THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2018/264

High Court Record No. 2013/4516P

UNAPPROVED
NO REDACTION NEEDED

Whelan J.
Power J.
Murray J.

BETWEEN:

G E

PLAINTIFF/RESPONDENT

- AND -

THE COMMISSIONER OF AN GARDA SÍOCHÁNA, THE GOVERNOR OF CLOVERHILL PRISON, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

DEFENDANTS/APPELLANTS

JUDGMENT of Mr. Justice Murray delivered on the 16th day of April 2021

The issue

1. The defendants in this action for false imprisonment raise a novel and important issue regarding the award of general damages for that tort. They say that where a plaintiff establishes that he or she has been unlawfully confined, a defendant will defeat any consequent claim for

compensatory damages if it can be shown that had the plaintiff not been *unlawfully* detained he or she could and would have been *lawfully* detained. A plaintiff, it is said, should not obtain compensation for a loss that would have been incurred irrespective of the defendant's wrong. The plaintiff disputes this, contending that the account of the law urged by the defendants both misinterprets the elements of the tort of false imprisonment and would, if correct, fail to afford sufficient weight to the importance of the right to personal liberty as protected by the Constitution.

2. The trial judge ([2018] IEHC 293) agreed with the plaintiff's analysis. For the reasons that follow I believe she was correct to do so. While a court in determining what is just and reasonable compensation for an unlawful detention may take account of all circumstances giving rise to and attending that detention, there is no rigid principle of Irish law that extinguishes the right of a person who has been unlawfully detained to compensatory damages by reference to a rule of '*but for*' causation of the kind that has been recognised in other jurisdictions and was contended for by the defendants in this case**.** I would accordingly dismiss this appeal.

The facts

3. The plaintiff is a non-national. The defendants believe that he is from Nigeria, although he has claimed that he is from Sierra Leone. He arrived in Ireland in 2008 and sought asylum in the State. His application was refused in 2009, following which he made an application for subsidiary protection. On August 1 2011 – while that application was still pending - he was arrested and detained by the Gardaí in Dundalk when travelling on a bus from Northern Ireland. He was refused permission to land in the State pursuant to s. 4(3)(e), (g) and (h) of the

Immigration Act 2004. Those grounds, respectively, were that the plaintiff being a non-national and not being exempt from the requirement to have an Irish visa was not the holder of a valid Irish visa, that he was not in possession of a valid passport or other equivalent document issued by or on behalf of an authority recognised by the Government which established his identity and nationality, and that he intended to travel to Great Britain or Northern Ireland and would not qualify for admission to those jurisdictions if he arrived there from a place other than the State.

4. The plaintiff was thereupon arrested. The relevant power of arrest arose from s. 5(2) of the Immigration Act 2003. That provision applies to a person whom an immigration officer or a member of the Garda Síochána suspects has been unlawfully in the State for a continuous period of three months and who *inter alia* has been refused leave to land. Following his arrest, the plaintiff was detained overnight in Dundalk Garda Station on foot of a detention order directed to the Member in Charge of that station and stated to be made in exercise of the powers conferred upon the relevant immigration officer by s. 5(2) of the 2003 legislation. The order stated that the detention was pending the making of arrangements for the plaintiff's removal from the State. The following day the plaintiff was released but was immediately re-arrested and detained on foot of a fresh detention order made out to the Governor of Cloverhill Prison. That order was made out on the same basis and by the same officer as the first. The plaintiff was brought to Cloverhill Prison later that day.

5. On 9 August, the plaintiff applied to the High Court pursuant to Article 40.4.1° of the Constitution for an enquiry into the legality of his detention. Ryan J. (as he then was) found that the plaintiff's detention was lawful. The plaintiff appealed that decision to the Supreme Court. On August 19, and while this appeal was pending, his application for subsidiary

protection was refused. On 26 August 2011, the Supreme Court (Denham C.J., Fennelly J. and O'Donnell J.) heard the plaintiff's appeal from the Order of Ryan J. and decided that his detention had been unlawful, ordering his release accordingly ([2011] IESC 41).

6. The basis for the decision of the Supreme Court lay in the matters it determined must appear on the face of a warrant of the kind used to ground the plaintiff's detention. The Court ruled that the warrant should have recorded the fact of the refusal of permission to land and that it should have recorded that the reason for the arrest and detention of the plaintiff was that the immigration officer in question had reasonable cause to suspect that the plaintiff was a non-national who had been unlawfully in the State for a continuous period of less than three months. Because the warrant recorded neither of these requirements, as the Supreme Court determined them to be, the detention was unlawful.

7. The decision of the Supreme Court was delivered at 12.40 pm on August 26. At 3 pm on that day the plaintiff was released from Cloverhill Prison. Immediately following that release the plaintiff was rearrested and detained on foot of a further detention order. That order contained the information that the Supreme Court determined to be requisite elements of the instrument but had been absent from the first two such orders. It was duly signed by the arresting immigration officer. On 30 August, the plaintiff applied to the High Court for a further enquiry into the lawfulness of his detention. He relied in that regard upon the failure of the first, second and third defendants to release him promptly on foot of the Order of the Supreme Court of 26 August.

8. That inquiry came before Hogan J. who found that the delay in releasing the plaintiff on 26 August 2011 was unlawful and that the plaintiff ought to have been released at 1.15 pm

rather than at 3 pm. It was held that as a result the plaintiff had been deprived of his constitutional right to liberty for that period, although the Court decided that the violation was inadvertent. Hogan J. found that the subsequent detention on foot of the new order was not unlawful. Hogan J. also determined that from August 2 there was an intention on the part of the defendants to remove the plaintiff from the State and to return him to Nigeria. The plaintiff remained in detention until 22 September 2011 when he was released.

The proceedings

9. These proceedings were instituted in May 2013. The plaintiff claimed damages for false imprisonment and/or for deprivation of his constitutional right to liberty from 1 August to 26 August and including the period from 12.40 to 3 pm on 26 August 2011. The trial lasted three days. Much of this was taken up with the cross-examination of the plaintiff. That cross-examination was largely directed to issues of credit, some of it going back to the circumstances of the plaintiff's application for asylum and the information given by him to the authorities for that purpose.

10. Originally, the plaintiff's claim for asylum had been based upon his alleged involvement in a youth campaign in Freetown, Sierra Leone. He had said that as a result of his activities on behalf of that movement and in response to a rape perpetrated by the son of a local police officer, he had received threats from the police officer and that his home was burnt down. He claimed that it was in those circumstances he fled Sierra Leone. The Refugee Applications Commission recommended that he should not be declared a refugee, finding that the plaintiff had little knowledge of Sierra Leone. That decision was upheld by the Refugee Appeals Tribunal. In September 2009 the Minister accepted this recommendation and decided to refuse to declare the plaintiff a refugee.

11. When he was arrested on August 1 2011 the plaintiff filled out a landing form in which he cited Sierra Leone as his country of nationality. As I have noted, this repeated the claim he made when applying for asylum in 2008. Based on the presence of Nigerian telephone numbers on his mobile phone, the Gardaí determined that the plaintiff was, in fact, from Nigeria. Eventually, he filled out a second landing form citing Nigeria as his country of nationality. He subsequently claimed that this was done under pressure from the Gardaí.

