IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY **NO C14 OF 2019**

BETWEEN: **STEVEN JAMES LEWIS**
Appellant

AND: **THE AUSTRALIAN CAPITAL TERRITORY**
Respondent

SUBMISSIONS OF THE COMMONWEALTH

SEEKING LEAVE TO INTERVENE OR APPEAR AS *AMICUS CURIAE*

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II BASIS OF INTERVENTION

2. The Commonwealth applies for leave to intervene in support of the respondent or to be heard as *amicus curiae*. These submissions constitute that application (rule 42.08A).

PART III WHY LEAVE TO INTERVENE OR BE HEARD AS *AMICUS CURIAE* SHOULD BE GRANTED

3. The issues in this appeal (**AS [2]–[3]; RS [2]**) are pure questions of law the resolution of which will directly affect the Commonwealth's interests in a manner warranting the grant of leave to intervene.[1] The Commonwealth is commonly a respondent to litigation challenging detention that occurs pursuant to federal statutes, including in particular the *Migration Act 1958* (Cth)[2] and the *Crimes Act 1914* (Cth).[3] The determination of this appeal will decide whether persons purportedly detained pursuant to those statutes are entitled to "substantial compensatory damages" or "vindicatory damages" if an error is made in the circumstances of a particular case, but where the person would have been detained lawfully even if that error had not been made. The determination of that point in favour of the appellant has potentially significant financial implications for the Commonwealth.

4. Interventions by the Commonwealth and States in non-constitutional litigation are not unknown. For example, two States were granted leave to intervene in *Cattanach v Melchior*[4] to file written submissions and to make brief oral submissions, recognising the special interest that a polity may occasionally have in the development of the common law. The Commonwealth has a special interest in the common law principles in issue in

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1 See generally *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 39 [2] (the Court). There is at least one ongoing case (in which judgment is reserved) where the Commonwealth has contended for nominal damages: see *Burgess v Commonwealth* (Federal Court of Australia, SAD73/2018, judgment reserved).

2 *Migration Act 1958* (Cth) s 189.

3 *Crimes Act 1914* (Cth) Pt IAA Div 4. Other Commonwealth statutes under which persons may be detained include *Australian Crime Commission Act 2002* (Cth) s 31; *Australian Federal Police Act 1979* (Cth) s 14A; *Australian Security Intelligence Organisation Act 1979* (Cth) Pt III, Div 3; *Biosecurity Act 2015* (Cth) s 103; *Customs Act 1901* (Cth) ss 210, 219L, 219Q, 219S; *Defence Act 1903* (Cth) ss 46(7)(f), 72P(2), 116V; *Defence Force Discipline Act 1982* (Cth) ss 68, 89.

4 (2003) 215 CLR 1 at 4–5.

this appeal, because situations where a person was unlawfully detained but could and would otherwise have been *lawfully* detained will most frequently arise in cases where a body politic or the executive is a respondent. That is because the counterfactual *lawful* detention will, in the vast majority of cases, occur pursuant to statutory authorisation of the executive to detain.

5. That these issues directly affect the Commonwealth's interests, and can reasonably be anticipated to do so in the future, is apparent from a review of the law reports. The Commonwealth (sometimes through a Minister of State) has been a respondent to each of the earlier cases in which these issues have arisen in Australia.[5] In particular, the Commonwealth was a respondent in *Fernando v Commonwealth*, in which special leave was granted in order to allow this Court to examine the first issue in this appeal, but then revoked when the appellant's submissions failed to agitate that issue.[6]

6. Further, and relevantly to both the application to intervene and the application to appear as *amicus curiae*, the Commonwealth's submissions add to those advanced by the respondent. They are "submissions which the Court should have to assist it to reach a correct determination".[7] Any added costs in considering and responding to the Commonwealth's submissions are not disproportionate to the expected assistance, and will not delay the hearing of the appeal.[8] If the Commonwealth is granted leave to make oral submissions, repetition will of course be avoided.

PART IV ISSUES PRESENTED BY THE APPEAL

7. If granted leave to intervene or to appear as *amicus curiae*, the Commonwealth advances the following propositions. **First**, damages for false imprisonment are compensatory in nature. Where a person would have been lawfully detained in any event, it would be inconsistent with the compensatory principle to award damages to compensate that person for lost liberty, because he or she would not have been at liberty had the false imprisonment not occurred. **Second**, where no compensable loss has occurred, nominal

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5 See *Fernando v Commonwealth* (2014) 231 FCR 251; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514; *Okwume v Commonwealth* [2016] FCA 1252 (issue not addressed on appeal: *Commonwealth v Okwume* (2018) 263 FCR 604); *Guo v Commonwealth* (2017) 258 FCR 31. See also *Burgess v Commonwealth* (Federal Court of Australia, SAD73/2018, judgment reserved).

6 Transcript of Proceedings, *Fernando by his Tutor Ley v Commonwealth* [2015] HCATrans 286.

7 *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 39 [3] (the Court).

8 Cf *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 39 [4] (the Court).

damages already exist to serve the purpose of vindicating a person's rights or interests (as, in some contexts, do exemplary damages). There is therefore no necessity to develop the common law to recognise a new head of non-compensatory vindicatory damages. **Third**, the Australian and overseas case law does not support the appellant's argument that he should have been awarded either substantial compensatory or so-called vindicatory damages.

