Before the High Court

Lewis v Australian Capital Territory: Valuing Freedom

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Abstract

It has long been a principle of the common law that where basic rights in person, liberty and property are infringed, such violations will be met with an award of substantial damages. This approach to damages has served to strongly protect and vindicate the importance of these basic rights, especially in the face of unlawful action by government. However, this longstanding tradition is now in jeopardy. Lower courts in Australia have begun to deny awards for significant breaches of the right to liberty on the basis that, albeit the public defendant unlawfully detained the plaintiff, the defendant could and would have otherwise detained the plaintiff lawfully. In *Lewis v Australian Capital Territory*, the High Court of Australia must decide authoritatively whether to endorse this deviation from orthodoxy. This column argues that the Court should reject this novel approach and maintain the orthodoxy that substantial damages follow infringements of basic rights.

I Introduction

Torts actionable per se have long performed a fundamental role in protecting and vindicating the basic rights of individuals, whether rights in liberty protected by false imprisonment, rights in land protected by trespass, or rights in the person protected by battery. By virtue of the principle of equality, which holds that the same ordinary law applies equally to private citizen and public official alike, these actions have played, and continue to play, a fundamental constitutional role in protecting these ancient rights specifically against excessive official action.

A fundamental feature of these actions, which has ensured they are able to perform this protective and vindicatory function, is that where protected rights are infringed absent lawful justification, such infringement will as of course be met with substantial (in the sense of more than nominal) damages. However, this longstanding tradition, which has served as a bulwark against governmental invasions of liberty, risks being lost. In *Lewis v Australian Capital Territory*, which now comes before the High Court of Australia,[1] the Australian Capital Territory ('ACT') Court of Appeal held that albeit Lewis had been unlawfully imprisoned by the defendant for

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1 High Court of Australia, Case No C14/2019.

82 days, he should only receive nominal damages.[2] The Court accepted that Lewis had been subject to false imprisonment: the defendant could not make out a defence of lawful excuse, as the Sentencing Administration Board's decision to cancel Lewis's periodic detention, which led to his incarceration, was unlawful and void for want of procedural fairness. However, when it came to damages, substantial damages were denied on the basis of 'but for' causal analysis. The Court held that Lewis had suffered no loss because but for Lewis's unlawful detention, the defendant could have and would have lawfully detained him anyway. In other words, the tort left him no worse off compared to the position he would inevitably have been in: 'the appellant was always going to serve the 82 days in prison'.[3] As such, he was awarded a token sum of $1. If entitled to compensatory damages, he would have recovered $100,000.[4]

In coming to this conclusion, the ACT Court of Appeal followed the United Kingdom ('UK') Supreme Court in *R (Lumba) v Secretary of State for the Home Department*, a case concerning foreign national prisoners.[5] The principle in that case holds that only nominal damages should be awarded where the plaintiff was unlawfully imprisoned, but could and would have otherwise been imprisoned lawfully. In *Fernando v Commonwealth (No 5)*, the Full Federal Court of Australia applied *Lumba* to deny substantial damages for a false imprisonment of over 1,000 days in the immigration context.[6] In the immigration case of *CPCF v Minister for Immigration and Border Protection*, discussed further below, the *Lumba* principle was considered by four of the seven High Court Justices.[7] However, as a majority found no liability on the facts, the damages discussion was obiter dicta.

In the appeal from *Lewis*, the High Court must authoritatively decide whether to approve the causal principle that derives from *Lumba*. This column argues that the High Court should reject this principle. The central problem with *Lumba* is that the decision was reached absent full understanding of the longstanding damages tradition within false imprisonment, according to which damages are awarded for breach of the right to liberty in itself, irrespective of what would have happened but for the wrong. In turn, the UK Supreme Court deviated from orthodoxy without recognising the deviation — or justifying it. At this late stage in the development of the common law, the High Court would require an overwhelming justification to support such a fundamental change to longstanding norms and concomitant downgrading of the protection afforded to liberty, a right sacred to the common law.

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2 *Lewis v Australian Capital Territory* [2019] ACTCA 16 ('*Lewis*').
3 Ibid [25].
4 Ibid [24].
5 [2012] 1 AC 245 ('*Lumba*').
6 *Fernando v Commonwealth (No 5)* (2014) 231 FCR 251.
7 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 ('*CPCF*').

II Orthodoxy

A *Two Types of Loss*

Let us commence by introducing a distinction that was mislaid in *Lumba* and *Lewis*, and which is critical to understanding why substantial damages ought to have been awarded in both cases. That is, the fundamental distinction between two types of compensatory damages: damages for 'factual loss' and damages for 'normative loss'.[8]

Damages for *factual or material loss* compensate for the negative physical, emotional, psychological or economic effects actually suffered by the claimant in consequence of the wrong, such as costs of repairing a machine or distress. These types of loss are subjective in that whether they are suffered and their extent varies according to the actual consequences the claimant experiences as a result of the wrong. Recovery is subject to rules of factual causation, such as 'but for' analysis, and to remoteness rules, such as reasonable foreseeability, albeit the exact rules vary among torts. Factual losses are recoverable across the law of torts, including as consequential losses for torts actionable per se, albeit specific heads vary among actions.

Damages for *normative loss* are radically different in nature. Their availability is, in general, limited to those torts such as trespass to land, battery, defamation and, importantly, false imprisonment, all of which are actionable per se and constituted to afford strong protection from outside interference to fundamental interests. Within these torts, a claimant may recover damages for the injury to those of his/her interests that are directly protected by the tort. Thus, one recovers in false imprisonment for the damage to one's interest in liberty inherent in the wrongful imprisonment under the head of 'loss of liberty', a standalone head distinct from the physical, mental or economic effects of the wrong. Similarly, one may recover in defamation under the head of damage to reputation, and in trespass simply for wrongful interference with exclusive possession of land, regardless of whether these wrongs lead to consequential harms.

