Executive applied to the board under s 59 and the Board decided that, as here, an offender was absent from two or more detention periods (s 69(1)). Section 69(2) required the Board to cancel the periodic detention under s 68 as soon as practicable.

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5 *Lewis v Australian Capital Territory (No 8)* [2018] ACTSC 218.

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

15. In light of these provisions, the Court of Appeal reasoned that, but for the *invalid* decision of 8 July 2008, it was inevitable that the appellant's periodic detention would have been *validly* cancelled by the Board under s 68 as required by s 69(2), and that he would therefore have been *lawfully* imprisoned for the whole of the time that he had in fact been *unlawfully* imprisoned (CA [47]–[52] [**CAB 110**]).

16. The Court of Appeal considered that, in these circumstances, the decision of the Supreme Court of the United Kingdom in *R (Lumba) v Secretary of State for the Home Department*,[7] and the decision of the Full Court of the Federal Court applying it in *Fernando v The Commonwealth*,[8] dictated the conclusion that the appellant was not entitled to any substantial damages by way of compensation for false imprisonment (CA [53]–[60] [**CAB 110–112**]). In *Lumba*,[9] each of the judges of the Supreme Court who considered the point held that aliens detained unlawfully pursuant to an invalid policy were not entitled to substantial compensatory damages because, had they not been so detained, they would have been detained lawfully pursuant to a different valid policy. In *Fernando*,[10] the Full Court of the Federal Court applied that conclusion to a non-citizen detained under the *Migration Act 1958* (Cth). The correctness of these decisions gives rise to the first issue in this appeal, identified in paragraph 2 above.

17. The Court of Appeal also rejected an alternative claim, of the kind accepted by a minority in *Lumba*,[11] for "vindicatory damages". The Court concluded that there was no basis for such an award in Australian law and that, if there were, such damages should not be awarded here (CA [61]–[68] [**CAB 112–113**]). This gives rise to the second issue in this appeal, identified in paragraph 3 above. (The Court of Appeal also rejected a claim based on the *Human Rights Act 2004* (ACT) (CA [69]–[76] [**CAB 113–114**]), which is not pressed in this Court.)

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7 [2012] 1 AC 245.

8 (2014) 231 FCR 251.

9 [2012] 1 AC 245 at [91]–[96] per Lord Dyson JSC, [176] per Lord Hope DPSC, [195] per Lord Walker JSC, [212] per Baroness Hale JSC, [237] per Lord Collins JSC, [253], [256] per Lord Kerr JSC, [335] per Lord Phillips PSC. Lord Brown JSC (Lord Rodger JSC agreeing) held that there was no false imprisonment if there would have been lawful detention in any event.

10 (2014) 231 FCR 251 at [81]–[89] per Besanko and Robertson JJ (Barker J agreeing).

11 [2012] 1 AC 245 at [176]–[180] per Lord Hope DPSC, [195] per Lord Walker JSC, [214]–[217] per Baroness Hale JSC. It was rejected by the majority: at [97]–[101] per Lord Dyson JSC, [222]–[237] per Lord Collins JSC, [254]–[256] per Lord Kerr JSC, [335] per Lord Phillips PSC, [361] per Lord Brown JSC (Lord Rodger JSC agreeing).

PART VI: ARGUMENT

(a) *CPCF v Minister for Immigration and Border Protection*

18. The issues presented by this appeal are not resolved by any authority of this Court. The availability of substantial compensatory damages is the subject of conflicting *dicta* in *CPCF v Minister for Immigration and Border Protection.*[12] However, for the following reasons, those *dicta* provide limited assistance.

19. It was alleged in *CPCF* that the detention of the plaintiff on a Commonwealth vessel was a false imprisonment, justifying an award of substantial damages. Relying on *Lumba*, the defendants argued that, even if there was a false imprisonment, the plaintiff was entitled only to nominal damages. This was said to be because, had the plaintiff not been detained on the Commonwealth vessel, he would have been brought to the mainland and detained in immigration detention for the same period.

20. However, the question of damages was not the focus of argument. It was the last of six substantive questions posed in the special case. The defendants' argument was not addressed in the plaintiff's written submissions in chief or reply and occupied only one paragraph in the defendants' written submissions.[13] In oral argument, the plaintiff did not challenge the correctness of the reasoning in *Lumba* but argued only that it was distinguishable.[14] Given that the correctness of the reasoning in *Lumba* was not in issue, *CPCF* would not have decided that question even if a majority of the Court had reached the question of damages.[15] In any event, that question was not reached by the majority.