A. COMPENSATORY DAMAGES

A.1 The compensatory principle

8. On the first branch of the appeal, the appellant disavows any suggestion that he contends for anything other than compensatory damages (**AS [37]**). As such, the cardinal principle identified by Mason CJ, Dawson, Toohey and Gaudron JJ in *Haines v Bendall* is relevant:[9]

> The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed. Compensation is the cardinal concept. It is the "one principle that is absolutely firm, and which must control all else". Cognate with this concept is the rule, described by Lord Reid in *Parry v Cleaver*, as universal, that a plaintiff cannot recover more than he or she has lost.

9. The compensatory principle expressed in the above passage has solid foundations.[10] In its terms, it applies to "actions of tort", without distinguishing between them, and therefore applies to the appellant's claim for false imprisonment. The principle is not in doubt.[11] It was applied, for example, in *Amaca Pty Ltd v Latz*, where the plurality explained that a claim for compensation "focuses attention upon the interests of the victim", which "are addressed by awarding damages as *compensation* for *actual* loss (either loss already

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9 (1991) 172 CLR 60 at 63 (citations omitted).

10 See, eg, *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 (Lord Blackburn). In this Court, see *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191 (Taylor and Owen JJ); *Skelton v Collins* (1966) 115 CLR 94 at 128 (Windeyer J); *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 12 (Mason, Wilson and Dawson JJ); *Johnson v Perez* (1988) 166 CLR 351 at 355 (Mason CJ), 367 (Wilson, Toohey and Gaudron JJ), 386 (Dawson J).

11 See *Manser v Spry* (1994) 181 CLR 428 at 434–5 (the Court); *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49 at 67 (Gummow J) approving *Campbell v Nangle* (1985) 40 SASR 161 at 192 (King CJ); *Harriton v Stephens* (2006) 226 CLR 52 at 103 [165]–[166] (Hayne J), 130 [264] (Crennan J; Gleeson CJ, Gummow and Heydon JJ agreeing); *Clark v Macourt* (2013) 253 CLR 1 at 18–19 [59] (Gageler J); *Northern Territory v Griffiths* (2019) 93 ALJR 327 at 398 [337] (Edelman J).

suffered or loss that will probably be suffered) — an award guided by the compensatory principle".[12]

10. The appellant asserts that "the thing that was lost was the right not to be imprisoned" (**AS [25], [28], [37]**). However, at the time of the detention for which he seeks substantial compensation, the appellant was subject to a sentence of imprisonment for 12 months, which had been imposed as a result of his having smashed a glass into another person's face.[13] Having regard to that sentence of imprisonment, the appellant had no "right not to be imprisoned" until that sentence was served in accordance with law. While the appellant's sentence was initially ordered to be served by periodic detention, both the trial judge[14] and the Court of Appeal[15] correctly found that the "inevitable" operation of the *Crimes (Sentence Administration) Act 2005* (ACT) (the **Act**) was that his periodic detention was required to be cancelled as a result of his multiple failures to report for periodic detention.[16] That conclusion is not now in dispute.

11. In those circumstances, while the Sentence Administration Board's decision to cancel the appellant's periodic detention was found to be invalid on the basis that it denied the appellant procedural fairness (a conclusion that is highly doubtful, although it went unappealed),[17] the Board's error does not change the fact that there was a legal requirement that the appellant's periodic detention be cancelled, and therefore that he serve his sentence in prison. For that reason, the invalid decision of the Board did not deprive the appellant of a moment of freedom from imprisonment that he was legally entitled to enjoy. As such, he sustained no loss of freedom that could be compensated by an award of compensatory damages. The appellant's argument to the contrary leaves entirely out of account the sentence of imprisonment that, when taken together with the inevitable operation of the Act, lawfully removed the right upon which his argument depends.

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12 (2018) 92 ALJR 579 at 595 [85] (Bell, Gageler, Nettle, Gordon and Edelman JJ) (emphasis in original). See also at 587-588 [41] (Kiefel CJ and Keane J).

13 CAB 104 [32], quoting Agreed Statement of Facts [2]; *Lewis v Australian Capital Territory* [2019] ACTCA 16 at [4] (the Court).

14 *Lewis v Australian Capital Territory* (2018) 329 FLR 267 at 325 [384]–[385] (Refshauge J).

15 *Lewis v Australian Capital Territory* [2019] ACTCA 16 at [52] (the Court).

16 See, in particular, *Crimes (Sentence Administration) Act 2005* (ACT) s 69(2).

17 *Lewis v Australian Capital Territory* [2019] ACTCA 16 at [10] (the Court).

12. Furthermore, the appellant's claimed entitlement to substantial general damages overlooks the fact that general damages are not awarded in compensation for an abstract loss or impairment of a "right", but for loss experienced in the real world.[18] The heads of damage reflected within an award of general damages for false imprisonment encompass compensation for that real world loss, being compensation for the lost time while falsely imprisoned, injury to feelings (such as the initial shock of detention, indignity, disgrace and humiliation), and any attendant loss of social status and injury to reputation caused by the false imprisonment.[19] Once those heads of damage are identified, it is immediately apparent why it is necessary to distinguish between the position of a plaintiff who would have been lawfully detained irrespective of the tort, and that of a plaintiff who would have been released. As Lord Dyson JSC put it in *R (Lumba) v Secretary of State for the Home Department* (***Lumba***), "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."[20] It simply makes no sense to provide substantial compensation for loss of liberty to a plaintiff who would have been imprisoned even if the tort had not occurred, for any loss of liberty suffered by such a plaintiff would have occurred equally as a result of the lawful detention.