Unlike damages for factual loss, normative damages compensate for a damage that is constructed by and only exists on the plane of the law. In contrast to factual losses, normative damage does not correlate to felt real-world effects as such. In this, damages for normative damage in the law of torts are akin to expectation damages in contract. There is no such thing as an expectation loss outside of the law, but without construction of this head of loss, contractual promises would be rendered hollow. As Hayne J said in *Clark v Macourt*: 'The loss which is compensated reflects a normative order in which contracts must be performed'.[9] I refer to these types of damages as 'normative damages' because, in constructing such heads, the law is

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[8] For a full elaboration of this distinction, see Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) chs 2–3 ('*Damages and Human Rights*'); Jason NE Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34(2) *Oxford Journal of Legal Studies* 253 ('Concept of "Vindication"'). Others recognise a similar distinction: see, eg, Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) ch 4. Albeit the normative damage thesis should be preferred to other accounts: Varuhas, 'Concept of "Vindication"' (n 8) 271ff.

[9] *Clark v Macourt* (2013) 253 CLR 1, 7 [11].

seeking an end or goal — that is, to give effect to the policies that underpin creation of the primary rights. As I have argued in depth elsewhere,[10] torts such as false imprisonment are characterised by a primary function of affording strong protection to basic interests from outside interference, and vindicating these interests, in the sense of affirming and reinforcing their importance within a hierarchy of legally-protected interests and that they ought to be respected. These functions are reflected in shared common features of torts actionable per se, including actionability per se, strict liability, and strict construction of defences[11] — but also, importantly, in the approach to damages. The law, by responding to every unjustified rights infringement with substantial damages for the interference in itself, and regardless of the happenstance of whether factual losses are suffered, affords strong protection to the interest in itself, and sends a signal that these are interests of the utmost importance which have inherent value and ought to be maintained inviolate. As the English Court of Appeal observed in *Dumbell v Roberts*, it is important that 'sufficient damages' should follow false imprisonment 'to give reality to the protection afforded by the law to personal freedom'.[12] Thus, the 'macro' protective and vindicatory functions of torts actionable per se shape the conceptualisation of compensatory damages: 'there may be no actual loss', but 'the law takes the view as a matter of policy that the claimants … are entitled to substantial compensation for the mere invasion of their rights'.[13]

Significantly for our consideration of *Lewis*, for normative damages causation is irrelevant. Normative damage is inherent in the wrong. As Holt CJ famously observed in *Ashby v White*, an injury imports a damage when a person is hindered in their right.[14] Reflecting this, in *Ashby* the plaintiff was ultimately awarded damages for denial of his right to vote, notwithstanding that the candidate he would have voted for was elected, so that he was factually no worse off. The idea that damage is inherent in the wrong has often been captured in the idea of a presumption of damage within torts actionable per se. In the formative case of *Ratcliffe v Evans*, the English Court of Appeal observed, the law 'implies' general damage 'in every breach of contract and every infringement of an absolute right'; '[i]n all such cases the law presumes that *some* damage will flow in the ordinary course of things from the mere invasion of rights'.[15] In contrast, with torts only actionable upon proof of loss, 'it is the damage done that is the wrong; and the expression "special damage", when used of this damage denotes the actual and temporal loss which has, in fact, occurred'.[16] It is particularly important to reiterate this distinction between torts actionable per se, for which normative damages are available, and loss-based torts, for which only factual loss is generally recoverable, as there is a propensity to unthinkingly conflate the whole of torts with the loss-based tort of negligence, which dominates the field of torts today. For example, senior British judges have made sweeping statements that the goal of all torts is to

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10 Varuhas, *Damages and Human Rights* (n 8) ch 2; Varuhas, 'Concept of "Vindication"' (n 8).

11 Varuhas, *Damages and Human Rights* (n 8) 25–46; Varuhas, 'Concept of "Vindication"' (n 8) 261–7.

12 *Dumbell v Roberts* [1944] 1 All ER 326, 329.

13 *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2009] Ch 390, 444 [36].

14 *Ashby v White* (1703) 2 Lord Raymond 938, 955 ('*Ashby*').

15 *Ratcliffe v Evans* [1892] 2 QB 524, 528 (emphasis in original) ('*Ratcliffe*'); *Nicholls v Ely Beet Sugar Factory Ltd (No 2)* [1936] 1 Ch 343, 350–51; *Embrey v Owen* (1851) 155 ER 579, 585.

16 *Ratcliffe* (n 15) 528.

provide compensation for those who have suffered material loss, not to vindicate the rights of those who have not.[17] While in the United States ('US'), the Supreme Court has, in its constitutional torts jurisprudence, conflated damages for negligence with damages for breach of fundamental rights.[18] It is fundamental therefore to recall Weir's warning that 'awareness of the difference' in function between vindicatory torts and negligence 'is vital if negligence is not to take over completely, with unfortunate effects on the rights of the citizen'.[19]

B *Damages Practice across Vindicatory Torts*

The outstanding modern example in any common law jurisdiction of this vindicatory tradition is the High Court of Australia's iconic decision in *Plenty v Dillon*.[20] Officers committed a trespass by entering the plaintiff's property to serve a summons absent lawful authority. All members of the High Court held that substantial damages simply follow the wrong as a matter of course: 'Their entry was wrongful, and the plaintiff is entitled to … an award of some damages.'[21] Whereas the lower court judge denied substantial damages as his Honour considered the wrong 'trifling', Mason CJ, Brennan and Toohey JJ responded: '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'.[22] Gaudron and McHugh JJ said that 'once a plaintiff obtains a verdict of trespass … he or she is entitled to an award of damages'.[23] Damages are a reflex of the wrong. While the entry 'caused no damage' to the land,

> 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 …[24]

As such 'the appellant is entitled to have his right of property vindicated by a substantial award of damages'.[25] The 'right must be supported by an effective sanction otherwise the term will be just meaningless rhetoric'.[26] *Plenty* has since been followed. For example, in *TCN Channel Nine Pty Ltd v Anning* the trespass caused no physical damage or pecuniary loss while mental trauma was not recoverable, yet the New South Wales ('NSW') Court of Appeal awarded $25,000 to 'reflect the significant purpose of vindicating the respondent's right to exclusive occupation'.[27] In *Smethurst v Commissioner of Police*, Kiefel CJ, Bell and Keane JJ