21. The majority, comprising French CJ, Crennan, Gageler and Keane JJ, held that the detention was authorised by legislation. It was therefore not necessary for the majority to consider the question of damages. Of the majority, only Keane J considered that issue. While noting that it was strictly unnecessary to do so, his Honour made

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[12] (2015) 255 CLR 514.

[13] See http://www.hcourt.gov.au/cases/case_s169-2014.

[14] [2014] HCATrans 227 (14 October 2014) at lines 3470–3487.

[15] *CSR Ltd v Eddy* (2005) 226 CLR 1 at [13] per Gleeson CJ, Gummow and Heydon JJ; *Bell Lawyers Pty Ltd v Pentelow* (2019) 93 ALJR 1007 at [28] per Kiefel CJ, Bell, Keane and Gordon JJ.

observations as to the difficulties confronting the plaintiff's claim in light of *Lumba*.[16] Those observations were, as his Honour observed, not necessary to his Honour's decision and were accordingly *dicta*.

22. Justices Hayne, Kiefel and Bell dissented as to the question whether the detention was unlawful. It was therefore necessary for each of their Honours to consider the question of damages. But as their Honours were in dissent, their Honours' reasoning on this point does not comprise part of the *ratio* of the decision.[17] Further, their Honours' reasoning is conflicting. Justices Hayne and Bell rejected the defendants' argument. As their Honours put it:[18]

> demonstrating that a plaintiff was unaware of the imprisonment, or for some other reason suffered no substantial loss [citing *Lumba*], neither denies the availability of the action nor provides a defence to it. Such matters are relevant, if at all, only to the assessment of damages but *do not, of themselves, require the conclusion that only nominal damages may be awarded.* [emphasis added]

In contrast, Kiefel J applied *Lumba* to hold that only nominal damages could be awarded.[19]

23. Given the lack of focus in argument in *CPCF* on the question of damages, and the fact that the plaintiff did not challenge the correctness of the reasoning in *Lumba*, the questions squarely at issue in this case did not arise in *CPCF*. The questions should, accordingly, be approached at the level of principle.

(b) Substantial compensatory damages

24. The view accepted by the Court of Appeal in this case has striking consequences. Suppose a police officer arrests the plaintiff without a warrant but fails to tell them the reason for their arrest. The arrest is tortious.[20] The fact that, but for the *unlawful* arrest,

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[16] (2015) 255 CLR 514 at [510]–[512].

[17] *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188 per Barwick CJ; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314 per Mason CJ, Wilson, Dawson and Toohey JJ; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [112] per Gaudron, McHugh and Gummow JJ; *Perara-Cathcart v The Queen* (2017) 260 CLR 595 at [134] per Nettle J.

[18] (2015) 255 CLR 514 at [155].

[19] (2015) 255 CLR 514 at [324]–[325].

[20] See, eg, *Christie v Leachinsky* [1947] AC 573, cited in *Lumba* [2012] 1 AC 245 at [75]–[76] per Lord Dyson JSC; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 201(1), 202(1)(c).

the police officer would have arrested the plaintiff *lawfully*, provides no defence.[21] Likewise, is not a defence to a battery that, had the plaintiff been asked to consent, they would have. However, on the Court of Appeal's view, the plaintiff is in each case entitled only to nominal damages. This immediately casts doubt on the correctness of the underlying reasoning. For the following reasons, it is unsound.

(i) The inappropriateness of a counterfactual analysis

25. The interest protected by the tort of false imprisonment is liberty. For that reason, any imprisonment is *prima facie* unlawful and it is for the defendant to establish a lawful justification when called upon to do so.[22] When that cannot be established, the plaintiff is entitled to their liberty. The tort is actionable *per se*, entitling the plaintiff to general — not merely nominal — damages without proof of special damage.[23] There is no occasion for a counterfactual analysis of the kind engaged in by the Court of Appeal. Substantial compensatory general damages go simply because the plaintiff's right not to be imprisoned was in fact infringed.

26. An award of general damages to compensate for infringement of a common law right, regardless of whether any discernible additional "loss" can be identified, is well known to Anglo-Australian law.[24] In the famous case of *Ashby v White*,[25] the plaintiff was prevented from voting by a constable on the pretext that he was not a settled inhabitant. The plaintiff's preferred candidate was elected and so he suffered no consequential loss. At trial, he obtained a verdict for substantial damages in an action on the case. On a motion in arrest of judgment, a majority of the Court of Kings Bench held that the

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[21] *Lumba* [2012] 1 AC 245 at [62] per Lord Dyson JSC, [327] per Lord Phillips PSC citing *Christie v Leachinsky* [1947] AC 573. See also, eg *Snead v Bonnoil*, 166 NY 325 (1901); *Noe v Meadows*, 229 Ky 53 (1929).