13. For these reasons, application of the compensatory principle requires the conclusion reached by the trial judge and the Court of Appeal in this case: that the appellant, having abandoned at trial any claim for exemplary damages (which, as noted below, may serve a vindicatory purpose) and damages for lost wages,[21] is entitled to nominal damages only.

14. No part of the analysis above results in the respondent "escaping" *liability* for having committed the tort of false imprisonment (cf **AS [2], [45]**). The appellant's submissions have a tendency — by referring repeatedly to "liability to compensate" — to elide the issue of *liability* for the tort with the issue of the *damages* to be awarded after a finding

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18 See James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) 568–9 [17-020].

19 James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) 1514 [42-013]. See, eg, *Myer Stores Ltd v Soo* [1991] 2 VR 597 at 603 (Murphy J); *Spautz v Butterworth* (1996) 41 NSWLR 1 at 15–18 (Clarke JA); *McDonald v Coles Myer Ltd* [1995] Aust Torts Reports ¶81-361 at 62,690 (Powell JA).

20 [2012] 1 AC 245 at 281 [93] (Lord Dyson JSC). See also at 324 [253] (Lord Kerr JSC).

21 See [2019] ACTCA 16 at [23] (the Court).

of liability, as if upholding the Court of Appeal's decision in some way negates or denies the finding of liability (see **AS [24], [25], [28], [45]**). It is important to keep those issues separate.[22] The inevitability of lawful imprisonment does not provide a *defence* to the tort. If the appeal is dismissed, that will not deny that the respondent committed the tort of false imprisonment. It will simply recognise that a finding that a tort has been committed does not justify an *assumption* that compensable loss has occurred even when lawful detention was inevitable.

15. Because the inevitability of lawful imprisonment does not deny liability, it follows that it does not deny a plaintiff the opportunity to establish specific damage warranting an award of substantial damages (including aggravated damages) or exemplary damages. The fact that the appellant failed or abandoned any attempt to do so does not justify an assumption in his favour that there is some foundation for an award of substantial damages.

16. The appellant's generalised attack on the use of counterfactual reasoning is misplaced. While causation of damage in the tort of negligence is classically a question of fact,[23] treating it as such has nothing to do with damage being the gist of the action in negligence (as opposed to relevant only to an assessment of damages). Accordingly, there is no reason to adopt a different approach to false imprisonment merely because a court seeks to identify damage in that context only for the purpose of quantifying any award of damages, rather than also for the purpose of determining liability. As a matter of principle, in either case, "the court must ask what would have happened in fact if the tort had not been committed".[24] In order to assess the claimed loss a court must therefore ask what would have happened had the false imprisonment not occurred.[25] To conclude otherwise is to prefer a court to assess compensation groping in the dark with eyes shut

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22 See *Chappel v Hart* (1998) 195 CLR 232 at 270 [93(4)] (Kirby J).

23 See, eg, *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 412–413 (Mason CJ, Deane and Toohey JJ), 419 (Gaudron J).

24 *Bostridge v Oxlea NHS Foundation Trust* [2015] EWCA Civ 79 at [23] (Vos LJ; Etherton C and Clarke LJ agreeing).

25 See, eg, *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238 at 2260 [98] (Leveson P; Hallett and Ryder LJJ agreeing) ("the factual question"); *Fernando v Commonwealth* (2014) 231 FCR 251 at 268 [86], 283–4 [167]–[168]. See generally *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 at 515 (Mason CJ).

to the light.[26]

17. The appellant asserts that "the nature of the tort [of false imprisonment] denies recourse to a counterfactual analysis" but does not demonstrate why that is so (**AS [36]**). While "the answer to a question of causation will differ according to the purpose for which the question is asked",[27] the question is asked here in order to identify the appropriate amount of damages to award to compensate a plaintiff in accordance with the compensatory principle described at paragraph 8 above. It is consistent with that principle to observe that the appellant in this case would have been detained anyway and inevitably. The appellant offers no persuasive reason to the contrary.

A.2 Nominal damages

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18. According to the appellant, not awarding substantial damages "sets the tort, and the liberty it protects, at nothing" (**AS [46]**). But what the appellant means by this submission is necessarily that an award of *nominal damages* sets the tort at nothing. It is a necessary part of the appellant's argument for substantial compensatory damages that an award of nominal damages is inadequate to vindicate the appellant's asserted right not to be imprisoned (**AS [28]**).

19. The appellant's submission must be rejected. It is at odds with the very nature and availability of nominal damages, which are awarded to vindicate a plaintiff's right and record that a wrong was done to it.[28] "[N]ominal damages ... are vindicatory, not
20 compensatory".[29] As Lord Halsbury LC explained at the turn of the 20th century in *The Mediana v The Comet*, in a passage quoted with approval by Griffith CJ in *Baume v Commonwealth* in 1906 and that was described by Isaacs J in *Cunningham v Ryan* as "a passage in a judgment of great authority":[30]

> "Nominal damages" is a technical phrase which means that you have negatived anything like real damages, but that you are affirming by your nominal damages that

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26 See *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 659 [39] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), quoting *Bwllfa & Merthyr Dare Steam Collieries (1891) Ltd v Pontypridd Waterworks Co* [1903] AC 426 at 431 (Lord Macnaghten).