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17 *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 403 [9] ('*Watkins*').
18 Varuhas, *Damages and Human Rights* (n 8) 159–64. On US constitutional torts more generally, see 446–69.
19 Tony Weir, *An Introduction to Tort Law* (Oxford University Press, 2nd ed, 2006) 134.
20 (1991) 171 CLR 635 ('*Plenty*').
21 Ibid 645.
22 Ibid.
23 Ibid 654.
24 Ibid 654–5.
25 Ibid 655.
26 Ibid, quoting Geoffrey Samuel, 'The Right Approach?' (1980) 12 *Law Quarterly Review* 12, 14.
27 *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 365 [178]. See also *New South Wales v Ibbett* (2006) 229 CLR 638, 644 [20].

recognised that the concept of 'injury' is 'somewhat wider' in trespass than in some other torts.[28] Gageler J, drawing on *Plenty*, said the policy underpinning trespass is protection of the right to exclusive possession, and damages compensate for infringement of that right in itself, vindicating the interest in maintaining one's land free from intrusion.[29]

Similarly, in trespass cases concerning 'use' of land, substantial damages are given for the wrong in itself — regardless of causal analysis.[30] If someone camps on my land without consent, I may recover substantial damages notwithstanding that I would not have leased the property but for the trespasser's use, and regardless of whether I could or would have used the land myself. Materially I am no worse off, but I still recover as my right to exclusive possession has been violated. As Allsop P explained in *Bunnings Group Ltd v CHEP Australia Ltd*, there is no need for recourse to heterodox restitutionary analysis to explain such damages as the notion of compensatory damages can be applied 'flexibly': damages are not limited to actual consequences of the wrong, but include 'the denial and infringement of [the owner's] rights'.[31] Allsop P quoted Lord Shaw in *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson*: 'wherever an abstraction of property has occurred … the law ought to yield a recompense'.[32] There is no 'but for' caveat here. In the UK Supreme Court decision in *One Step (Support) Ltd v Morris-Garner*, Lord Reed JSC described user damages as compensating loss, but 'not loss of a conventional kind'; they address loss of the right to control, which goes with exclusive possession.[33] Lord Sumption JSC said the law treats the right to exclusive possession as having a value independent of any actual detriment suffered in consequence of wrongful interference.[34] As Nicholls LJ explained in a seminal statement of principle, approved in *Morris-Garner*,[35] normative loss is distinct from factual loss to which counterfactual analysis applies: 'loss or damage' here has a 'wider meaning than merely financial loss calculated by comparing the property owner's financial position after the wrongdoing with what it would have been had the wrongdoing never occurred'.[36]

We find a similar approach in relation to goods. In *The Mediana*, the Earl of Halsbury LC asked:

> Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there were plenty of other chairs in the room?[37]

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28 *Smethurst v Commissioner for Police* [2020] HCA 14, [73] ('*Smethurst*').
29 Ibid [120]–[121].
30 For fuller consideration of user damages, see Varuhas, 'Concept of "Vindication"' (n 8) 284–9.
31 *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420, 467 [174]–[175].
32 *Watson, Laidlaw & Co Ltd v Pott, Cassels and Williamson* (1914) 31 RPC 104, 119.
33 *One Step (Support) Ltd v Morris-Garner* [2019] AC 649, 671 [30] ('*Morris-Garner*').
34 Ibid 694 [110].
35 Ibid 671 [29] (Lord Reed JSC); 695 [110] (Lord Sumption JSC).
36 *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406, 1416.
37 *The Mediana* [1900] AC 113, 117. See also *Smethurst* (n 28) [120]–[121].

It would be 'absurd' to reduce damages on this basis.[38] That the owner would have been no worse off but for the wrong is irrelevant; causal analysis was relevant to 'special damage' only. In conversion, if you convert my airplanes, I can recover substantial damages even though it was inevitable that if you had not converted them, someone else would have.[39] I would not have had my planes in any case, but I still recover.

In defamation, as Windeyer J explained in *Uren v John Fairfax & Sons Pty Ltd*, the plaintiff 'gets damages because he was injured in his reputation, that is simply because he was publicly defamed'.[40] Or as English courts have put it, '[d]efamation constitutes an injury to reputation'[41] and such injury 'will always sound in damages'.[42] In contrast to recovery for consequential factual losses that may flow from a libel such as lost earnings or distress, for damage to reputation there is no 'but for' inquiry; damage is inherent in being defamed. In battery, courts have awarded more than nominal damages where a claimant is subject to unwanted touching even though he/she suffers no pain, suffering, loss of amenity or pecuniary loss.[43] As Lord Walker said in *Watkins v Secretary of State for the Home Department*, the 'most trifling and transient physical assault' would give a claimant an action 'sounding in damages (and if appropriate aggravated or exemplary damages)'.[44] This vindicatory model, by which damages are awarded for the wrongful interference in itself, has been recognised and extended to new contexts where basic rights are protected through liability, including under the *Racial Discrimination Act 1975* (Cth)[45] and other statutes,[46] in actions for damages under rights-charters,[47] and in the new privacy actions recognised across the common law world.[48]

The approach has been the same in false imprisonment. Loss of liberty is conceptually distinct from factual losses such as mental or physical injury.[49] One recovers substantial damages even if one is left materially no worse off by the wrong or better off. In *Huckle v Money*, the plaintiff was treated very civilly and fed beef-steaks and beer while detained.[50] Albeit he suffered no injury or discomfort,

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38 Ibid.

39 *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883, 1093 [82], 1106 [129] ('*Kuwait*').

40 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 150.

41 *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, 398 [119].

42 Ibid 391 [93].

43 See, eg, *Hurst v Picture Theatres Ltd* [1915] 1 KB 1; *Pelling v Johnson* [2004] EWHC 492 (QB); *Shah v Gale* [2005] EWHC 1087 (QB), [52]; *Forde v Skinner* (1830) 4 Car & P 239; *Loudon v Ryder* [1953] 2 QB 202; *B v NHS Hospital Trust* [2002] 2 All ER 449, 474 [99].

44 *Watkins* (n 17) 421 [68].

45 *Wotton v State of Queensland (No 5*) (2016) 352 ALR 146, 525–6 [1626]–[1629] ('*Wotton*').

46 See, eg, *Lloyd v Google LLC* [2020] 2 WLR 484, 498–504 [44]–[70] ('*Lloyd*'); *Marshall v IDEA Services Ltd (HDC Act)* [2020] NZHRRT 9, [66]–[131].