12. The plaintiff was cross-examined at some length during the hearing around these matters. The cross-examination was directed to establishing that the plaintiff was not from Sierra Leone. It revealed that he did not know the international dialling code for that country (although he did know the code for Nigeria). It was put to him that the interview he underwent at the time of his asylum application similarly disclosed little knowledge about Sierra Leone. He was cross examined about a Nigerian telephone number appearing in his phone under the description '*Mum'* which, the plaintiff claimed, referred to an elderly asylum seeker whom the plaintiff had met in Cork and who had returned to Nigeria. He said in evidence that this person was not a relative of his, although his solicitor in a letter written on his behalf in 2011 had said that the person was his aunt. Moreover, in 2009/2010 he had submitted to the Registrar of Marriages what purported to be a Sierra Leonean birth certificate and driving licence for the purpose of his marriage to a Dutch national in 2010. When asked why in 2015 he had failed to respond to queries from the Irish Naturalisation and Immigration Service raised in connection with a further application he had by then made for subsidiary protection, he said that he was attempting to obtain documentation from Sierra Leone (he claimed that all of his personal papers had been destroyed in the fire in Freetown). He said that it was only in 2016 that he had been able to procure a Sierra Leonean birth certificate.

The High Court judgment

13. The critical findings of the trial judge as to fact and law were six fold. First, the Court referred to the decision of the United Kingdom Supreme Court in *R (WL (Congo)) v. Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245 ('*Lumba*'). It was the defendants' case that in *Lumba* a majority of the United Kingdom Supreme Court had decided that where a person had been unlawfully detained but could and would on the following of the correct procedure for the detention have been lawfully detained, an entitlement to only nominal damages arises - unless the circumstances were such as to give rise to a claim for exemplary or punitive damages. Citing passages from the judgments of Lord Dyson and Lord Kerr in that case, the trial judge (at para. 63) identified the essential question before the Court as whether the fact that the illegality in the detention arose from '*technical omissions*':

> '*lessen the import of the plaintiff's false imprisonment in circumstances where the defendants argue that the plaintiff would have been in lawful detention for the period in question but for the fact of certain omissions on the face of the detention warrant*'

14. Second, the High Court agreed with the contention advanced by the plaintiff that '*the approach of the UK Supreme Court in Lumba to the question of the assessment of compensatory damages cannot be said to reflect the law in this jurisdiction*' (at para. 66). That conclusion followed from the consideration that the tort of false imprisonment is a vindication of the guarantee of personal liberty in Article 40.4.1° of the Constitution. The stipulation there that no citizen shall be deprived of his personal liberty save in accordance with law dictated that the court could not accept that (at para. 67):

> '*the plaintiff's period of false imprisonment should be viewed as a lesser infringement of the constitutional guarantee to personal liberty since it only came about because of omissions of a technical nature ... the fact of the matter is that the plaintiff was wrongly deprived of his liberty for some twenty six days, a deprivation which was not in due course of law, as required by the Constitution and which to my mind cannot be remedied by an award of €1.00 as urged by counsel for the defendant.'*

15. Third, the judge concluded that there was no oppressive conduct by the Gardaí on 1 August and thus that there was no basis on which an award of exemplary damages could be made. She found that the Gardaí had acted properly at all times and that there was '*nothing unsavoury'* in the manner of the Garda investigation on August 1. She decided that the plaintiff was not put under any pressure to say that he was from Nigeria, and that there was no basis in the evidence for the plaintiff's claim that the second landing card was filled out under pressure.

16. Fourth, a claim for aggravated damages by the plaintiff was similarly dismissed. The cross-examination, while described by the Court as robust and while relating to matters collateral to the issue of his false imprisonment, was held not to be unfair and the judge said that it did not give rise to circumstances grounding the jurisdiction to award exemplary damages as identified in *Conway v. Irish National Teachers Organisation* [1991] 2 IR 305.

17. Fifth, the Judge felt that there were what she described as '*credibility deficits'* in the plaintiff's evidence. She focussed in this regard upon the plaintiff's evidence as to his nationality ('*less than forthcoming'*) and the discrepancy between the instructions given to his solicitors as reflected in their letter of 2011 to the Minister and the evidence given in Court as

to his relationship with the person described as '*Mum'* in his telephone contacts ('*gave no acceptable explanation as to why his solicitors would have advised the immigration authorities'* as they did). The Court also addressed the evidence he tendered that he did not have identity documents to give to the authorities in 2015 when he had provided such documents in 2009/2010 ('*I did not find the plaintiff's explanation ... to be a satisfactory explanation in all the circumstances'*). The judge further rejected the plaintiff's evidence regarding the reason he gave two different addresses to the arresting Gardaí. He had said in evidence that he did this because of Garda intimidation. The judge found that this explanation was not credible.

18. Sixth and finally, the trial judge fixed what she described as '*compensatory damages'* in the case at €7,500. She explained this as follows (at para. 96):

> '*taking account of the credibility deficits in the plaintiff's evidence, the Court sets the compensation for the tort of false imprisonment over twenty-six days and for the injury caused to the plaintiff as a result, specifically his unchallenged evidence as to the effect prison had on him, at €7,500'*.

19. After delivering her judgment and hearing the parties the High Court judge made a differential costs order pursuant to s. 17(5) of the Courts Act 1981 as substituted by s. 14 of the Courts Act 1991. The plaintiff was thus awarded his costs at the Circuit Court level but was ordered to pay the defendants the difference between their costs at Circuit Court level and High Court costs.

The submissions of the parties

20. The defendants do not dispute that the plaintiff was falsely imprisoned. Instead, they say that he is entitled only to nominal damages. In their submission, it was '*inevitable'* that the plaintiff would have been lawfully detained from 1 August 2011 had the Gardai been aware of the necessary recitals to a detention order issued under s. 5(2) of the Immigration Act 2003. Relying upon the decision in *Lumba* as subsequently explained by the Court of Appeal for England and Wales in *Parker v. The Chief Constable of Essex Police* [2018] EWCA Civ. 2788, [2019] 1 WLR 2238 ('*Parker'*) the defendants submit that the specific proposition they advance in respect of the tort of false imprisonment is merely an application of the general principle governing the award of compensatory damages. The object of such an award is to place the plaintiff in the position he would have been in but for the wrong, and this (the defendants contend) may involve an assessment of what would have happened but for the commission of the wrong. Here, but for the procedural error, the plaintiff would have been detained and, it follows on this argument, he should not obtain damages to compensate him for a loss of liberty that he would have suffered in any event. His experience of prison (it is said) was the consequence of the misconduct that justified his arrest, not of the errors in the detention order identified by the Supreme Court.

21. The defendants reject the suggestion that the contention they advance undermines the seriousness of a breach of the constitutional right to liberty. That right is vindicated, they contend, by the finding of the court that there had been an unlawful detention, the order for the plaintiff's release, and the award of nominal damages. That, they say, marks the seriousness of the tort or breach of constitutional right that has been committed but does so without providing a windfall to the plaintiff. The defendants further submit that the authorities demonstrate that the fact that a wrong comprises a breach of a constitutional right does not

entitle a plaintiff to compensatory damages if the plaintiff has suffered no damage. Reference was made to the decisions in *Kearney v. Minister for Justice* [1986] IR 116, *Redmond v. Minister for Environment (No. 2)* [2006] 3 IR 1, and *SF (A Minor) v. Director of Oberstown Children Detention Centre and ors.*, [2017] IEHC 829, [2018] 3 IR 466 in each of which nominal damages were awarded following a breach of constitutional rights.