[22] *R v Davey; Ex parte Freer* (1936) 56 CLR 381 at 385 per Evatt J; *Liversidge v Anderson* [1942] AC 206 at 245 per Lord Atkin; *Trobridge v Hardy* (1955) 94 CLR 147 at 152 per Fullagar J. See generally *Marshall v Watson* (1972) 124 CLR 640. A "good faith" exercise of power is insufficient to afford a defence: *Ruddock v Taylor* (2005) 222 CLR 612 at [122] per McHugh J.

[23] *CPCF* (2015) 255 CLR 514 at [155] per Hayne and Bell JJ; *Lumba* [2012] 1 AC 245 at [64] per Lord Dyson JSC, [175] per Lord Hope DPSC, [181] per Lord Walker JSC, [197] per Baroness Hale JSC, [252] per Lord Kerr JSC, [343] per Lord Brown JSC (Lord Rodger JSC agreeing). The expression "general damages" is here used to refer to damages quantified by a jury (or judge performing the role of the jury) according to their view of what is reasonable without any precise measure: see, eg, *Prehn v Royal Bank of Liverpool* (1870) LR 5 Ex 92 at 99–100 per Martin B; *The Mediana* [1900] AC 113 at 117–118 per Earl of Halsbury LC; *Paff v Speed* (1961) 105 CLR 549 at 558–9 per Fullagar J.

[24] See further Stevens, *Torts and Rights* (2007) at 59–91.

[25] (1703) 2 Ld Raym 938 [92 ER 126]. See also 1 Bro PC 62 [1 ER 417].

plaintiff had suffered no loss and that the action therefore failed. Holt CJ dissented, saying:[26]

> Surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary but an injury imports a damage, when a man is thereby hindered of his right.

On a writ of error to the House of Lords, his Lordship's dissent was upheld. Importantly, the damages awarded were not merely nominal.[27]

27. More recently, in this Court in *Plenty v Dillon*,[28] where the plaintiff sued for trespass to land, Mason CJ, Brennan and Toohey JJ said:

> At first instance, Mohr J said that, even if a trespass had occurred, the trespass was "of such a trifling nature as not to found [sic] in damages." *But this is an action in trespass not in case and the plaintiff is entitled to some damages in vindication of his right to exclude the defendants from his farm.* [emphasis added]

28. This statement applies equally to false imprisonment, which is a species of trespass not an action on the case. As Hayne and Bell JJ said in *CPCF*:[29] "Like all trespassory torts, the action for false imprisonment is for vindication of basic legal values". This echoes the observation of Holt CJ in *Ashby v White*[30] 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". It is difficult to see how an award of $1 for 82 days of unlawful imprisonment is a vindication of the plaintiff's right not to be imprisoned. That puts the infringement of the plaintiff's right on the same level as a defamation of a person whose reputation is so poor as to be incapable of being lowered and who thus recovers "derisory damages".[31]

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[26] (1703) 2 Ld Raym 938 at 955 [92 ER 126 at 137].

[27] cf, eg, *Neville v London Express Newspaper Ltd* [1919] AC 368 at 392 per Viscount Haldane.

[28] (1991) 171 CLR 635 at 645, quoted in *New South Wales v Ibbett* (2006) 229 CLR 638 at [30] per *curiam*.

[29] (2015) 255 CLR 514 at [155]. See also the passages in *Lumba* cited in n 23 above.

[30] (1703) 2 Ld Raym 938 at 953 [92 ER 126 at 136].

[31] See, eg, *Connolly v "Sunday Times" Publishing Co* (1908) 7 CLR 263; *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024 (HL).

29. Returning to *Plenty v Dillon*,[32] Gaudron and McHugh JJ said:

> 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.* ... 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.* [emphasis added]

30. The damages awarded after remittal of the matter were $122,000 plus interest, though this did include amounts for personal injury suffered in consequence of the trespass.[33]

31. It may be accepted that in *Plenty v Dillon* this Court was not concerned with a case in which it was said that the defendants would, but for their unlawful entry onto land, have entered lawfully. The point, however, is that nothing in the passages quoted above suggests the appropriateness of a counterfactual analysis of the kind adopted by the Court of Appeal in the assessment of general damages.