47 See, eg, *Dunlea v Attorney-General* [2000] 3 NZLR 136, 151 [41]–[42]. See further Jason NE Varuhas, 'The Development of the Damages Remedy under the *New Zealand Bill of Rights Act 1990*: From Torts to Administrative Law' [2016] 1 *New Zealand Law Review* 213, 218–29.

48 See those cases cited at n 97 below. See further Jason NE Varuhas, 'Varieties of Damages for Breach of Privacy' in Jason NE Varuhas and NA Moreham (eds), *Remedies for Breach of Privacy* (Hart Publishing, 2018) ch 3 ('Varieties of Damages').

49 *New South Wales v Williamson* (2012) 248 CLR 417, 429 [34].

50 (1763) 2 Wils KB 205.

substantial damages were awarded as his liberty right was infringed. Senior judges explicitly recognise normative damages are different *in kind* from factual damages. In *Ruddock v Taylor*, Kirby J said: 'the principal function of the tort is to provide a remedy for "injury to liberty". … Damages are awarded to vindicate personal liberty, rather than as compensation for loss per se.'[51] In *Wotton v State of Queensland (No 5)*, Mortimer J said that within vindicatory torts, including false imprisonment, 'what is being vindicated by an award of damages is the infringement of a right itself, rather than compensation for actual loss or damage'.[52]

There are examples of damages being awarded for false imprisonment where 'but for' analysis would lead to their denial. In *New South Wales v Abed*, damages of $10,000 were awarded for three hours' false imprisonment. The arresting officers had reasonable suspicion based on reasonable grounds to conduct the arrest, but the arrest was nonetheless unlawful as they failed to state their reason for it.[53] Damages followed notwithstanding that had the officers followed proper procedure, the plaintiff could and would have been otherwise lawfully arrested. In *Christie v Leachinsky*, the plaintiff was similarly arrested without notice of the charge.[54] On the *Lumba* principle, damages would likely have been denied, given the officer could otherwise have lawfully arrested the plaintiff by giving notice. Yet, as Lords Rodger and Brown JJSC observed in *Lumba*, there is no hint of a suggestion in *Christie* that only nominal damages would be given.[55] Indeed Lord du Parcq, giving the most comprehensive speech, said the plaintiff 'is entitled to recover damages for false imprisonment'.[56] In *New South Wales v TD*, the plaintiff, an Indigenous woman suffering mental illness, was awarded $80,000 for false imprisonment where she inevitably would have been detained.[57] An order was made that she be imprisoned in a hospital, but she was imprisoned in a cell not so gazetted. No one disputed that she would have been imprisoned in any case, but substantial damages followed. It was observed that how the conditions in which the plaintiff was confined compared to the conditions in which she should have been confined may affect quantum.[58] But this likely refers to that part of damages dedicated to factual losses, such as distress, and importantly there was no suggestion damages could be denied altogether. In *Kuchenmeister v Home Office*, substantial damages were awarded for false imprisonment despite the Judge accepting that the defendant could have otherwise detained the plaintiff lawfully, and despite the plaintiff suffering no ill treatment nor pecuniary loss.[59] The Judge considered 'it would be quite wrong for the court to award a contemptuous figure' where the 'very precious right of liberty' was at stake; the sum awarded represented a 'fair figure which will vindicate the plaintiff's rights'.[60] In *Roberts v Chief Constable of Cheshire Constabulary*, the plaintiff was

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51 *Ruddock v Taylor* (2005) 222 CLR 612, 651 [141] (citations omitted) ('*Ruddock*').
52 *Wotton* (n 45) 525 [1626].
53 [2014] NSWCA 419 ('*Abed*').
54 *Christie v Leachinsky* [1947] AC 573 ('*Christie*').
55 *Lumba* (n 5) 353 [345] (Lord Brown JSC; Lord Rodger JSC agreeing).
56 *Christie* (n 54) 603.
57 [2013] NSWCA 32.
58 Ibid [62].
59 [1958] 1 QB 496, 512–13.
60 Ibid 513.

imprisoned and periodic reviews were legally required.[61] The defendant's failure to conduct reviews rendered the imprisonment unlawful until the next properly conducted review. The plaintiff was awarded substantial damages, and his entitlement to damages was held to arise regardless of whether the reviews, if properly carried out, would have led to his release. The outcomes in these cases are consonant with general statements of principle that one is 'entitled' 'to mandatory compensation' for false imprisonment,[62] and that damages are awarded for loss of liberty 'inherent in *any* unlawful detention'.[63]

Some might argue that in some of these cases the point in *Lewis* was simply not raised. But the point was never raised because it is, and has long been, axiomatic that damages follow breaches of basic rights as of course. The stronger argument is that there is no evidence of the *Lewis* principle because it is foreign to the common law of false imprisonment. If it were a recognised principle of the common law, one would expect to locate easily many examples of it being applied. This is especially so as the principle could be relied on in many cases concerning exercise of public powers of detention, which make up the vast bulk of false imprisonment claims. Yet there are no examples. In *Lumba*, no authority was invoked to support the complete denial of damages for proven false imprisonment on causal grounds (while, in *Lewis*, no authority was invoked except *Lumba* and cases applying *Lumba*). The fact is the practice that damages follow wrongful deprivations of liberty is a longstanding one stretching back to old jury practice.[64] Dicey and Blackstone recalled the practice of juries giving awards for every interference of liberty, whether petty or grave. This practice 'seems to us such a matter of course as hardly to call for observation'.[65] Blackstone, having observed that juries '*will* give adequate damages'[66] for battery 'though no actual suffering is proved',[67] said for 'the injury of false imprisonment' one '*shall* recover damages'.[68]

Even in *Lumba*, while there was a majority for the outcome of nominal damages, closer inspection reveals that a majority of the nine-judge panel, as a matter of legal principle, favoured the proposition that some substantial damages should follow false imprisonment. Three Justices (Lord Hope DPSC, Lord Walker and Baroness Hale JJSC) would have awarded more than nominal damages, driven by a concern that an invasion of liberty ought to be met with a more than nominal award. Lord Walker JSC recalled: 'the common law has always recognised that an award of more than nominal damages should be made to vindicate an assault on a person or reputation, even if the claimant can prove no special damages'.[69] Two further Justices, Lords Brown and Rodger JJSC, while they would not have found liability on the facts, maintained that substantial damages ought to follow false

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61 *Roberts v Chief Constable of Cheshire Constabulary* [1999] 1 WLR 662 ('*Roberts*').