22. On this – the principal issue in the appeal – the plaintiff says that the decision in *Lumba* was a sea change in the common law of the United Kingdom, citing *Halsbury's Laws of England* 1st Ed. 1913 at para. 1551. He contends that the reasoning of the majority of the United Kingdom Supreme Court in that case should not and cannot be introduced into the law of this jurisdiction other than by legislative change. Moreover, he contends, to import a causal requirement as a precondition to the recovery of compensatory damages would render the tort of false imprisonment '*basically ineffective'* requiring recourse to be had to an action for damages for breach of the plaintiff's constitutional right to liberty. He stresses that the plaintiff in this case has already obtained court determinations as to the legality of his detention *via* his applications for inquiries pursuant to Article 40.4.1° of the Constitution. Were the defendants correct in their contention that it is appropriate in this case to order only nominal damages, the plaintiff's constitutional rights being vindicated by that award and by any associated declaratory relief granted to him, he says that this would render civil actions for damages futile in the circumstances of his case. The plaintiff further contends that even if the defendants are correct on this issue, the onus is on them to satisfy the court that a plaintiff would have been deprived of his personal liberty lawfully had he not been deprived of it unlawfully. The plaintiff says that the defendants neither sought nor obtained such a finding of fact from the trial judge.

23. There is a second question arising from the plaintiff's cross appeal. He contends that the trial judge erred in taking account of her findings as to the plaintiff's lack of credibility in determining the level of damages to be awarded to him. He emphasises in this regard the fact that the issues of credibility identified and relied upon by the trial judge concerned matters antecedent to the false imprisonment, and were unconnected with the fact or legality of his detention or its effect upon him. On this issue, the defendants submit that the trial judge was correct in having regard to the plaintiff's credibility in fixing compensatory damages.

24. It is important to note that the position adopted by the defendants was directed entirely to the contention that the decision in *Lumba* represented the law in this jurisdiction and that, accordingly, the '*but for'* analysis applied in that case should have been adopted by the High Court judge resulting in an award of only nominal damages. The appeal was not argued on the basis that lower compensatory damages ought to have been ordered having regard to the circumstances of the case. While the notice of appeal seeks *inter alia* remittal of the action to the High Court, and while there is a general ground of appeal to the effect that the judge failed to consider '*the principle of compensatory loss'*, it was not suggested there or in the defendants' written legal submissions that if the plaintiff was entitled to compensatory damages the High Court erred in its decision as to the quantum of such an award.

Lumba

25. *Lumba* was the centrepiece of the defendants' appeal, and it merits detailed consideration. It emerged from a highly unusual circumstance arising, in turn, from the statutory discretion vested in the respondent Home Secretary to release from detention and pending their deportation, foreign national prisoners who had been convicted of offences but had served their

sentences. A scheme was published by the respondent Home Secretary identifying the basis on which she would exercise that discretion. That scheme presumed that these prisoners would be released unless their continued *detention* could be justified. However, in fact, the Home Office operated a secret and unpublished policy that they would be detained unless their *release* could be justified. The applicants (two of a large number of persons who had been detained on foot of this secret policy and whose appeals came before the Supreme Court together) sought declaratory relief that their detention pursuant to that policy was unlawful. They also sought damages for false imprisonment. In the High Court, it was held that the policy was not lawful. However, the judge found that the claim for damages for false imprisonment failed. He reasoned that a detention pursuant to that policy would only have been unlawful if the applicants would not have been detained had the published policy been applied to them and that, on the facts and on this basis, the claimants' detention was not unlawful. The Court of Appeal also held the policy was unlawful and decided that the policy had not been the effective cause of the claimants' detention.

26. With one dissent (Lord Phillips), a majority of the Supreme Court (Lord Hope, Lord Rodger, Lord Walker, Lady Hale, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson) decided that the unpublished policy was unlawful because it was a blanket policy admitting of no exceptions and because it was inconsistent with the published policy. A majority (Lords Phillips, Brown and Rodger dissenting on this aspect) further determined that the illegality attaching to the policy rendered the continued detention of the claimants unlawful for the purposes of the tort of false imprisonment. All of the judges agreed that if the detention was unlawful the fact that the detention could have been imposed lawfully was not relevant to whether there was *liability* for false imprisonment. It was also accepted by all members of the Court that the circumstances were not such as to give rise to exemplary damages.

27. The issue on which the Court split most closely, and that of relevance to these proceedings, arose from the argument that the claimants were entitled only to nominal damages because, had the decision to continue their detention not been made unlawfully, a lawful decision would nonetheless have been made to the same effect. Within that issue lay two questions: (a) whether the fact that the claimants would have been detained had the proper policy been applied meant that their entitlement under the heading of *compensatory damages* was only to nominal damages, and (b) if so whether the Court should recognise and award a species of '*vindicatory damages'*.

28. Central to the first of those questions is what is described in some of the cases as '*the compensatory principle'.* Damages awarded for the purposes of compensating for the effects of a wrongful act are calculated so as to put the plaintiff (insofar as money can do) in the position he or she would have been in had the wrong not occurred (*Livingstone v. Rawyards Coal Co.* (1880) 5 App. Cas. 25, at p. 39: *Kelleher v. O'Connor* [2010] IEHC 313, [2010] 4 IR 380, at para. 51). That '*compensatory principle'* is the essential foundation of the argument advanced by the defendants in this action: if the plaintiff could and would in any event have been detained lawfully, he or she should not obtain compensatory damages if detained unlawfully. To apply the principle requires what the defendants present as a '*but for'* analysis. This is referred to in some of the cases as a '*counterfactual'* examination. But for the illegality, they say, the plaintiff would have been lawfully detained; the plaintiff has therefore lost nothing by reason of the unlawful detention, and – the argument proceeds - the wrong of the defendant is not therefore the cause of any loss sounding in damages.

(a) Compensatory damages and causation

29. Lord Dyson concluded that the claimants were, insofar as their claims were based upon the application of an unlawful policy, entitled only to nominal damages. Lord Collins shortly expressed his agreement with Lord Dyson on this issue. Lord Dyson explained this conclusion as follows (at para. 95):

> '*The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies … it is inevitable that the appellants could have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages.'*

30. Framing this solely as an issue of compensatory damages, Lord Hope agreed with this view. He dismissed the contrary argument briskly (at para. 176):

> '*An award on ordinary compensatory principles is, of course, out of the question. It is plain that the appellants would not have had any prospect of being released from detention if the Secretary of State had acted lawfully. So they cannot point to any quantifiable loss or damage which requires to be compensated.'*

31. Lady Hale, while accepting that on the facts of the case the claimants had suffered no loss, stressed that this was because the error involved a failure to comply with a procedural requirement, and because it would even in that context *'rarely be possible to be confident that had the correct procedure been followed, the outcome would have been the same'* (at para. 211). The case before the court was different, she said, because it did appear that had the decision makers applied the published lawful policy rather than the unpublished unlawful policy, they would '*inevitably'* have reached the same conclusion (at para. 211). She accepted the general principle urged by the respondents noting that damages for false imprisonment were intended to compensate for the loss of liberty, and that it was '*difficult to see why a claimant should be compensated for something which he would never have enjoyed'* (at para. 212). However, as I explain shortly, she also felt that there was a necessity for the law to intervene and provide a remedy in damages where there was established neither loss on conventional principles, nor the conditions for an award of exemplary damages.