27 *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642 [45] (Gummow and Hayne JJ), cited in **AS fn 44**.

28 See generally *New South Wales v Stevens* (2012) 82 NSWLR 106 at 110–111 [18]–[21] (McColl JA;
30 Ward JA agreeing).

29 *New South Wales v Stevens* (2012) 82 NSWLR 106 at 112 [26] (McColl JA; Ward JA agreeing)). See also at 120-121 [74] (Sackville AJA; Ward JA agreeing).

30 [1900] AC 113 at 116, quoted in *Baume v Commonwealth* (1906) 4 CLR 97 at 116 and *Cunningham v Ryan* (1919) 27 CLR 294 at 314.

> there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

20. The appellant does not mount any express challenge to this longstanding understanding of the role or purpose of nominal damages. However, once it is recognised that nominal damages are available, it cannot be said that the tort is set at nothing unless substantial compensatory damages are awarded.

21. With this understanding of nominal damages in mind, it is apparent that the Court of Appeal's decision in this case is not inconsistent with Holt CJ's observation in *Ashby v White*[31] that "a remedy" must be available to vindicate a right where a plaintiff has been wronged (**AS [28]**) and that "every injury imports a damage" (**AS [26]**). As Viscount Haldane explained in *Neville v London Express Newspaper Ltd*, on the page cited by the appellant (**AS fn 27**), what this means is that "every infringement of such an absolute right gives a claim to nominal damages, even though all actual loss or injury is disproved".[32] It is the availability of nominal damages, when all other claims for damages fail, which secures the vindication of which Holt CJ spoke.

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A.3 Authorities

22. ***CPCF***. It is true that statements made in *CPCF v Minister for Immigration and Border Protection*[33] that are relevant to the first point in issue in this appeal do not form part of the *ratio* of that decision. That follows because the majority held that the detention in issue was authorised by legislation (**AS [18]–[23]**), meaning that it was unnecessary to consider whether the plaintiffs would have been entitled to substantial damages if that detention had been *unlawful* but the plaintiffs would have been detained *lawfully*.

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23. Nevertheless, this issue was addressed in the reasons of four Justices. The appellant correctly concedes that the separate judgments of Keane J[34] (who was a member of the majority) and Kiefel J[35] (as her Honour then was, in dissent) are consistent with *Lumba*,[36] and thus are contrary to his submissions in this appeal (**AS [21]–[22]**). However, the

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31 (1703) 2 Ld Raym 938; 92 ER 126.

32 [1919] AC 368 at 392.

33 (2015) 255 CLR 514.

30 34 (2015) 255 CLR 514 at 655–6 [510]–[512].

35 (2015) 255 CLR 514 at 620–1 [324]–[325].

36 [2012] 1 AC 245.

appellant mischaracterises the joint judgment of Hayne and Bell JJ (in dissent), who did *not* reject the reasoning in *Lumba* (see also **RS [20]**). To the contrary, their Honours held:[37]

> Whether this is a case in which only nominal damages should be allowed should not be decided on the facts recorded in the special case. Plainly, such a verdict is open in a case where a form of lawful detention was available and would have been effected. But it would not be right to foreclose the examination that can take place only at a trial of whether the differences between the form of detention (as to both place and conditions of detention) actually effected and the form of detention which could and would lawfully have been effected may warrant allowing more than nominal damages.

24. When this joint judgment is read as a whole (and particularly in light of [154]), it is apparent that Hayne and Bell JJ were concerned that, because the lawful detention that would have occurred in *CPCF* was in a *different place* and under *different conditions*, the special case provided an insufficient foundation to decide whether more than nominal damages were warranted. However, their Honours apparently accepted that nominal damages would have been appropriate if there were no material differences between the circumstances pertaining to the unlawful detention that actually occurred and the lawful detention that would otherwise have occurred. So much is confirmed by the answer their Honours proposed to the question reserved:[38]

> The detention of the plaintiff during some or all of the period from 1 July 2014 to 27 July 2014 was unlawful and the plaintiff is entitled to claim damages in respect of that detention. Both the duration of the unlawful detention and the amount of damages to be allowed for that detention (whether nominal or substantial) should be determined at trial.

25. In this case, the Court of Appeal found it inevitable that the appellant's periodic detention order would have been cancelled in any event and that he would have been imprisoned as a result.[39] Accordingly, he would have been detained *in prison*, just as in fact occurred.[40] In a case of that kind, *obiter dicta* of four Justices in *CPCF* supports the conclusion that only nominal damages should be awarded.

26. ***Fernando***. In *Fernando v Commonwealth*,[41] a Full Court of the Federal Court unanimously applied the conclusion in *Lumba*, which it noted had not been doubted in

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37 (2015) 255 CLR 514 at 570 [157] (emphasis added).

38 (2015) 255 CLR 514 at 572 (emphasis added).

39 *Lewis v Australian Capital Territory* [2019] ACTCA 16 at [52] (the Court).

40 *Lewis v Australian Capital Territory* [2019] ACTCA 16 at [7] (the Court).