32. Likewise, the majority in *Lumba* pointed to no authority in which a counterfactual analysis had been adopted to the assessment of damages in cases of false imprisonment. There was no such suggestion in *Christie v Leachinsky*.[34] The arresting officers there suspected, and had reasonably grounds for suspecting, that the plaintiff had stolen or feloniously received property. That would have provided a lawful basis to arrest him without a warrant. However, they told him they were arresting him for unlawful possession under a particular statute which gave no power to arrest without warrant. The House of Lords upheld the decision of the Court of Appeal that judgment be entered for the plaintiff for damages to be assessed. There was no suggestion that only nominal damages should be awarded on the basis that, but for the unlawful arrest, the arresting

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[32] (1991) 171 CLR 635 at 654–655.

[33] *Plenty v Dillon* (1997) 194 LSJS 106. See also, eg, *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 (CA) (general damages $25,000; aggravated damages $25,000); *TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd* (2008) 71 NSWLR 323 (CA) (general damages $60,000; aggravated damages $50,000).

[34] [1947] AC 573.

officers would have arrested the plaintiff lawfully for stealing or feloniously receiving.[35]

33. In *Kuchenmeister v Home Office*,[36] a German airline passenger *en route* from Amsterdam to Dublin was detained in the immigration hall at London Airport and prevented from making his connection. The immigration officers had no power to detain him as they did but would have had power to prohibit him from landing in the first place. The defendant was liable for false imprisonment notwithstanding that it could have lawfully exercised the power to prevent the claimant landing. The Court awarded substantial damages, concluding:[37]

> No pecuniary damage has been suffered, but the very precious right of liberty — which is a right available to everyone who can for the time being be regarded as a subject by local allegiance to Her Majesty — is one which must be protected. I think that a fair figure which will vindicate the plaintiff's rights without amounting to a vindictive award would be £150.

There was no suggestion it was necessary to compare the situation in which the passenger found himself to the one in which he would have been if prohibited from landing. The reference to vindicating the plaintiff's rights is consistent with what was said in *Plenty v Dillon*. Indeed, in *Ruddock v Taylor*,[38] Kirby J said of false imprisonment: "Damages are awarded to vindicate personal liberty, rather than as compensation for loss per se".

34. As Professor Varuhas has noted:[39]

> If *Lumba* represented orthodoxy there would have been far fewer cases across English legal history in which substantial damages were awarded. … In many of these cases it would have been open to courts to deny awards on the basis that the defendant would otherwise have exercised their powers lawfully. Yet courts never engaged in or even contemplated counterfactual reasoning in such cases, including where such cases reached the higher courts.

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[35] So much was noted by Lord Brown JSC in *Lumba* [2012] 1 AC 245 at [345] (Lord Rodger JSC agreeing).

[36] [1958] 1 QB 496.

[37] [1958] 1 QB 496 at 513 per Barry J

[38] (2005) 222 CLR 612 at [147].

[39] J Varuhas, *Damages and Human Rights* (2016) at 63.

35. Rejecting a counterfactual approach for the quantification of general damages in a false imprisonment case is consistent with the approach to other trespassory torts. In cases involving trespass to land by the defendant's wrongful use of the land, the plaintiff is entitled to general damages calculated as the sum that should reasonably be paid for the use regardless of whether the plaintiff would, but for the tort, have used the land.[40] So too in cases involving loss of use of goods even where no financial loss is suffered by the plaintiff as a result of being unable to use the goods: the award of general damages is to compensate for the infringement of the plaintiff's right to use the goods.[41] A plaintiff may recover substantial damages for conversion of goods notwithstanding that, but for the defendant's conversion of the goods, a third party would have converted them so that, but for the tort, the plaintiff would not have had the goods.[42] In England, general damages for the tort of misuse of private information go "to compensate for the loss or diminution of a right to control formerly private information", even where the misuse causes no distress.[43]

36. These 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".[44] For false imprisonment, the nature of the tort denies recourse to a counterfactual analysis.

37. To be clear, none of the analysis above casts doubt on the proposition that the damages to be awarded to the appellant are compensatory. No question arises on this branch of

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[40] *Swordheath Properties Ltd v Tabet* [1979] 1 WLR 285 at 288 per Megaw LJ (Browne and Waller LJJ agreeing); *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 at 717–718 per Lord Lloyd (for the Board), citing *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 at 1416–1417 per Nicholls LJ; *Attorney General v Blake* [2001] 1 AC 268 at 278 per Lord Nicholls (Lords Goff, Browne-Wilkinson and Steyn agreeing). See also *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 (CA).

[41] See, eg, *The Greta Holme* [1897] AC 596; *The Mediana* [1900] AC 113; *The Marpessa* [1907] AC 241; *The Susquehanna* [1926] AC 655; *The Hebridean Coast* [1961] AC 545. See recently *Rider v Pix* [2019] QCA 182.