32. Lord Kerr also agreed with the conclusions reached by Lord Dyson. He felt that the actual impact on the individual who has been falsely imprisoned should feature prominently in the assessment of the amount of compensation (at para. 253) and on the particular facts found nominal damages the appropriate remedy because '*the appellants would have been lawfully detained if the published policy had been applied to them'* (at para. 256).

33. Lord Phillips expressed the view that – had he agreed with Lord Dyson on liability – he also would have agreed with his approach to damages. Lord Walker adopted the position that the claimants had no basis for seeking *special* damages on conventional principles: each claimant had a very bad criminal record and would undoubtedly have been kept in custody under the published policies. However, he felt that the argument as to causation did not

'*completely defeat their claims'.* He felt that the traditional function of damages at common law in vindicating an assault on an individual's person or reputation required some compensation (at para. 195).

34. Lords Brown and Rodger were of the view that if there was a false imprisonment, there was no reason to limit the damages claim to nominal damages. Asking why damages should be so limited, Lord Brown said that if the reason was that the claimants would have been imprisoned anyway under the same power and in just the same way, then in reality the court was saying that the tort may be committed merely in a technical way (at para. 343). He put the matter as follows:

> '*Given, moreover, that the tort of false imprisonment is actionable per se – that "it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification" (Lord Hope in R v Governor of Brockhill Prison ex parte Evans [2001] 2 AC 19, 32) – logic also suggests that the notion of nominal damages should have no part to play in determining the compensation payable. Why should someone imprisoned without lawful justification be paid nominal damages only? If the answer is that they would have been imprisoned anyway, under the same power and in just the same way, then in reality the Court is saying that the tort may be committed merely in a technical way. I have to say that such an approach would to my mind seriously devalue the whole concept of false imprisonment.'*

35. Referring to an example prayed in aid of his conclusion by Lord Dyson (that of a person who is falsely imprisoned yet unaware of that fact and who, he said, should thus obtain only nominal damages), Lord Brown continued (at para. 345):

> '*In my opinion, however, there is a very real difference between a detainee who is in fact unaware of being under physical restraint (perhaps because he is asleep or because he simply does not know that the door has been locked) and a detainee who is fully aware of his loss of freedom. To award the latter nominal damages only, on the basis that, even had he been dealt with lawfully he would still have been deprived of his freedom anyway, is really to say that he was in truth rightly in detention. That seems to me very different from saying that he was wrongly imprisoned but happily unaware of it.'*

(b) 'Vindicatory' damages

36. The majority also concluded that English law did not recognise a distinct species of damages that could be described as '*vindicatory'*. Lord Dyson explained that while the award of compensatory damages – nominal or substantial – might serve a vindicatory purpose, this – he said – was quite distinct from deciding that there was a specific category of damages that were solely '*vindicatory'*. Noting that the Privy Council had acknowledged the availability of '*vindicatory damages'* for breach of constitutional rights in some jurisdictions with written constitutions (*Attorney General of Trinidad and Tobago v. Ramanoop* [2005] UKPC 15, [2006] 1 AC 328), Lord Dyson cited with approval the 18th Edition of *McGregor on Damages* (2009) at para. 42-009 that '*[i]t cannot be said to be established that the infringement of a right can in our law lead to an award of vindicatory damages'* (at para. 100). The implications of

awarding vindicatory damages, he said, would be '*far reaching'*, would result in considerable uncertainty and would amount to '*letting … an unruly horse loose on our law'* (at para. 101). The purpose of vindicating a claimant's common law rights was sufficiently met by (i) an award of compensatory damages where loss had been sustained and nominal damages where it had not, (ii) declaratory relief where this was appropriate and (iii) exemplary damages where this was justified.

37. Lord Collins conducted a comprehensive survey of the authorities in other jurisdictions noting that, apart from the Privy Council decisions, the issue of whether a person whose constitutional rights had been violated but who had sustained no special damage could obtain more than nominal damages so as to reflect the value of the right infringed, has not prompted a uniform response. He rooted the notion of '*vindicatory'* damages in some older cases in the United States where the phrase was, he said, used as a synonym for exemplary damages (*Cole v. Tucker*, 6 Tex 266 (1851*); Blair Iron & Coal Co v. Lloyd*, 3 WNC 103 (Pa (1874)). He too referred to the decisions in *Attorney General of Trinidad and Tobago v. Ramanoop*, as well as to *Merson v. Cartwright* [2005] UKPC 38, [2006] 3 LRC 264. He noted that while the Canadian Supreme Court had concluded that the fact that a claimant had not suffered personal loss did not preclude an award of damages where the objectives of vindication or deterrence clearly called for an award (*City of Vancouver v. Ward* [2010] 2 SCR 28), and that the Supreme Court of New Zealand had been similarly sympathetic to this view (*Taunoa v. Attorney General* [2008] 1 NZLR 429), this did not reflect the position underpinning recovery of damages for constitutional tort in either the United States (*Memphis Community School District v. Stachura* (1986) 477 US 299) or in South Africa (*Fose v. Minister for Safety and Security* [1998] 1 LRC 198).

38. He concluded that it was not appropriate that the concept of '*vindicatory damages'* should be introduced into the law of tort. Such damages, he felt were, in truth akin to punitive or exemplary damages (at para. 233) and to make a separate award for vindicatory damages was to confuse the purpose of damages awards with the nature of the award (at para. 236). Such damages had not been recognised in English law, and he considered that there was no basis in policy for introducing them (at para. 237).

39. Lord Kerr, while not entirely outruling the prospect that in some cases '*vindicatory damages'* might be awarded, felt that if there was scope for such awards, it was '*very limited indeed'* and was restricted to cases in which the declaration that a claimant's right has been infringed provides '*insufficiently emphatic recognition of the seriousness of the defendant's default'* (at para. 256). This was not, he felt, the situation in the case before him. Lord Phillips, had he agreed with the majority on the issue of the legality of the detention indicated that he would have shared Lord Dyson's view as to the availability of damages, observing that he agreed with Lord Collins' approach to vindicatory damages.