41 (2014) 231 FCR 251.

the United Kingdom in the period since it was decided. In doing so, their Honours pointed out that the principle identified in that case was not a new one, observing that it was "a basic principle relevant to the award of compensatory damages under Australian common law as much as the common law of the United Kingdom".[42]

27. ***Plenty v Dillon***. Contrary to **AS [27]–[31]**, this Court's decision in *Plenty v Dillon*[43] does not stand as authority for the award of substantial damages for a trespass absent proof of any loss or damage (see also **RS [24]**). As the appellant correctly concedes, the 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" (**AS [31]**). Furthermore, particularly in light of the appellant's attempt to undermine the authority of the *obiter* statements in *CPCF* because only limited submissions are said to have been advanced on the point (**AS [23]**), it should be noted that the subject of damages was not argued *at all* in *Plenty v Dillon*.[44] Nothing in the judgment suggests that an award of nominal damages would not satisfy what Mason CJ, Brennan and Toohey JJ described as the plaintiff's entitlement "to some damages in vindication of his right".[45] While the joint judgment of Gaudron and McHugh JJ considered that vindication should be achieved "by a substantial award of damages",[46] their Honours did not command a majority on this point. And in any event, as already noted, the point was not argued. As such, *Plenty v Dillon* says nothing as to the appropriateness of a counterfactual analysis of the kind endorsed in *Lumba* (cf **AS [31]**).

28. **AS [30]** records that Mr Plenty was ultimately awarded substantial damages by a Master of the Supreme Court of South Australia.[47] These damages were *not*, however, awarded for mere violation of a right to liberty. Judge Kelly awarded those damages as damages for consequential losses (including a depressive illness, which accounted for the overwhelming majority of the award), $15,000 in aggravated damages for the "distress" caused to him by being humiliated in front of his friends, which was said to be "very

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42 (2014) 231 FCR 251 at 268 [82] (Besanko and Robertson JJ). See also at 283 [166] (Barker J).

43 (1991) 171 CLR 635.

44 (1991) 171 CLR 635 at 645 (Mason CJ, Brennan and Toohey JJ), as is confirmed in the sentence immediately following that quoted in **AS [27]**.

45 (1991) 171 CLR 635 at 645.

46 (1991) 171 CLR 635 at 655.

47 *Plenty v Dillon* (1997) 194 LSJS 106.

substantial indeed", and $5,000 in exemplary damages.[48]

29. ***United Kingdom authorities***. The majority's reasoning in *Lumba* is now well entrenched in the common law of the United Kingdom. The Supreme Court referred to it with approval in *R (Kambadzi) v Secretary of State for the Home Department*,[49] *R (O) v Secretary of State for the Home Department*[50] and *R (Hemmati) v Secretary of State for the Home Department*.[51] The earlier authorities cited by the appellant do not undermine that reasoning.[52]

30. *Roberts v Chief Constable of the Cheshire Constabulory*[53] was not correctly decided, for the reasons identified in *Lumba*.[54]

10 31. *Christie v Leachinsky*[55] was about whether police officers were liable for false imprisonment for arresting the plaintiff on a charge under a statute that conferred no power of arrest, when the officers had an alternative lawful ground of arrest that they did not purport to rely upon at the time of arresting the plaintiff (see **AS [32]**; **RS [29]**). While nothing is said in the speeches in the House of Lords to suggest that nominal damages might be awarded, that can be readily explained on the basis that the assessment of damages was not in issue in the appeal. As Vos LJ observed in *Bostridge v Oxleas NHS Foundation Trust*, "the Court of Appeal, which was substantially upheld, had remitted the assessment of those damages to a jury. [Counsel] was unable to say what arguments were addressed to that jury or what it ultimately decided".[56]

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48 *Plenty v Dillon* (1997) 194 LSJS 106 at 112–13, See also James Edelman, 'Vindicatory Damages' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 343 at 357.

49 [2011] 1 WLR 1299.

50 [2016] 1 WLR 1717. See also *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238 at 2262 [104], 2262–3 [108] (Leveson P; Hallett and Ryder LJJ agreeing).

51 [2019] 3 WLR 1156 at 1193 [112] (Lord Kitchin JSC).

52 Varuhas's observation that cases might have been decided differently in the past had the point taken in *Lumba* been applied does not advance the appellant's case (cf **AS [34]**). Because the point was not argued in earlier cases, nothing of precedential value can be drawn from them: *CSR Ltd v Eddy* (2005) 226 CLR 1 at 11 [13] (Gleeson CJ, Gummow and Heydon JJ). And it is otherwise hardly surprising to observe that a different result might have been reached if a party had presented a different argument.

53 [1999] 1 WLR 662.

30 54 *Lumba* [2012] 1 AC 245 at 280–1 [91]–[93] (Lord Dyson JSC).

55 [1947] AC 573.

56 [2015] EWCA Civ 79 at [24].