62 *ID v Home Office* [2005] EWCA Civ 38, [109].

63 *Kerman v City of New York*, 374 F 3d 93 (2004) 130 (emphasis added). See also 129, 131–2.

64 As acknowledged by Baroness Hale JSC in *Lumba* (n 5) 315 [217].

65 AV Dicey, *Lectures Introductory to the Law of the Constitution* (Macmillan, 1885) 224–5 (and restated in every edition thereafter).

66 William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765–1769) Bk III, 121 (emphasis added).

67 Ibid Bk III, 120.

68 Ibid Bk III, 138 (emphasis added).

69 *Lumba* (n 5) 308 [195]. See also 304–5 [181].

imprisonment. The foregoing, as well as the fact *Lumba* was a split decision, weakens *Lumba*'s force as an authority for denying substantial damages altogether based on the novel causal principle.

In *CPCF*, the two Justices who would have denied substantial damages did so simply by applying *Lumba*,[70] without addressing the correctness of that decision or analysing the damages issue in depth; after all, the damages point was moot. However, notably, the two Justices that considered damages in more detail reached a different view. Hayne and Bell JJ rejected the Commonwealth's argument that the plaintiff should receive only nominal damages because they could and would have otherwise been detained lawfully. Their Honours said it was probably sufficient to reject the Commonwealth's argument that, in the hypothetical alternative, the plaintiff would likely have been detained in different conditions (thereby suggesting some damages for actual loss might be awarded if the plaintiff would otherwise have been detained in better conditions, for example).[71] But Hayne and Bell JJ gave a 'more fundamental reason' for rejecting the Commonwealth's argument: the argument implicitly assumed that loss is the gist of the action.[72] That is wrong: '[l]ike all trespassory torts, the action for false imprisonment is for vindication of basic legal values'.[73] The right is not a right not to suffer mental distress or pecuniary loss through invasion of liberty, but simply a right to liberty. Absence of actual loss neither denies the action, nor provides a defence. Absence of actual loss could affect damages: quantum would be lower absent any component for factual loss. But even where there is no 'substantial loss' to speak of, this would not 'require the conclusion that only nominal damages may be awarded'.[74] In other words, more than nominal damages could be awarded even if the plaintiff suffered no actual or material loss. What would these damages be for? Their Honours' reasoning provides the clue: the common law has 'long assigned' 'value' to liberty in itself.[75]

Hayne and Bell JJ's reasoning illustrates the fundamental importance of starting with the nature of the action: issues of damages and causation do not arise in a vacuum, but against the background of an action based in certain normative concerns, and the approach to remedies ought to cohere with those concerns.

Lastly, it might be asked: if substantial damages follow as a matter of course, what role do nominal damages play? Nominal damages are reserved for fleeting or miniscule interferences. For example, in trespass, if a person fleetingly places their foot on another's land. But specifically in relation to false imprisonment — nominal damages, while available in principle, have historically played an extremely limited role, so it is difficult to locate *any* case of a nominal award prior to *Lumba*. In turn,

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70 *CPCF* (n 7) 610–11 [324]–[325] (Kiefel J), 655–6 [510]–[512] (Keane J).

71 Ibid 569 [154].

72 Ibid 569 [154]–[155]. Importantly, the Commonwealth's submissions in the appeal from *Lewis* (n 2) omit any mention or consideration of Hayne and Bell JJ's 'more fundamental reason', so that the Commonwealth's account of *CPCF* is, with respect, incomplete: see Commonwealth, 'Submissions of the Commonwealth Seeking Leave to Intervene or Appear as Amicus Curiae', Submission in *Lewis v Australian Capital Territory*, Case No C14/2019, 5 February 2020, 8–9 [20]–[24] ('*Commonwealth Submissions*').

73 *CPCF* (n 7) 569 [155]. See also *Ruddock* (n 51) 650–51 [140].

74 *CPCF* (n 7) 569 [155].

75 Ibid.

this reflects that the *Lumba* principle is foreign to false imprisonment; if it were a recognised principle we would expect to find many examples of substantial damages being denied based on the causal principle, and nominal damages awarded. More generally, the paucity of cases in which nominal damages have been awarded reflects the primacy of liberty in the common law's hierarchy of protected interests; even what may seem a technical or miniscule interference will sound in substantial damages. Thus, substantial awards have been made routinely for brief imprisonments of hours or even minutes,[76] the High Court observing in such a case that '[a]n interference with personal liberty even for a short period is not a trivial wrong'.[77] As the great tort scholar Weir observed, 'while a transitory trespass to land can be paid off by the tender of a tiny sum … that could hardly apply where the trespass was an infringement of liberty'.[78]

C *Reference Point for Assessment of Normative Loss*

If judges in vindicatory actions do not consider the position the claimant actually would have been in but for the wrong, what is their reference point or benchmark for assessment of normative damages? To answer this, we need to go back to the nature of these torts as torts concerned with protecting basic interests from outside interference. The law's starting assumption is that the position each person ought to be in is one in which their basic interests are inviolate; thus the starting point in false imprisonment is that each person is entitled to be free.[79] Wherever there is an interference with those interests that cannot be justified, the law takes the view that the claimant has been subject to an interference to which they ought not to have been subjected. Absent a justified interference, the claimant 'was in principle entitled to his liberty'.[80] Normative damages redress the imbalance between the position the claimant is entitled to be in — one in which their interests are in pristine form — and their position given the wrongful interference, where their interests are subject to an unjustified encumbrance. This approach is most explicit in conversion. Damages are assessed by reference to 'the owner's position had he retained his goods'[81] — that is, the position he ought to have been in — as opposed to the position he actually would have been in but for the defendant's wrongful actions.

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76 *Abed* (n 53) ($10,000 for three hours); *Neilsen v Attorney-General* [2001] 3 NZLR 433, 446 [50]–[51] (NZ$5,000 for one-and-a-half hours); *Petticrew v Chief Constable Royal Ulster Constabulary* [1988] NI 192, 204 ('*Petticrew*') (£300 for thirty-five minutes); *Nellins v Chief Constable Royal Ulster Constabulary* (High Court QBD (NI), Sheil J, 20 February 1998) (£45 for five minutes); *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 515 ('*Thompson*') (£500 for first hour).