40. A minority of the Court (Lord Hope, Lord Walker, and Lady Hale) disagreed insofar as it was suggested by the majority that there was no power to award damages reflecting the fact that there had been a breach of fundamental rights. Lord Hope categorised the behaviour of the officials in the case as '*a serious abuse of power'* and '*deplorable'* (at para 176). He said that in cases which fell short of those circumstances warranting an award of exemplary damages but nonetheless amounting to a serious abuse of power, something more than nominal damages or declaratory relief was required. Referring to the decisions in *Attorney General of Trinidad and Tobago v. Ramanoop* and *Harrikissoon v. Attorney General of Trinidad and Tobago* [1980] AC 265, Lord Hope quoted with approval the remarks of Lord Nicholls in the

former case that when exercising its constitutional jurisdiction the court is concerned with upholding or vindicating the constitutional right, and that an award – not necessarily of substantial size – might be needed to reflect '*the sense of public outrage, emphasise the gravity of the breach and deter further breaches'* (at para. 177). The purpose of such an award, Lord Nicholls had said, was '*to recognise the importance of the right to the individual, not to punish the executive'* (at para. 178). The award should take account of the underlying facts and circumstances, affording some recognition of the wrong done without being nominal or derisory (at para. 180). In his view, this could be achieved by an award that was '*substantially lower'* than £1000. Lord Hope explained his conclusion as follows (at para. 178):

> '*Although such an award is likely in financial terms to cover much the same ground as an award by way of punishment in the sense of retribution, punishment in that sense is not its object. The expressions "punitive damages" or "exemplary damages" are therefore best avoided. Allowance must be made for the importance of the right and the gravity of the breach in the assessment of any award. Its purpose is to recognise the importance of the right to the individual, not to punish the executive. It involves an assertion that the right is a valuable one as to whose enforcement the complainant has an interest. Any award of damages is bound, to some extent at least, to act as a deterrent against further breaches. The fact that it may be expected to do so is something to which it is proper to have regard.'*

41. Lord Walker (citing *McGregor on Damages*' 18th ed. (2009) at para. 42-008-42-009) adopted the view, as I have previously noted, that the common law has always recognised that an award of more than nominal damages should be made to vindicate an assault on an individual's person or reputation, even if the claimant can prove no special damage. He said:

> '*The notion that no more than nominal damages should ever be awarded for false imprisonment by the executive arm of government sits uncomfortably with the pride that English law has taken for centuries in protecting the liberty of the subject against arbitrary executive action. It would ... seriously devalue the whole concept of false imprisonment.'*

42. The argument as to causation, therefore, did not in his opinion '*completely defeat [the claimants'] claims*' and each was accordingly entitled to damages of £1000. Lady Hale concluded that the law should be able to vindicate in some way the right to be free from arbitrary imprisonment – irrespective of whether compensatable harm has been suffered or the conduct of the authorities was so egregious as to merit exemplary damages (at para. 217). She felt that such an award was appropriate in a case presenting a fundamental right, noting that the right to be free from arbitrary imprisonment by the State was of no less importance because of the absence of written constitution (at para. 217). Lady Hale attached some significance to the decisions in *Tuanoa v. Attorney General* [2008] 1 NZLR 429, *Attorney General of St. Christopher, Nevis and Anguilla v. Reynolds* [1980] AC 637, *Merson v. Cartwright , Fraser v. Judicial and Legal Services Commission* [2008] UKPC 25 (St Lucia), *Innis v. St. Christopher and Nevis* [2008] UKPC 42 (St Kitts) and *Ramanoop*, all of which addressed the recovery of '*vindicatory'* damages for breach of rights conferred by written constitutions. She indicated that she would have awarded under this heading a '*modest conventional sum'* of £500.

What did Lumba decide?

43. While the implications of the strict application of the principles of *stare decisis* to the decision is of limited relevance here, the exercise of seeking to identify the *ratio decidendi* of *Lumba* is revealing. Certainly, a majority of the nine judges who heard the appeal decided that the compensatory principle and consequent rule of causation urged by the respondents applied to the determination of general damages in the tort of false imprisonment. Thus *compensatory* damages were not available in the view of six judges (Lords Dyson, Collins, Kerr, Hope, Phillips and Lady Hale). Only three judges (Lords Browne, Rodger and Walker) rejected outright the contention that damages in false imprisonment should be nominal on the thesis that the claimant would have been imprisoned anyway.

44. However, viewing the matter another way five judges felt that if the claimants had been falsely imprisoned they should have obtained an award greater than merely nominal damages (Lords Hope, Walker, Browne, Rodger and Lady Hale). As I have noted Lord Kerr did not outrule *vindicatory* damages entirely - although *Lumba* was not a case in which he would have awarded them. That means not merely that a clear majority of the Court felt that on the facts of the case nominal damages alone ought not to have been awarded if there were a false imprisonment where the detention might have been lawfully imposed, but that of the majority on the issue of whether there had been false imprisonment at all, three of the six so concluded. Indeed if I have correctly interpreted Lord Kerr's judgment a majority of that majority were of the view that there might be available in an appropriate case a mechanism by which the gap between nominal and exemplary damages could be bridged in the tort of false imprisonment in a case where it was determined that compensatory damages should not be awarded.

45. *R (Kambadzi) v. Secretary of State for the Home Department* [2011] UKSC 23, [2011] 1 WLR 1299 was argued before *Lumba* but the decision was delivered after judgment in that

case. It, similarly, involved a foreign national detained following the serving of his sentence and pending deportation the issue being whether a failure of the Secretary of State to carry out regular reviews of the apellant's immigration detention pursuant to the relevant rules and policy meant that his detention was unlawful. As with *Lumba*, there was a significant debate as to whether failure to comply with the relevant policy did or did not render his detention unlawful. A majority of the United Kingdom Supreme Court (Lady Hale, Lord Hope and Lord Kerr) determined that it did, with Lords Browne and Rodger dissenting on this issue as they had done in *Lumba*. Having determined that question, the case was remitted for a decision on damages. The judgments strike me as being somewhat tentative in their application of that aspect of *Lumba*. Lord Hope recorded the decision of the majority in *Lumba*, but stated that it could not be assumed that nominal damages would follow in every case (presumably because it required proof that the detention would at all times have been, as he put it, '*justifiable'* (at para. 55)). He said '*it may be that the conclusion in this case will be that an award of nominal damages is all that is needed to recognise that the appellant's fundamental rights have been breached'* (at para. 56). Lady Hale explained that the result of a review had it been held '*cannot be irrelevant to the quantum of damages to which the detainee may be entitled'* noting the conclusion of the majority in *Lumba* that vindicatory damages were not available (at para. 74). Lord Kerr said that *'causation is relevant to the question of the recoverability of damages'* stating that if the claimant would have been detained upon a proper review, nominal damages only would be recoverable (at para. 89).

46. In *Bostridge v. Oxleas NHS Foundation Trust* [2015] EWCA Civ. 79, the Court of Appeal described *Lumba* as deciding that nominal damages were available only for false imprisonment where it was '*inevitable that they would anyway have been detained had the published policy and the correct principles been applied'* (at para. 15). Thus, to assess damages

in such a case it was necessary for the Court to '*ask what would have happened in fact if the tort had not been committed'* (at para. 23). In that case (arising where a patient was detained pursuant to the Mental Health Act 1983 on foot of an order that was technically invalid), the claimant would have been detained lawfully in any event and was thus entitled only to nominal damages.

47. The identification of the effect of *Lumba* in this way leads to a further question. How, precisely, should the court proceed to apply the 'but for' test of causation envisaged by the decision? Usually the explanation (although not always the application) of this principle is straightforward. In analysing whether a wrong has '*caused'* a loss it will often be helpful to subtract the wrong from the factual context and to determine from there whether, if the wrong had not been committed, the loss would have been incurred in any event. Sometimes this will require a reconfiguration of the facts so as to see what would have happened had the defendant acted as it ought to have done: a doctor may be negligent in failing to properly examine and treat a patient, but the plaintiff fails in a claim for negligence if a proper examination and correct treatment would not have arrested the cause of the injury (*Barnett v. Chelsea and Kensington Hospital Management Committee* [1969] 1 QB 428).