32. In *Kuchenmeister v Home Office*,[57] the immigration authorities did have a power available to them under which the plaintiff could have been lawfully detained,[58] but the defendant sought to rely upon it only to deny liability, not substantial compensatory damages.[59] In particular, it does not appear that the defendant sought any finding that the authorities *would* have exercised that alternative power lawfully had the plaintiff not been detained unlawfully. This explains why Barry J framed the "one vital question in this case" as proceeding upon an assumption that "the immigration authorities do not put into operation their powers to grant or refuse leave to land [being a gateway to the alternative power of detention]".[60] In these circumstances, nothing can be drawn from the fact that "[t]here 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" (cf **AS [33];** see also **RS [31]**). There is nothing to suggest that any finding about what "would have been" was ever sought, and thus no occasion to analyse the consequences of what "would have been" for an award of damages.

B. VINDICATORY DAMAGES

33. The second ground of appeal concerns the appellant's claim for so-called "vindicatory damages". Precision is required, because vindication can mean different things (and could also refer to one or both of the *purpose* or the *effect* of the award).[61] The appellant appears to conceive of vindicatory damages as damages awarded for the purpose of recognising that a wrong has been committed, separate from any compensatory purpose (see **AS [48], [50]**). These submissions proceed on this understanding of the appellant's case.

B.1 Australian case law

34. Contrary to **AS [48]**, substantial vindicatory damages within the above conception do not have "firm roots in the case law, including in the context of false imprisonment". In particular, as submitted at paragraphs 27 to 28 above, *Plenty v Dillon* is not an authority

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57 [1958] 1 QB 496.

58 See [1958] 1 QB 496 at 507, 509 (referring to art 2(2) of the *Aliens Order 1953* (UK) SI 1953/1671).

59 See the summary of argument at [1958] 1 QB 496 at 502 (Rodger Winn).

60 [1958] 1 QB 496 at 509.

61 See generally Normann Witzleb and Robyn Carroll, 'The Role of Vindication in Torts Damages' (2009) 17 *Tort Law Review* 16 at 17–21.

for vindicatory damages within the above conception.

35. Nor does resort to damages in the tort of defamation assist. The award of substantial damages for defamation in order to "vindicate" a plaintiff's reputation[62] is not an example in Australian law of non-compensatory "vindicatory" damages (cf **AS [48]**). Such an award is squarely within the compensatory paradigm. As Windeyer J explained in *Uren v John Fairfax & Sons Pty Ltd*, a plaintiff "gets damages [for defamation] because he was injured in his reputation .... For this reason, compensation by damages operates in two ways – as a vindication of the plaintiff to the public and as consolation to him for a wrong done".[63] Damages "signal to the public the vindication of the [plaintiff's] reputation"[64] so as to compensate for the loss to reputation in the public's eyes. It "looks to the attitude of others to the [plaintiff]"[65]. The vindicatory component of damages for defamation is awarded because the plaintiff "must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge" if the defamatory statement "emerges from its lurking place at some future date".[66] This recalls the remark in *Amaca Pty Ltd v Latz* that damages may compensate for loss that will "probably be suffered" within the paradigm of the compensatory principle (see paragraph 9 above).[67] That damages to "vindicate" a plaintiff's reputation serve a compensatory purpose explains why, in *Carson v John Fairfax & Sons Ltd*, Mason CJ, Deane, Dawson and Gaudron JJ said that any amount awarded on this account "must not exceed the amount appropriate

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62 See, eg, *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 150 (Windeyer J); *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 60 (Mason CJ, Deane, Dawson and Gaudron JJ).

63 (1966) 117 CLR 118 at 150.

64 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61 (Mason CJ, Deane, Dawson and Gaudron JJ).

65 *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 at 61 (Mason CJ, Deane, Dawson and Gaudron JJ); *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 at 347–8 [60], 349 [67] (Hayne J).

66 *Brooke v Cassell & Co Ltd* [1972] AC 1027 at 1071 (Lord Hailsham). See also *Crampton v Nugawela* (1996) 41 NSWLR 176 at 190, 194–5 (Mahoney ACJ; Handley JA agreeing), 202 (Giles AJA). See generally Normann Witzleb et al, *Remedies: Commentary and Materials* (Thomson Reuters, 6th ed, 2015) 358 [4.355]; Alastair Mullis and Richard Parkes (eds), *Gatley on Libel and Slander* (Sweet & Maxwell, 12th ed, 2013) at 330–5 [9.4]; Matthew Collins, *Collins on Defamation* (Oxford University Press, 2014) at 416 [21.04]–[21.05].

67 (2018) 92 ALJR 579 at 595 [85] (Bell, Gageler, Nettle, Gordon and Edelman JJ). See also at 587–8 [41] (Kiefel CJ and Keane J).

to *compensate* the plaintiff for any relevant harm he or she has suffered".[68]

B.2 No need to develop the common law

36. As submitted at paragraphs 18 to 20 above, the work of the suggested category of vindicatory damages is already done, and has for many years been done, by an award of nominal damages.

37. Further, in some cases exemplary damages may also serve a vindicatory purpose,[69] as the appellant himself acknowledges (**AS [49]**). This Court has said that "conscious wrongdoing in contumelious disregard of another's rights"[70] describes at least the greater part of the relevant field in which exemplary damages may be awarded. The focus of such an award is on the wrongdoer, because the "party wronged will receive just compensation for the wrong that is suffered" such that "[i]f exemplary damages are awarded, they will be paid in addition to compensatory damages and, in that sense, will be a windfall in the hands of the party who was wronged".[71] Here, the appellant having abandoned his claim to exemplary damages, no question of whether a vindicatory award of such damages would have been appropriate arises in this appeal.