[42] *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883 at [82] per Lord Nicholls, [129] per Lord Hoffmann.

[43] *Gulati v MGN Ltd (No 2)* [2017] QB 149 (CA) at [45]–[48] per Arden LJ (Rafferty and Kitchin LJJ agreeing).

[44] *Kuwait Airways Corp v Iraqi Airways Co* [2002] 2 AC 883 at [128]–[129]. See also *Chappel v Hart* (1998) 195 CLR 232 at [7] per Gaudron J, [62]–[64] per Gummow J, [122] per Hayne J; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at [45] per Gummow J and Hayne J.

the case about an award of substantial non-compensatory damages. As Lord Lloyd said in the context of damages awarded for wrongful use of property:[45]

> 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.

In the present case, the thing that was lost was the right not to be imprisoned.

(ii) The correct counterfactual

38. Even if a counterfactual analysis is undertaken, it does not lead to the result that substantial compensatory general damages are unavailable in a case such as the present. The correct counterfactual is not one in which the only difference is that, instead of imprisoning the plaintiff unlawfully, the defendant imprisons the plaintiff lawfully. That incorrectly treats the *unlawfulness* of the imprisonment as the wrong. The wrong is interference with liberty in breach of the right not to be confined; illegality goes to the absence of any defence. A counterfactual in which the plaintiff does not suffer *the wrong* is thus one in which the plaintiff is not imprisoned at all.[46]

39. So much was correctly recognised by the English Court of Appeal in *Roberts v Chief Constable of the Cheshire Constabulary*.[47] In that case, there was a failure to conduct a review of the plaintiff's detention by police after six hours at 5.25am as required by legislation. The review instead took place at 7.45am, when the continuation of the plaintiff's detention was authorised. The result was that his detention between 5.25 and 7.45am was unlawful. It was common ground that, had the review taken place at 5.25am, the continuation of the plaintiff's detention would have been authorised for the same reasons it was authorised at 7.45am. The Court of Appeal held that the plaintiff was entitled to substantial damages. As Clarke LJ (with whom the rest of the Court agreed) explained:[48]

> The plaintiff's claim was not for damages for breach of duty to carry out a review at 5.25am but for false imprisonment. … [T]he reason why the

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[45] *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 at 717 (for the Board).

[46] Varuhas, above n 38, at 62.

[47] [1999] 1 WLR 662.

[48] [1999] 1 WLR 662 at 668 (Schiemann and Stuart-Smith LJJ agreeing).

> 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 5.25am and 7.45am. It follows that, as a matter of principle, he is entitled to be compensated for having been detained for those 2 hours and 20 minutes.

His Lordship correctly distinguished the case of a person unaware of their imprisonment,[49] concluding that the plaintiff "was no doubt aware of his imprisonment and, as I see it, he was entitled to be compensated for being unlawfully detained in a police cell for 2 hours and 20 minutes when, in the absence of a review, he should have been released".[50] The reasoning in *Roberts* is directly applicable in this case.

40. In *Lumba*,[51] Lord Dyson JSC considered *Roberts* to have been wrongly decided. For the reasons above, his Lordship was in error to do so. His Lordship's approach incorrectly treats the illegality of the imprisonment as the wrong and the loss of liberty merely as a consequential loss. That is to misunderstand the nature of the tort. Loss of liberty is not merely a loss consequential on the tort: it is the very essence of the tort.

41. Lord Dyson JSC was also in error to criticise *Roberts* as drawing:

> no distinction between a detainee who would have remained in detention if the review had been carried out (and therefore no tort committed) and a detainee who would not have remained in detention if the review had been carried out. But the position of the two detainees is fundamentally different. The first has suffered no loss because he would have remained in detention whether the tort was committed or not. The second has suffered real loss because, if the tort had not been committed, he would not have remained in detention.

To assert that the first detainee "has suffered no loss because he would have remained in detention whether the tort was committed or not" is to assume the conclusion. Both detainees have suffered the same unlawful deprivation of their liberty and both should receive substantial damages for that wrong. It does not follow that both should receive substantial damages *of the same quantum*. For instance, so far as general damages are

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[49] See *Murray v Ministry of Defence* [1988] 1 WLR 692 (HL) at 703 per Lord Griffiths. The correctness of the view that a falsely imprisoned person unaware of their imprisonment is entitled to receive only nominal damages raises different issues from those in the present appeal and need not be determined.

[50] [1999] 1 WLR 662 at 669 (Schiemann and Stuart-Smith LJJ agreeing).

[51] [2012] 1 AC 245 at [91]–[93].

to compensate for the discomfort of being imprisoned, the position of the detainees may be different. But so far as general damages are to compensate for the infringement of the right not to be imprisoned, their position is the same.