48. *Lumba* fits clumsily into that model, because the counterfactual it necessarily envisages is not a simple situation in which the loss caused by the wrongful act would have occurred anyway. Instead it presumes a circumstance in which the loss is avoided through the hypothesis that an entirely new event should be put into that matrix. This happens in a unique way. The *wrong* decision, made on the basis of the unlawful policy, is replaced by a *right* decision, which is reached lawfully. The wrong is thus not merely subtracted from the factual context, it is replaced with a non-wrongful act by the entity which acted unlawfully, that hypothetical non-

wrongful act being used to eliminate the loss that the actual wrongful act has caused. This is not a construct I can identify in any other line of authority. It appears to correspond to the '*hypothetical alternative cause'* described by Hart and Honore '*Causation in the Law'* (2nd Ed. 1985 at p. 249) - with the additional feature that the hypothetical action is that of the defendant itself. They say:

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

49. On the facts of *Lumba* the extent to which the '*but for'* test is being thus remodelled is not at first obvious. The claimants were in detention and a decision had to be made whether or not to release them. The court assumes that the decision would have been a lawful one, therefore that is the counterfactual. It would, of course, make a nonsense of the construct if the original error were repeated in the 'but for' analysis. However the very fact that the thesis depends on the proposition that for the purposes of determining the availability of compensatory damages for a wrongful act the law must engage in a fiction where the positive and unlawful action giving rise to the claim is replaced by the same positive, but this time lawful action, raises to my mind a fundamental question around whether this analysis has any proper role to play in the determination of when damages are available for such a wrong.

50. The construct becomes trickier – and the difficulties it presents more pronounced - when the claimant is not in detention when the unlawful action is undertaken and when no-one actually *has* to *do* anything. That was the problem in *Parker*. There, the claimant was arrested

on suspicion of serious offences. The arrest was part of a planned operation involving the arrest at the same time of two other individuals at different locations. Under the applicable statutory provisions, the arrest ought to have been effected by an officer who personally had reasonable grounds for suspecting that the claimant was guilty of an offence. Because the claimant was a well-known celebrity and details of the case were limited to a small number of people, only one police officer involved in the operation was made aware of the basis for the arrest. She, however, was unexpectedly detained when the arrest was to take place and it was effected instead by a more junior officer. None of the officers involved gave thought to the legal requirement that an arresting officer must have reasonable grounds for the requisite suspicion and belief for a lawful arrest, and the plan was to arrest the claimant '*come what may'.* The arrest was acknowledged to have been unlawful. One of the grounds of defence to the action for false imprisonment that followed was that the plaintiff was - having regard to *Lumba* - entitled to claim only nominal damages.

51. Leveson P. defined the relevant counterfactual by reference to '*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'* (at para. 104). This was not the most likely *factual* sequence – that was identified by the trial judge as being that another police officer who was also legally precluded from doing so would have effected the arrest - but was instead a hypothesis in which everything is done correctly. The decision was approved in *R. (Hemmati) v. Secretary of State for the Home Department* [2019] UKSC 56, [2021] AC 143 at para. 112: '*a claimant will be awarded nominal damages if it is established that the detention could have been effected lawfully under the existing legal and policy framework'*. The counterfactual thus understood envisages an inquiry directed not to what probably would as a matter of fact have happened had the wrongful act not occurred, but instead to what *should* have transpired had all

parties conducted themselves as required by law or – at the very least – to what *would* have happened had all actors known of their legal obligations and complied with them.

52. When these elements are added together what emerges from the law in England and Wales as it was pronounced in *Lumba* and most recently expressed in *Hemmati* is the following:

i. A claimant in an action for false imprisonment is entitled to nominal damages where the tort is established, compensatory damages where he sustains a loss and exemplary or aggravated damages where the defendant acts in an oppressive, arbitrary or unconstitutional way.

ii. The claimant is *not* entitled to any compensation to reflect the fact that his liberty has been unlawfully interfered with. In particular (a) there is no heading of vindicatory damages in English law and (b) no part of the award of compensatory damages can be attributed to the insult arising from the illegality. Vindication is obtained by nominal damages and declaratory relief (where there is no loss), by compensatory damages (where there is loss) and by exemplary or aggravated damages (where the defendant has engaged in conduct to merit such an award).

iii. In deciding in any given situation whether there has been loss requiring an award of compensatory damages, the court applies a counterfactual. That counterfactual is directed not only to what *would* have happened had the claimant not been detained as he was, but instead to whether he *could* have been lawfully deprived of his liberty or, at the very least, to what *would* have happened had the defendants known of and complied with their legal obligations. If the claimant *could* or perhaps *could* and *would* have been

detained lawfully, no compensatory damages will be awarded and, it follows from the foregoing, unless the claimant can bring his or her case into the category of claims in which exemplary or punitive damages are awarded, he or she will obtain only nominal damages.

iv. Therefore in many cases in which a claimant's detention is unlawful for a procedural reason – that he or she was not given the reasons for an arrest, that a necessary permission was not obtained for the continuation of his or her detention, or that the documentation grounding the detention fails to record the legal pre-requisites to a valid imprisonment - there will be no claim for compensatory damages and accordingly no compensation to reflect the *illegality* of the detention.

v. There was, in *Lumba,* a certain lack of clarity around where the burden of proof in relation to these questions of causation lay and as to the standard to which the counterfactual had to be proven. Indeed, this gave rise to a conflict in lower courts following the decision (see Keene and Dobson, *'At what price liberty? The Supreme Court Decision in Lumba and Compensation for False Imprisonment',* [2012] PL 628 at 633 to 635**).** Many of the judges spoke in terms of the continued detention in that case being '*inevitable'.* Insofar as *Parker* and *Hematti* express the test in normative rather than factual terms, the question does not appear to now arise in English law. Insofar as they envisage a factual inquiry as part of that, the location of the burden or definition of the standard of proof are not yet defined.

Lewis

53. In *Lewis v. Australian Capital Territory* [2020] HCA 26 ('*Lewis*') the High Court of Australia adopted the first and second of these propositions. The Court unanimously rejected the approach to the 'but for' test adopted by the Court of Appeal in *Parker*, although the judges appear to have differed as to what, precisely, should replace it.

54. The facts were also extreme. The appellant was found to have been wrongfully detained on foot of a decision of a statutory body in the Australian Capital Territory, the Sentence Administration Board. That decision cancelled a periodic detention regime to which the appellant had been sentenced following his conviction of offences of serious assault. The effect of the cancellation of the sentence was that the claimant had to serve the remainder of his term by way of full time detention.

55. The cancellation of the claimant's sentence was prompted by his failure to attend for periodic detention as required by his original sentence, but the decision itself was held unlawful because of a failure to afford the appellant his entitlements to procedural fairness in connection with the cancellation decision. The grounds on which the decision was quashed – essentially that the judge was not satisfied on the evidence that the appellant had been advised of the fact of the hearing notwithstanding receiving letters from the Board to that effect – were described in the Court of Appeal in addressing the damages claim as '*illogical*'. That underlying decision was not appealed, however, and the claim in relation to false imprisonment proceeded on the basis that the detention was, indeed, unlawful. It appears that within the legal regime in which the decision was made it was inevitable that the periodic detention order would, on the facts, have been cancelled.