38. In light of the established vindicatory functions of the award of both nominal damages and exemplary damages, the appellant has not established that there is any need to develop the common law in order to fill a lacuna. In particular, he has not established that existing principles are insufficient to support an award of damages to ameliorate all of the consequences of a wrong.[72] Indeed, were vindicatory damages to be recognised as a separate category, that category would not be concerned with the *consequences* of

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68 (1993) 178 CLR 44 at 66 (emphasis added). See also at 59 fn 38; *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1315].

69 See *NSW v Ibbett* (2006) 229 CLR 638 at 649–50 [40] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ), approving Lord Hutton's statement in *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 at 147–149 that "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".

70 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ), quoting Knox CJ in *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77.

71 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

72 James Edelman, 'Vindicatory Damages' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 343 at 354–5.

wrongdoing at all.[73] That tends to highlight that "[t]o make a separate award for vindicatory damages is to confuse the *purpose* of damages awards with the nature of the award".[74]

B.3 Uncertainty

39. Not only is there no need to develop a category of "vindicatory damages", but if accepted it would be, to adopt Lord Dyson's description in *Lumba*, to let "an unruly horse loose on our law",[75] including because it is not apparent when such damages would appropriately be available, or how such damages would be quantified.

40. The appellant's comparison to general damages is inapt (**AS [52]**). While at large, their quantification remains guided by the compensatory principle, whereas vindicatory damages on the appellant's case should be awarded precisely because "ordinary compensatory damages are not available" (**AS [53]**). The Court should not lead the common law into such uncertain terrain.

B.4 Foreign case law

41. None of the foreign case law relied upon by the appellant provides compelling support for the recognition of vindicatory damages as part of the common law of Australia.

42. ***Rees.*** The appellant places chief reliance upon the "conventional" award of £15,000 in *Rees v Darlington Memorial Hospital NHS Trust*[76] (**AS [50]**). However, the reasoning of the majority in favour of that award is not persuasive. By contrast, the dissenting judgments are powerful, and more consistent with the incremental approach to the development of the common law of Australia. McGregor referred to *Rees* as an "invention" that was "controversial".[77] *Clerk & Lindsell on Torts* explains it as

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73 James Edelman, 'Vindicatory Damages' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 343 at 356.

74 *Lumba* [2012] 1 AC 245 at 320 [236] (Lord Collins JSC) (emphasis in original), the point being that all damages awards (including compensatory awards) have at least the incidental purpose of vindicating rights.

75 [2012] 1 AC 245 at 283–4 [101].

76 [2004] 1 AC 309.

77 Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed, 2014) at 1557 [38-285], [38-287]. See also James Edelman, *McGregor on Damages* (Sweet & Maxwell, 20th ed, 2018) at 1421 [40-289], 1422 (heading (2)).

compensation for non-pecuniary loss.[78]

43. ***Mosley*. AS [50] fn 72** refers to *Mosley v News Group Newspapers Ltd*,[79] where Eady J awarded £60,000 for breach of privacy, explaining that this sum "marks the fact that an unlawful intrusion has taken place while affording some degree of *solatium* to the injured party" in circumstances where "the traditional object of *restitutio* is not available".[80] While that language suggests that there was a vindicatory component of the award, as explained in the 18th edition of *McGregor on Damages*, *Mosley* can (and in light of *Lumba*, should) be understood on a compensatory footing alone: "£60,000 can be regarded as justifiable simply as *solatium* for injury to feelings, distress and loss of standing in the community".[81] The figure reflected a contempory understanding of the damage caused by a breach of privacy, resulting in a higher compensatory figure than might previously have been considered necessary to achieve that compensatory purpose.[82]

44. ***Privy Council*. AS [50] fn 73** refers to a series of Privy Council decisions concerning breaches of constitutional rights. For example, in *Attorney General of Trinidad and Tobago v Romanoop*, Lord Nicholls said "[t]he fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches".[83] This award in question was authorised by an express constitutional provision (s 14) that permitted application to be made to the High Court for "redress" of a constitutional violation. As such, the context was far removed from the tort of false imprisonment. Further, the Privy Council itself has recognised that the award of damages on this basis substantially overlaps with traditional exemplary damages.[84]

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78 Michael A Jones, Anthony M Dugdale and Mark Simpson (eds), *Clerk & Lindsell on Torts* (Sweet & Maxwell, 22nd ed, 2017) at 2024–5 [28-63].

79 [2008] EMLR 20.

80 [2008] EMLR 20 at [231] (emphasis in original).

81 Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009) at 1716 [42-010]. The analysis in the 19th edition is different and briefer, presumably due to the decision in *Lumba*: see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed, 2014) at 603–4 [16-013].

82 Compare the higher compensatory figures for discrimination in light of contemporary understandings: see *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 at 366 [117] (Kenny J; Besanko and Perram JJ agreeing).

83 [2006] 1 AC 328 at 336 [19].

84 *Takitota v Attorney General of the Bahamas* [2009] 4 LRC 807 at 814 [13] (Lord Carswell).

For that reason, the Privy Council recognised that "it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights".[85] Thus, in circumstances where exemplary damages and nominal damages already exist to serve a vindicatory purpose, there is no need to introduce a new and overlapping category of vindicatory damages.