77 *Watson v Marshall* (1971) 124 CLR 621, 632 ($200 for detention during a drive in a police car). See also *Petticrew* (n 76) 204: 'any detention even for a very short period, is not insignificant and deserves something more than mere nominal damages for a technical false imprisonment'.

78 Weir (n 19) 136.

79 See, eg, *Christie* (n 54) 585, 587–8; *R (Kambadzi) v Secretary of State for the Home Department* [2011] 1 WLR 1299, 1321–2 [54] ('*Kambadzi*'). See also Richard O'Sullivan, 'A Scale of Values in the Common Law' (1937) 1 *Modern Law Review* 27, 27: 'The reasonable man of the law is naturally also a freeman. Freedom in the conception of the Common Law is a thing native to man as man.'

80 *Roberts* (n 61) 667.

81 *Kuwait* (n 39) 1094 [83]. See also 1093–4 [80]–[82].

As McHugh J observed, 'the issue of causation cannot be divorced from the legal framework that gives rise to the cause of action'.[82] How we frame the damages inquiry depends on the normative concerns of the law, and in vindicatory, protective torts the inquiry is framed so as to maximally protect basic interests.

The recognition that normative damages redress the normative imbalance generated by a wrong in turn explains quantification.[83] Unlike factual loss, quantum does not vary with the specific emotional or physical effects experienced by the plaintiff. Rather, quantum varies with the extent of the interference with protected interests; that is, damages respond proportionately to the degree of normative imbalance produced by the wrong. Thus, *ceteris paribus*, a person imprisoned for a short period in a large warehouse shall receive less than a person confined for a long time in a small cell, given the degree of interference with the liberty interest is proportionately greater in the latter case.[84]

D *Against* Lumba

The main reason for exploring the fundamental distinction between factual and normative loss is that it does not appear that the majority in *Lumba*, nor the judges in *Fernando*, *Lewis* and *CPCF* who applied *Lumba*, had brought to their attention or properly considered this core distinction and the common law's longstanding vindicatory tradition. Even iconic High Court of Australia authorities, such as *Plenty*, were not considered in *Lewis*, *Fernando* and *CPCF*. The net result in these cases, as in *Lumba*, was to assume wrongly that the only form of damages available in false imprisonment are those for factual loss. This is reflected in the language used in *Lumba* and its progeny: no 'real loss';[85] what was the 'actual impact' of the imprisonment?;[86] and 'actual loss'.[87] Moreover, because there was no recognition of departure from longstanding norms, no justification has been proffered for the novel causal principle. If longstanding principles protective of basic rights are to be departed from, this should be with eyes-wide-open and on the basis of a proper understanding of the normative underpinnings of those principles and a transparent, fully articulated justification.

Furthermore, *Lumba* creates two types of incoherence. First, the traditional approach to damages ensures coherence as between the approach to remedies and the policy underlying creation of primary rights. In contrast, that policy of strong protection and maintaining respect for basic interests is seriously undermined at the remedial stage if damages can be denied altogether for an actually unlawful imprisonment on the basis that the imprisonment could hypothetically have been effected lawfully. Indeed, if this is going to be the remedial approach, one may ask what is the point of being ever so strict as to liability criteria. As Lords Rodger and

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82 *Henville v Walker* (2001) 206 CLR 459, 491 [98]. See also *Kuwait* (n 39) 1106 [129].

83 On quantification, see further: Varuhas, *Damages and Human Rights* (n 8) 67–9, 130–34; Varuhas, 'Varieties of Damages' (n 48) 72–3.

84 On time, see *Thompson* (n 76) 515. On area, see *Iqbal v Prison Officers Association* [2010] QB 732, 747 [46], 747–8 [48]–[49].

85 *Lumba* (n 5) 281 [93].

86 Ibid 324 [253].

87 *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238, 2263 [108] ('*Parker*').

Brown JJSC said in dissent in *Lumba*, to adopt such an approach would 'seriously devalue the whole concept of false imprisonment'.[88]

Second, it is well-established in vindicatory torts that damages can be recovered for the interference in itself. Why single out liberty for weaker remedial protection than interests in land, goods, person and reputation? Is liberty any less basic? Common law judges do not seem to think so, given they consistently state that protection of liberty is of supreme importance, and that such basic matters should not become 'the stuff of empty rhetoric'.[89] As Edelman J has said, '[i]t would be remarkable if today the remedies for infringement of rights to property were somehow elevated to a privileged position over bodily integrity or liberty'.[90] The inconsistency created by the *Lumba* deviation is all the more stark given false imprisonment is of the same genus as trespass and battery, being a trespassory tort.[91]

These arguments for maintenance of orthodoxy are reinforced by rule-of-law principles. First, meeting unlawful invasions of basic rights by government with significant awards reinforces the normative force of legal constraints on public power and thus the principle of government under law. As Dicey observed, the strict remedial tradition in actions such as false imprisonment 'has gone a great way both to ensure the supremacy of the law of the land and ultimately to curb the arbitrariness of the Crown'.[92] In contrast, as Lord Walker JSC observed in *Lumba*, to meet false imprisonment by government with a nominal award 'sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action'.[93] This constitutional tradition, of meeting unlawful official invasions of liberty with effective remedies is part of Australia's 'common law inheritance', to be ignored or devalued 'at our peril'.[94] Second, albeit the *Lumba* principle is formally one of general application, the reality is that only public actors will be able to take advantage of it to insulate themselves from liability, as only officials generally have legal authority to detain. Indeed, the Commonwealth's first stated reason for intervening in the *Lewis* appeal is its special interest in the outcome.[95] Creation of what is effectively a special protection for government runs counter to the principle of equality, a principle enshrined in s 64 of the *Judiciary Act 1903* (Cth).[96]

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88 *Lumba* (n 5) 353 [343]; *Kambadzi* (n 79) 1337 [108].

89 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 529.

90 *Smethurst* (n 28) [239].

91 *CPCF* (n 7) 569 [155].

92 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1960) 210.

93 *Lumba* (n 5) 304–5 [181].

94 *Smethurst* (n 28) [126]. See also [111], [122]–[125], [127], [169]. *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157 [56].

95 *Commonwealth Submissions* (n 72) 1 [3].