56. The High Court of Australia (Kiefel C.J. and Keane, Gageler, Gordon and Edelman JJ.) unanimously concluded in these circumstances that the plaintiff was limited to a remedy in nominal damages. All judges agreed that there was no distinct heading of '*vindicatory damages'* known to Australian law. Each member of the Court was of the view that the claimant could not obtain compensatory damages in circumstances in which had his detention not been unlawful, he would have been detained following a procedure that was lawful. Two judges (Kiefel C.J. and Keane J.) were additionally of the view that because the appellant was unlawfully at large from the point of his first failure to report for detention, he had no legal basis on which to insist on being at liberty as if he was not under sentence.

57. Central to the conclusion on loss was the approach adopted by the Court to the issue of causation. Gageler J. began by noting the conventional proposition that a counterfactual inquiry '*necessarily proceeds by drawing inferences from known facts to find the counterfactual position on the balance of probabilities'* (at para. 35). Having so observed he acknowledged a reality not referenced in the English cases, and which I have noticed earlier. In order to reach a counterfactual in the tort of false imprisonment the nature of that inquiry has to be qualified. The qualification arose from (at para. 36):

> '*the application to the determination of compensation of the same common law policy that underlies imposition of tortious liability for wrongful imprisonment whenever, but only when, there is a deprivation of liberty that cannot be justified by law. Consistent application of that policy means that compensation for wrongful imprisonment can only be determined by postulating a counterfactual in which all who had lawful capacity to contribute to a deprivation of liberty conducted themselves strictly in accordance with law.'*

58. Earlier in this judgment I noted that *Lumba* depends on the proposition that for the purposes of determining the availability of compensatory damages for a wrongful act the law must engage in a fiction where the positive and unlawful action giving rise to the claim is replaced by the same positive action, it now being assumed that it was lawful. Gageler J. explained why this was necessary (at para. 36):

> '*The law would be an ass were a person whose position in fact is that he or she has been deprived of liberty by unlawful conduct to be denied compensatory damages through the application of a counterfactual in which he or she would have been deprived of liberty by the same or other unlawful conduct in any event'*

59. This construct differs from that suggested in the English authorities, because (as Gageler J. defined the relevant inquiry) '*[i]t cannot simply be assumed that a power to detain that could have been exercised lawfully would have been exercised lawfully if that power had not been exercised unlawfully'* (at para. 39). This meant that difficulties could arise '*in applying that approach to determine on the balance of probabilities what would have happened had an invalidly exercised power to detain not been exercised.'* However, in the case before the Court there was no such difficulty. Applying the counterfactual inquiry thus understood what, Gageler J. said, would have occurred in that case is that the Sentence Administration Board would have held an inquiry in which it would have observed procedural fairness because it had a duty to do so. Because the claimant had failed to report for periodic detention on more than two occasions, the Board would have proceeded to make an order cancelling the periodic detention and would have done so as soon as practicable because that was what it was required by law to do. It followed that there was no liability for compensatory loss. The approach

adopted by Gageler J. is thus both *factual* (in that it looks at what would have happened) and *normative* (insofar as it proceeds on the assumption that all acted lawfully). The factual element is determined on the balance of probabilities (at para. 42).

60. Gordon J.'s interpretation of the applicable counterfactual was that it arose where (at para. 50) '*imprisonment was inevitable'* and *Lewis* was such a case because the statute in question mandated the claimant's detention. Cases in which this would happen were '*rare'* (*id*.). The '*inevitability'* of the detention was central to her conclusion. Thus, one case relied upon by the claimant (*Plenty v. Dillon* (1991) 171 CLR 635) concerned police officers who trespassed on land by entering without a warrant. Although the plaintiff in that case had suffered no loss, the High Court of Australia said that the plaintiff was entitled '*to have his right of property vindicated by a substantial award of damages'*. Gordon J. appears to have adopted the view that the damages were justified by the fact the plaintiff suffered '*a loss of the right not to be trespassed upon'* (at para. 78). She said that '*the lawful presence of police officers on the land was in no way inevitable'*.

61. Gordon J. expressed her disagreement with the approach adopted by the English Court of Appeal in *Parker* . The counterfactual, she said, was what would have happened if the tort had not been committed; the Court of Appeal was wrong to frame the question assuming the conclusion of lawfulness. No statute required that the claimant in *Parker* be arrested, and on the facts of that case the most likely outcome if he had not been arrested as he was, was that another officer would have unlawfully arrested him. The arrest was not '*inevitable'*. Noting the quotation from Hart and Honore addressing '*hypothetical alternative causes'* to which I have referred earlier, Gordon J. expressed the view that this was, at most, of assistance in determining liability but was not directed to the issue of whether substantial compensatory

damages should be awarded. Moreover, in that case (she said) there was no alternative cause: imprisonment was mandated by the relevant legislation.

62. Thus, Gordon J. does not envisage any assumption of legality in the counterfactual and, to that extent, her analysis differs not only from that of the English Courts in *Parker* and *Hemmati*, but also from that of Gageler J. However, the rule she proposes is narrow, only arising where there is an inevitability to the detention. That inevitability arose in *Lewis* because on the facts the statute mandated detention. It was, there, a *legal* inevitability rather than a factual one. If applied to the instant case Gordon J.'s test would not preclude the plaintiff from obtaining compensatory damages. There was no legal obligation to arrest him.

63. Edelman J. (with whose judgment in this regard Kiefel C.J. and Keane J. expressed their agreement) explained that the '*compensatory principle'* enables '*restoration'* through financial recompense. It assumes a causal question, posed as a counterfactual: would the loss have lawfully occurred without the defendant's wrongful act? (at para. 151). If '*but for*' the act of the defendant the loss would have occurred lawfully, then the defendant's act was not a cause of the loss, and the defendant's responsibility for that loss becomes more difficult to justify (at para. 151). To answer this question, the court changes one thing at a time to see if the outcome changes, the change being the removal of the wrongful act (at para. 178). If the loss would lawfully have occurred but for the wrongful act then the wrongful act was not necessary for the loss. The question is thus a hypothetical one where no other fact or circumstance is changed other than that which constituted the wrongful act (*id*.).

64. That required a counterfactual based upon (at para. 179):

> '*whether Mr. Lewis would lawfully have been subject to the same imprisonment but for the decision of the Board made in denial of procedural fairness.'*

65. The answer to that was in the affirmative because the primary judge and the Court of Appeal had both concluded that such imprisonment by a valid decision was inevitable. Thus far, his reasoning was the same as Gordon J.'s and can be rationalised on the basis that there was only one decision the Board could make. Indeed, as with Gordon J., Edelman J. also believed that *Parker* was wrongly decided. The correct counterfactual he said, removes only the wrongful act and does not require the court to ask what would have happened if what the law required had been appreciated. However, it does not appear that he (unlike Gordon J.) regarded '*inevitability'* as a necessary condition of the counterfactual (at para. 182):

> '*The proper approach, taken by the trial judge in Parker, involves asking whether the loss would lawfully have been suffered but for the wrongful acts of PC Cootes. Damages should have been nominal only if without the wrongful acts of PC Cootes the arrest would otherwise have been lawfully made, as it should have been. Thus, the Supreme Court of the United Kingdom described Parker as a case where "had things been done as they should have been, the claimant could and would have been arrested."'*

66. I would repeat my earlier observation that Lord Kitchin continued in the same paragraph in *Hematti* (which is being referred to here) stating '*a claimant will be awarded nominal damages if it is established that the detention could have been effected lawfully'.* Edleman J., in a footnote to his judgment (at para. 182 fn. 324) stresses his view – citing *Kuchenmeister v.*

Home Office [1958] 1 QB 496 - that the fact that the detention '*could'* have been effected lawfully is not enough.