(iii) Analysis based on "alternative causes"

42. The issue may also be approached from a more theoretical perspective. This matter involves what Hart and Honoré aptly call *alternative causes*:[52]

> when defendant's wrongful act is sufficient in combination with other conditions to produce the harm but, even had he acted lawfully, the same or similar harm would have been produced whether through the wrongful act of some third person or without it.

Viewing the deprivation of liberty suffered by the appellant as the harm, that harm was in fact produced by the respondent's wrongful conduct but, even had the respondent acted lawfully, the same harm would have been produced.

43. The way in which the law deals with alternative causes cannot be answered by simple application of a "but for" test of causation. That would in all cases yield an adverse result for the plaintiff. To the contrary, Hart and Honoré assert that:[53]

> the generally accepted view is that defendant's wrongful or criminal act has caused the harm, for which the wrongdoer is therefore criminally or civilly responsible, despite the existence of a set of alternative conditions sufficient to produce the same harm.

They instance a German criminal case in which an accused procured the detention of certain Jewish people in concentration camps: on a charge of unlawful deprivation of freedom, it was no defence to prove that, had *he* not done so, others would have done. The more prosaic conversion of goods example mentioned in paragraph 35 above is to the same effect. American authority concerning the destruction of property by a negligently lit fire, which would have been destroyed by a naturally occurring fire in

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[52] Hart and Honoré, *Causation in the Law* (2nd ed, 1985) at 249. They distinguish alternative causes from *additional causes*, being "cases in which there are present on a given occasion two or more factors each sufficient with other normal conditions to bring about certain harm" (at 235). "The difference between an alternative and an additional cause is that an alternative cause is hypothetical; the act or event to which it refers did not in fact occur": at 249. They also distinguish from these cases *contributory causes*, where "both wrongful acts are necessary conditions of the harm": at 205.

[53] Hart and Honoré, above n 52, at 249.

any event, supports the same conclusion,[54] though there are also contrary American authorities involving different facts.[55]

44. Importantly for present purposes, Hart and Honoré draw a distinction involving claims for compensation for consequential economic loss (which is not the case here):[56]

> a plaintiff only establishes the right to compensation when he shows that, in the absence of wrongful acts on the part of the defendant or anyone else, he would have enjoyed the relevant economic advantage.

They instance a case[57] where the defendants unlawfully maintained a bridge which obstructed a waterway and delayed the plaintiff's barge, so that he suffered financial loss, but a lawfully maintained bridge further along the waterway would in any case have obstructed the barge causing the same delay. They continue:[58]

> [T]his reasoning only applies to cases where compensation is paid because plaintiff has been deprived of economic opportunities. It would be quite irrelevant to compensation for, for example, pain and suffering: if *A* has negligently caused *B* pain and suffering the fact that, if *A* had not done so, *C* would have caused B greater pain does not in any way show that *A* has not caused *B* pain and suffering, and, if *C*'s act would have been wrongful, *A* cannot insist that the fact that he has saved *B* from it should be taken into account in assessing damages, in view of the fact that the legal system aims to protect *B* against all wrongful invasions of his interests. But if the alternative pain would not have been wrongfully caused, there is an argument for taking it into account.

45. As this analysis makes clear, the law does not take a uniform approach to alternative causes. The approach to be taken reflects judgements about matters such as the reason

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[54] *Anderson v Minneapolis, St Paul & Sault-Ste Marie Railway*, 179 NW 45 (1920), cited in *Chappel v Hart* (1998) 195 CLR 232 at [116] per Hayne J. See *Restatement (Second) of Torts* §432 (1965). See also *Restatement (Third) of Torts* §27 (2010) (using "alternative cause" to mean something quite different from Hart and Honoré, namely a circumstance where of two potential causes apparently acting simultaneously, it is found that only one was in fact causative). See further D Fisher, "Successive Causes and the Enigma of Duplicated Harm" (1999) 66 *Tennessee Law Review* 1127.

[55] *Utzinger v United States*, 432 F 2d 485 (1970) (where the plaintiff was injured when their boat collided with a rail left negligently near a riverbank, the tortfeasor was not liable because the plaintiff would have suffered the same injuries when the boat inevitably hit the riverbank itself); *Department of Environmental Protection v Jersey Central Power & Light Co*, 351 A 2d 337 (1976) (a tortfeasor who negligently killed fish by pumping cold water into a stream was not liable because unusually cold weather conditions would have killed the fish in any event).

[56] Hart and Honoré, above n 52, at 250. See also Stevens, above n 24, at 137–144.