96 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 262–3; *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 427–8; *Ruddock* (n 51) 644–5 [120]–[121], 648 [132]; *Smethurst* (n 28) [111], [153].

E *Vindicatory Damages*

For completeness, normative damages in the common law tradition are conceptually distinct[97] from the novel head of 'vindicatory damages' recognised in several overseas constitutional law cases,[98] and by a minority in *Lumba*. The issue of whether to recognise this novel form of damages arises in cases such as *Lumba* and *Lewis* because these cases contemplate complete denial of compensatory damages for lengthy false imprisonments; vindicatory damages are mooted as a possible gap-filler. I have considered vindicatory damages in detail elsewhere.[99] For present purposes, it suffices to say: it would be illogical to depart from longstanding damages orthodoxy by adopting the *Lumba* principle, only to have to correct for that departure through a further deviation from orthodoxy.

III 'But For': Getting the 'Wrong' Right

Thus normative damage, which responds to the wrong in itself, is *not* subject to 'but for' analysis. Where a person is subject to false imprisonment, they ought to receive a substantive award notwithstanding what could or would have happened but for the wrong.

However, even if one were to adopt the heterodoxy that such damages depend on 'but for' analysis, one would need to consider how to frame the causal question. This was not the subject of considered analysis in *Lumba* or *Lewis*. Yet there are different ways of framing the analysis and it is open to serious question whether the approach adopted in *Lumba* and *Lewis* is a normatively attractive one, given other alternatives.

In counterfactual analysis, one compares the claimant's position given the wrong with their position had the wrong never occurred. But what is the wrong in false imprisonment? There are two possibilities.[100] On the first view, the wrong is breach of a duty not to imprison another without lawful justification. On this conception the result in *Lumba* is likely supportable: but for the unjustified imprisonment the plaintiff could and would have been subject to a justified imprisonment.

On the second view, the wrong is breach of a duty not to confine another; justification does not go to the nature of the wrong, but to defences to the wrong. On this view, compensatory damages might have been awarded in *Lumba*. Given this conception of the wrong, the counterfactual question is: what would the plaintiff's position have been if the defendant had not imprisoned the plaintiff? In many cases if the plaintiff had not been imprisoned by the defendant, he/she would have been free (unless there is convincing evidence someone else would have detained them,

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97 See *Gulati v MGN Ltd* [2016] FSR 12, [132], approved in *Gulati v MGN Ltd* [2016] 2 WLR 1217, 1234 [48]; *Lloyd* (n 46) 499 [50]–[51], 500 [54], 502 [63].

98 See, eg, *Attorney-General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328.

99 Varuhas, *Damages and Human Rights* (n 8) 125–9; Varuhas, 'Varieties of Damages' (n 48) 87–90.

100 See John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) ch 4; Varuhas, *Damages and Human Rights* (n 8) 62–3.

for example), so substantial damages follow as the wrong leaves the plaintiff in a worse position.

There are at least four reasons to favour the second view. First, by characterising every interference with liberty as wrongful, notwithstanding whether the wrong is ultimately justified, the law signals liberty is of such importance that normative significance ought to be attached to every interference with it. The law signals it is not ambivalent between non-interference and justified interference, maintaining a preference for preservation of liberty in pristine form. This is consonant with the tort's basic concern to vindicate the importance of liberty, and its analytical starting-point that individuals are entitled to their liberty.

Second, justifications are analogous to explanations for one's conduct and have also been said to be 'in the nature of an apology for the defendant's conduct'.[101] If imprisonment is not wrongful in itself, why should the defendant explain themselves or apologise for detaining the plaintiff? As Lord Hobhouse said in *R v Governor of Brockhill Prison; Ex parte Evans (No 2)*: 'Imprisonment involves the infringement of a legally protected right and therefore must be justified.'[102]

Third, the first view requires the court, in the course of counterfactual analysis, to ask what would have happened if the defendant had acted lawfully: would they have still detained the plaintiff? This requires the court to effectively stand in the shoes of an executive officer and ask how they would have exercised their public powers. Such approach appears to impermissibly require judges to go beyond simply determining the legality of an exercise of power, to determining how a governmental power would be exercised on the merits. Consider *R (OM (Nigeria)) v Secretary of State for the Home Department*, where the English Court of Appeal applied the *Lumba* principle in circumstances where government had adopted a policy document to guide exercise of a detention power.[103] To determine whether the power would have been exercised to detain the plaintiff, the Court had to interpret the government policy document and apply that document to the plaintiff's case.[104] It is difficult to imagine how, in the Australian setting, a court effectively standing in the shoes of an executive officer and applying a government policy document to determine how a governmental power would be exercised, can be squared with the constitutional separation of powers.

Fourth, to adopt the first view is effectively to create an irrebuttable presumption of legality in favour of defendants, as the court will ask: what would have happened *assuming the defendant acted lawfully*? But why, in the counterfactual, should courts adopt an assumption that defendants — typically officials — will invariably act lawfully, especially given that when the defendant had the chance to exercise their powers, they *in fact* exercised them unlawfully? Significantly, such an assumption would require judges to assume a lawful invasion of liberty where, as a matter of fact, an unlawful interference was the only possible

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101 *Warwick v Foulkes* (1844) 12 M & W 507, 509; 152 ER 1298, 1299.

102 *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2001] 2 AC 19, 42. See also *Christie* (n 54) 592 ('right of every citizen to be free from arrest').

103 *R (OM (Nigeria)) v Secretary of State for the Home Department* [2011] EWCA Civ 909.

104 Ibid [28]–[39].

outcome. Consider *Parker*,[105] where the defendant officer acted unlawfully in arresting the plaintiff as he lacked requisite information to form a reasonable belief. The trial judge, effectively applying the second view, held that but for the arrest by the defendant, another officer at the scene would have most likely arrested the plaintiff, but on the balance of probabilities he too would have acted unlawfully as he also lacked the requisite information.[106] As such, substantial damages were awarded. But on appeal, the Court of Appeal held that *Lumba* demanded an approach equivalent to the first view: 'The 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.'[107] Only nominal damages were awarded.[108]

How to frame the counterfactual analysis involves a normative choice. It is difficult to think of a good normative argument for courts abandoning the longstanding law of damages within false imprisonment to adopt an irrebuttable assumption of legality that will be applied to deny damages for invasion of basic rights in circumstances where we know an unlawful arrest was the only possible outcome. This is to turn the tort on its head. Underpinning the tort is an assumption that the plaintiff ought to have their freedom, based in the normative importance of vouchsafing liberty, not an assumption of legality for the benefit of government.