45. ***New Zealand.*** The New Zealand authorities cited in **AS fn 74** do not support the appellant. The majority in *Dunlea v Attorney-General* avoided the question "whether a different approach should be adopted to the fixing of compensation for a breach of the Bill of Rights compared with the fixing of damages for a tort arising out of essentially the same facts".[86] Thomas J, in dissent, examined the quantification of compensation in closer detail, and his Honour adopted reasoning that emphasised the importance of vindicating the statutory Bill of Rights.[87] But even then, his Honour said that damages for a breach of the Bill of Rights "remains compensatory but includes the value of the right".[88] The latter point is consistent with the judgments in *Simpson v Attorney-General (Baigent's Case)*.[89] By contrast, the appellant's case on this ground proceeds from an avowedly non-compensatory basis (see **AS [48]**).

46. ***United States***. The appellant does not refer to United States authorities. However, decisions of the Supreme Court support the conclusion that was reached in *Lumba*, and by the Court of Appeal in this case. Those decisions concern 42 USC §1983, which creates a civil action for deprivation of any constitutional right, privilege or immunity. They are relevant by analogy because it has been held that this provision creates "a species of tort liability",[90] and damages awarded under it are "ordinarily determined according to principles derived from the common law of torts".[91] As in Australia, "[p]unitive damages aside, damages in tort cases are designed to provide '*compensation* for the injury caused

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85 [2009] 4 LRC 807 at 814 [13], 815–6 [15].

86 [2000] 3 NZLR 136 at 149 [37].

87 [2000] 3 NZLR 136 at 157 [67]–[68].

88 [2000] 3 NZLR 136 at 158 [70]. *Taunoa v Attorney-General* [2008] 1 NZLR 429 was likewise heavily influenced by the statutory Bill of Rights context, which was said to require an "adequate" remedy to vindicate the wrong, and a purpose to deter any repetition of the wrong.

89 [1994] 3 NZLR 667 at 677–8 (Cooke P), 692 (Casey J), 703 (Hardie Boys J).

90 *Imbler v Pachtman*, 424 US 409 at 417 (1976); *Carey v Piphus*, 435 US 247 at 253 (1978).

91 *Memphis Community School District v Stachura*, 477 US 299 at 306 (1986) (Powell J).

to plaintiff by defendant's breach of duty'".[92] Thus, it is established doctrine in the United States that contravention of a constitutional right entitles a plaintiff to substantial damages under §1983 only if injury is proved. "[T]he abstract value of a constitutional right may not form the basis for §1983 damages".[93] To hold otherwise would result in damages that are "too uncertain to be of any great value to plaintiffs, and would inject caprice into determinations of damages in §1983 cases".[94] Consistently with the submissions made above, the Supreme Court has held that "nominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury".[95]

B.5 Quantification of any award of vindicatory damages

47. If, contrary to the above submissions, vindicatory damages are available, then their quantification must still be squared with the unchallenged finding that the appellant's *lawful* imprisonment was inevitable.

48. It would be inappropriate to award damages to "vindicate" an absolute right to liberty when the appellant had no such right. Indeed, to vindicate such a right would be flatly inconsistent with the unchallenged and inevitable operation of the applicable statutory regime. It would be incongruous to award substantial damages for violation of a "right not to be imprisoned" of a person who had in fact been sentenced to imprisonment as a result of the commission of a serious crime, and who had then failed to present himself to serve that sentence by periodic detention as required. When attention is paid to the unserved sentence of imprisonment, it is not "difficult to see how 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" (cf **AS [51], [28]**). To the contrary, the award of nominal damages was entirely appropriate.

C. ORDERS

49. For the above reasons, the appeal should be dismissed. As an intervener, no costs order for or against the Commonwealth should be made.

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92 *Memphis Community School District v Stachura*, 477 US 299 at 306 (1986) (Powell J).

93 *Memphis Community School District v Stachura*, 477 US 299 at 308 (1986) (Powell J).

94 *Memphis Community School District v Stachura*, 477 US 299 at 310 (1986) (Powell J).

95 *Memphis Community School District v Stachura*, 477 US 299 at fn 11 (1986) (Powell J).

PART V ESTIMATED HOURS

50. The Commonwealth seeks no more than 20–30 minutes to present oral argument.

Dated: 5 February 2020

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IN THE HIGH COURT OF AUSTRALIA

CANBERRA REGISTRY NO C14 OF 2019

BETWEEN: STEVEN JAMES LEWIS

Appellant

AND: THE AUSTRALIAN CAPITAL TERRITORY

Respondent

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ANNEXURE TO THE INTERVENER'S SUBMISSIONS

LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

1. *Aliens Order 1953* (UK) SI 1953/1671
2. *Australian Crime Commission Act 2002* (Cth) s 31
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3. *Australian Federal Police Act 1979* (Cth) s 14A
4. *Australian Security Intelligence Organisation Act 1979* (Cth) pt III, div 3
5. *Biosecurity Act 2015* (Cth) s 103
6. *Crimes Act 1914* (Cth) pt IAA div 4
7. *Customs Act 1901* (Cth) ss 210, 219L, 219Q, 219S
8. *Defence Act 1903* (Cth) ss 46(7)(f), 72P(2), 116V
9. *Defence Force Discipline Act 1982* (Cth) ss 68, 89
10. *Migration Act 1958* (Cth) s 189

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