[57] *Douglas, Burt & Buchanan Co v Texas & Pacific Railway Co*, 150 La 1083; 91 So 503 (1922).

[58] Hart and Honoré, above n 52, at 251.

for the imposition of liability and considerations of justice. "[A] bright line rule can seldom either explain all cases or resolve all cases in a desirable way."[59] Accordingly, it is not necessary in this case to determine what should be the result where a defendant unlawfully imprisons a plaintiff but, had they not done so, the plaintiff would have been (a) imprisoned, lawfully or unlawfully, by another party[60] or (b) imprisoned as a result of some external natural cause. It is sufficient to conclude that, for the reasons above, 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 thus causing the same harm (imprisonment) actually inflicted on the plaintiff.

(iv) Conclusion

46. To adopt the language of Lord Brown JSC in *Lumba*:[61]

> To compensate (or rather to deny compensation) on the basis that the detainee "has suffered no loss because he would have remained in detention whether the tort was committed or not" is ... the very negation of the tort: it is to hold that the detainee was at one and the same time both rightly and wrongly imprisoned.

However, the solution is not, as his Lordship thought, to hold that there is no tort if the detainee could have been, but was not, lawfully detained. As explained in paragraph 24 above, that is unorthodox and contrary to authority. The solution is to conclude that substantial damages are available. The Court of Appeal's conclusion to the contrary sets the tort, and the liberty it protects, at nothing. As Lord Scott observed in a battery case:[62]

> In *Chester v Afshar*, Lord Hope of Craighead remarked that "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached" and that unless an infringed right were met with an adequate remedy, the duty would become "a

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[59] Fisher, above n 48, at 1143

[60] In *Bostridge v Oxleas NHS Foundation Trust* [2015] EWCA Civ 79, the Court of Appeal applied *Lumba* in this context.

[61] [2012] 1 AC 245 at [344] (Lord Rodger JSC agreeing).

[62] *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 at [22], quoting *Chester v Afshar* [2005] 1 AC 134 at [87].

> hollow one, stripped of all practical force and devoid of all content". So, too, would the right.

That is the effect of the Court of Appeal's conclusion in this case.

47. In the event that more than nominal damages could be awarded, the primary judge notionally assessed general damages for the 82 days of false imprisonment at $100,000.[63] No challenge was made to that assessment in the Court below.

(c) Vindicatory damages

48. If, contrary to the submissions above, substantial compensatory damages are unavailable, this Court should recognise that non-compensatory but "vindicatory" damages are available. As noted in paragraph 17 above, this was the course favoured by the minority in *Lumba*. The cases in paragraphs 26ff above show that such an approach has firm roots in the case law, including in the context of false imprisonment.[64] Likewise, the award of general damages in defamation has long been regarded as going, in part, to vindicate the plaintiff's reputation.[65]

49. Likewise, a vindicatory purpose is present in the recognised head of non-compensatory exemplary damages. Thus, in *New South Wales v Ibbett*,[66] this Court quoted approvingly from the reasons of Lord Hutton in *Kuddus v Chief Constable of Leicestershire Constabulary*[67] that:

> in 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. ... the power to award exemplary damages in such cases serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct.

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[63] *Lewis v Australian Capital Territory* (2018) 329 FLR 267; [2018] ACTSC 19 at [388] per Refshauge J.

[64] See generally N Witzleb and R Carroll, "The Role of Vindication in Torts Damages (2009) 17 *Tort Law Review* 16.

[65] *Uren v John Fairfax & Sons* (1966) 117 CLR 118, 150 per Windeyer J; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60–61 per Mason CJ, Deane, Dawson and Gaudron JJ; *Radio 2UE Sydney Pty Ltd v Chesterton* (2009) 238 CLR 460 at [1] per French CJ, Gummow, Kiefel and Bell JJ. See also *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 396 per Lord Radcliffe.

[66] (2006) 229 CLR 638 at [40].

[67] [2002] 2 AC 122 at 147, 149.

50. In the cases referred to above, while vindication was recognised as a purpose of an award of damages, whether compensatory or exemplary, no separate head of non-compensatory "vindicatory damages" was recognised. Such a separate head was, however, recognised by the House of Lords in *Rees v Darlington Memorial Hospital NHS Trust*.[68] A majority held that, for policy reasons, a mother who had a healthy child after a negligent sterilisation procedure could not recover compensatory damages for the cost of raising the child.[69] The majority held instead that the mother, and anyone in like position, could recover a "conventional" award of £15,000:[70]

> The conventional award would not be, and would not be intended to be, compensatory. It would not be the product of calculation. But it would not be a nominal, let alone a derisory, award. It would afford some measure of recognition of the wrong done.