More generally, the High Court of Australia should treat the conceptualisation of the wrong in *Lumba* with caution. Indeed, much of the explanation for why the UK Supreme Court mislaid damages orthodoxy lies in the Justices' conceptualisation of the wrong. The focus in *Lumba* was on public law principles that went to the question of lawful justification, and the case commenced as a judicial review claim. Perhaps because of this, the public law dimensions of the case eclipsed the private law dimensions. Specifically, the relevant wrong was seemingly conceptualised as public law illegality *simpliciter*. For example, Lord Collins JSC said 'breach of principles of public law can found an action at common law for damages for false imprisonment'[109] and Lord Hope DPSC in *Kambadzi* spoke of *Wednesbury* principles 'founding' an action for false imprisonment.[110] This is wrong. Damages for false imprisonment are not a form of administrative law compensation. The normative event that founds liability for damages is breach of an individual's private law right. By treating public law error as the wrong, the Supreme Court effectively treated loss of liberty as a material harm consequential upon the wrong, which may or may not be suffered in false imprisonment, as opposed to normative damage inherent in the wrong. This is evident in Lord Dyson JSC's statement: 'they suffered no loss or damage *as a result of* the unlawful exercise of the power to detain'.[111] It is also evident in the surprising observation in *Parker* that *Lumba* stands for the proposition that procedural errors do not merit substantial

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105 *Parker* (n 87).
106 *Parker v Chief Constable of Essex Police* [2017] EWHC 2140 (QB), [150]–[153].
107 *Parker* (n 87) 2262 [104].
108 Ibid 2268 [132].
109 *Lumba* (n 5) 316 [221], citing *Mohammed-Holgate v Duke* [1984] AC 437, 443. There are many similar statements in *Lumba* (n 5): see, eg, 275 [68] (Lord Dyson JSC), 308 [194] (Lord Walker JSC).
110 *Kambadzi* (n 79) 1317 [40].
111 *Lumba* (n 5) 282 [95]

damages.[112] Damages are not for breach of procedural fairness — which goes to lawful justification — but for violation of the plaintiff's liberty rights.

IV Conclusion

In *AIB Group (UK) plc v Mark Redler & Co Solicitors*, Lord Reed JSC observed, 'that the loss resulting from a breach of duty has to be measured according to legal rules, and that different rules apply to the breach of different obligations', these rules in turn reflecting the distinctive 'nature' and 'rationale' of the obligations breached.[113] As such, it makes little sense to speak of 'ordinary'[114] or 'normal'[115] compensatory principles. Compensatory principles vary across private law, and the 'but for' test is far from universal.[116] Within vindicatory torts, the protective and vindicatory policies that underpin creation of primary rights shape the remedial approach, so every unjustified interference with basic rights is met with substantial damages. If this orthodoxy ensures damages strongly protect and reinforce the inherent value and importance of liberty, the *Lumba*/*Lewis* approach, which would meet unlawful imprisonments of months and years with $1 awards, achieves the opposite.

If the High Court of Australia is to make the choice to deviate from orthodoxy, it must do what the *Lumba* majority and the ACT Court of Appeal in *Lewis* did not: it must approach its task with a full understanding of orthodoxy and provide a fully articulated justification for deviating from centuries of authority in a way that downgrades ancient rights.

It is important to recognise that any deviation would have significant ripple effects. *Lewis* arises in the prisons context. But the High Court's decision will have ramifications wherever governments have powers to detain, including in mental health, police, immigration, and quarantine contexts. If the *Lumba* principle is endorsed in the false imprisonment context, it will be open to government to argue for its recognition in the context of other fundamental common law rights including rights to physical and psychological integrity and property, as well as statutorily enacted fundamental rights, such as anti-discrimination rights.

It may be tempting to base any legal change on public policy concerns, including 'usual suspects' such as 'chilling effects', 'flood of claims' and impact of damages liability on public finances. But notwithstanding that such considerations offer a fraught basis for judicial decision-making,[117] the High Court has, probably

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112 *Parker* (n 87) 2262 [104].

113 *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2015] AC 1503, 1534 [92]. And see *Morris-Garner* (n 33) 671 [31].

114 *Lumba* (n 5) 303 [176].

115 *Kambadzi* (n 79) 1322 [56].

116 See, eg, *Wrongs Act 1958* (Vic), s 51(2) (exceptions to 'but for' in negligence); *Gould v Vaggelas* (1985) 157 CLR 215, 236, 250–51 ('a factor' test of factual causation in deceit); *Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq)* (2019) 373 ALR 79 (no counterfactual analysis for *Australian Consumer Law* damages); *Agricultural Land Management v Jackson (No 2)* (2014) 48 WAR 1, 66 [345]–[346], 70 [368] (no 'but for' analysis for 'substitutive' awards in equity); *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, 469 (no 'but for' analysis in non-disclosure cases).

117 Varuhas, *Damages and Human Rights* (n 8) 361–404.

for well-founded separation-of-powers reasons, signalled that decisions over tortious liability should not be made on the basis of public policy, but according to more recognisably 'legal' criteria such as precedent, principle and coherence.[118] Yet, as we have seen, all arguments of precedent, principle and coherence are against overturning damages orthodoxy. Moreover, as Gageler J has reiterated recently: 'In the vindication of common law rights against unauthorised official invasion, considerations merely of convenience have no place.'[119]

If longstanding protections of individuals' fundamental rights are to be downgraded based on calculations as to the public good, such a decision is properly for democratic institutions with the legitimacy to weigh rights and policy concerns to determine what course lies in the public interest. Commonwealth, state and territory legislatures are perfectly capable of effecting such change — and delineating its scope — if they consider such change warranted. Australia is not a country in which the political branches have shied away from reforming the law of torts, including the adoption of reforms protective of government.

[118] *Sullivan v Moody* (2001) 207 CLR 562, 579–80 [49]–[53].
[119] *Smethurst* (n 28) [134]. And to the same effect, see *Plenty* (n 20) 654.