Such a head of damages has also been recognised in Ontario as an available remedy for the tort of intrusion upon seclusion which is recognised in that province.[71] It was recognised in England in a similar context prior to *Lumba*.[72] Vindicatory damages have been awarded for breaches of constitutional rights by the Privy Council[73] and by the Court of Appeal and Supreme Court of New Zealand.[74]

51. The same explanation as that given by Lord Bingham in *Rees* would justify, but perhaps with even greater force, a like award where a person is subjected, by the authority of the state, to deprivation of that most fundamental right to exercise and enjoy one's liberty. To repeat a point made above, it is difficult to see how that the infringement of the plaintiff's right not to be imprisoned constituted by 82 days' false imprisonment is sufficiently "recognised" by an award of $1.

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68 [2004] 1 AC 309.

69 This Court reached the opposite conclusion in *Cattanach v Melchior* (2003) 215 CLR 1.

70 [2004] 1 AC 309 at [8] per Lord Bingham.

71 *Jones v Tsige* (2012) 108 OR (3d) 241; 346 DLR (4th) 34 (CA) at [75] per Sharpe JA (for the Court).

72 *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 at [216], [231] per Eady J. Subsequent to *Lumba*, the English Court of Appeal has justified such an award as being to "compensate for the loss or diminution of a right to control formerly private information", as explained in n 43 above and accompanying text.

73 *Attorney-General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328; *Merson v Cartwright* [2006] 3 LRC 264; [2005] UKPC 38; *Inniss v Attorney General of St Chrisopher and Nevis* [2008] UKPC 42; *Subiah v Attorney General of Trinidad and Tobago* [2008] UKPC 47; *Takiota v Attorney General of the Bahamas* [2009] UKPC 11.

74 *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA); *Dunlea v Attorney-General* [2000] 3 NZLR 136 (CA); *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC).

52. It may be accepted that the possibility of an award of vindicatory damages, of the kind accepted in *Rees*, has not gone uncriticised. In *Lumba*, Lord Dyson JSC said:[75]

> 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.

10 These concerns are overstated. As demonstrated by *Rees*, the circumstances in which such an award would be available are limited. It is 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. Those circumstances can be expected to be limited. The fact that they would not be limited to false imprisonment by the state is no objection. The state has no monopoly on the infringement of important common law rights. The uncertainty would be no greater than that which often arises in relation to the awarding of general damages, which is a topic on which minds may readily differ.

53. If vindicatory damages are available, to describe the unlawfulness here as "at fairly much the lowest level" (CA [67] [**CAB 113**]) wrongly focusses on the reasons the 20 Board's decision was invalid, rather than the unlawfulness of the imprisonment. It wrongly implies that there are degrees of unlawful imprisonment. Any contumacious conduct (which it is not in this Court suggested is present here) would be addressed by an award of exemplary damages. To observe that the appellant would, but for the unlawful imprisonment, have been lawfully imprisoned is likewise no answer to a claim for vindicatory damages (CA [68] [**CAB 113**]). To the contrary, on the hypothesis that ordinary compensatory damages are not available in such a circumstance, it is that very circumstance which makes an award of vindicatory damages the suitable remedy. More generally, the reasons of the Court of Appeal at CA [67]–[68] [**CAB 113**] are precisely the kind of reasoning rejected by this Court in *Plenty v Dillon* in the passages quoted in 30 paragraphs 26–29 above.

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[75] [2012] 1 AC 245 at [101].

PART VII: ORDERS SOUGHT

54. Orders should be made as set out in the notice of appeal [**CAB 129–130**] as follows:

(1) Appeal allowed.

(2) Set aside the orders of the Court of Appeal and, in their place, order:

(a) appeal to that Court allowed;

(b) set aside paragraph 1 of the orders of the Supreme Court made on 16 February 2018 giving judgment for the plaintiff in the sum of $1 and the costs orders made on 6 April 2018 and 14 August 2018;

(c) in their place, give judgment for the plaintiff in the sum of $100,000 plus interest, with costs; and

(d) the respondent pay the appellant's costs in the Court of Appeal.

(3) The respondent pay the appellant's costs in this Court.

PART VIII: ORAL ARGUMENT

55. The appellant estimates that 2½ hours are required for presentation of his oral argument, including reply.

Dated: 5 December 2019

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ANNEXURE

Statutes referred to in the appellant's submissions

1. *Crimes (Sentence Administration) Act 2005* (ACT) as at 8 July 2008 (republication number 7, effective 3 June to 25 August 2008).