67. So, Edelman J. explained, on the facts of *Parker* the claimant would not have been validly arrested – or at least would not have been lawfully arrested when he was. Similarly, because his detention was determined by the trial judge and the Court of Appeal in *Lewis* to be inevitable, the claimant in *Lewis* could not claim compensatory damages. The question of the standard to which, and by whom, this must be established is not addressed in the judgment.

Did Lumba change the law?

68. In this case the defendants only succeed in their appeal if they establish either (a) that it is the law in this jurisdiction that a person who is detained unlawfully may obtain only nominal damages if he or she *could* have been detained lawfully or (b) that the approach by Gageler J. in *Lewis* (looking, essentially, to whether there would have been arrest by an officer acting in accordance with the relevant legal requirements) represents the correct analysis as a matter of Irish law. It is not sufficient for the defendants to say that the Court should simply look to whether the plaintiff *could and would* have been detained. Not only is that a factual inquiry depending upon a finding as to what *would* have happened had the plaintiff not been detained on foot of the orders that were issued (and there is none) but it is very difficult to see how the correct answer to that question is not that another officer would have made a detention order containing exactly the same legal error. Based upon the understanding of the authorities of the legal position at the time of the plaintiff's detention it cannot be said that he *would* have been detained on foot of a valid order. This is the one thing that *would not* have happened. The

defendants can thus only prevail if, somehow, the Court assumes that they would have acted according to an understanding of the law which, in fact, they never entertained.

69. For the defendants to succeed in the essential argument advanced by them, accordingly, it must be the case *both* that Irish law recognises a legal rule precluding the recovery of general damages for unlawful detention based upon a counterfactual analysis, *and* that in conducting that analysis there is a principle that in some way presumes legality. In my view the correct starting point in addressing whether that is so is neither the compensatory principle, nor the anatomy of '*but for'* causation, but the history, scope and object of the tort of false imprisonment.

70. The civil cause of action for damages for false imprisonment has been referenced in the texts and yearbooks since the middle of the thirteenth century as one of two remedies for wrongful arrest and detention (the other being criminal). By the early fifteenth century the Irish Parliament (XI Hen. IV c. 15) was describing a civil remedy for arrest without showing sufficient warrant (the Act remains in force, being designated the False Imprisonment Act, 1410 by the Statute Law Revision Act 2007). The elements of the cause of action as understood now were firmly in place by the time of, and are recited in terms familiar to the law today by, Coke and Blackstone. They were repeated throughout the leading nineteenth century English commentaries, and were echoed in those in the United States at that time. Those elements were reiterated in the law applicable in this jurisdiction both at the time of the foundation of the State (*Connors v. Pearson* [1921] 2 IR 51) and the adoption of the Constitution (*O'Conghaile v. Wallace* [1938] IR 526).

71. The features of the cause of action as it has thus developed reflect the critical importance historically attached by the law not only to personal liberty, but to the principle of legality. A central element of the cause of action (the illegality of the detention) does not have to be proven by the plaintiff at all. The law of false imprisonment thus reflects the legal position adopted *vis a vis* trespass in general in *Entick v. Carrington* (1765) 2 Wils KB 275, it being clear since at least the decision in *Holroyd v. Doncaster* (1826) 3 Bing. 492 that it is a matter for the *defendant* to establish that the detention is lawful once imprisonment is established (and see *Dullaghan v. Hillen and anor.* [1957] Ir. Jur. Rep. 10, at p. 15). The law adopts the position that imprisonment must be justified by the defendant *because* it is the infringement of a legally protected right (*R v. Governor of Brockhill Prison ex parte Evans (No.2)* [2001] 2 AC 19, at p. 42 *per* Lord Hobhouse). As Lord Griffiths explained in *Murray v. Ministry of Defence* [1988] 1 WLR 692 (at p. 703), '*[t]he law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage'*. It is for the same reason that liability is strict and operative irrespective of whether the defendant acted *bona fide* (*R. v. Governor of Brockhill Prison ex parte Evans*). Unless the confinement is fleeting, these principles apply regardless of the duration of the imprisonment: '*any detention even for a very short period is not insignificant and deserves something more than nominal damages'* (*Petticrew v. Chief Constable RUC* [1988] NI 192, at p. 204 (*per* O'Donnell L.J.). All of this strongly suggests that the award of damages in a claim of this kind is intended to reflect not merely the loss consequently occasioned to the plaintiff's freedom, but also the insult arising from the illegality that attends it. The adjective in the description of the cause of action does not, on this basis, merely identify its elements. It also proclaims the interests an award of compensation is intended to protect. If that is correct, it becomes very difficult to see how a rule that requires the court to ignore the

illegality in its assessment of damages for the tort can be reconciled with the essential objective of the cause of action.

72. It is not hard to identify language in the judgments - and outcomes in the case law - supporting this thesis. In *Dumbell v. Roberts* [1944] 1 All ER 326, at p. 329 the awarding of substantial damages for the tort of false imprisonment was related to the need '*to give reality to the protection afforded by the law to personal freedom'*. In *Kuchenmeister v. Home Office* Barry J. observed that damages should follow in order to *vindicate* the '*very precious right of liberty'* (at p. 513).

73. The facts of *Kuchenmeister* are especially instructive. The plaintiff was unlawfully detained at London Airport when he arrived there in transit to Dublin. The detention was effected pursuant to a provision of the Aliens Order 1953. However, the plaintiff could have been lawfully detained by the defendant pursuant to powers conferred by other articles of the same Order. In particular, they could have prohibited him from landing in the first place. Having regard to some of the comments made in both *Lumba* and *Lewis* about this case it is important to stress that there can be no doubt about the fact that the plaintiff *could have been* lawfully detained. Barry J. said '*the defendants could have provided themselves with a justification for the plaintiff's detention'* (at p. 509).

74. That, it was held by Barry J., was immaterial to the legality of the plaintiff's detention (at p. 512). Even though the plaintiff's claim to compensatory damages would have been defeated by the theory of loss causation advanced here, and even though the actions of the immigration officials were based upon a legitimate construction of the relevant legal provisions as applied to a person who had (by reason of his internment in the United Kingdom during the

war) been refused liberty to reside in or visit the United Kingdom, the court nonetheless adopted the position that it would be wrong to award '*contemptuous damages'*. The sum awarded by Barry J. (£150) was described by him as the figure '*which will vindicate the plaintiff's rights without amounting to a vindictive award'* (at p. 513). It was awarded in respect of an initial detention of two and a half hours which resulted in his having to remain in the airport terminal for the night having thus missed his flight to Dublin.

75. *Christie v. Leachinsky* [1947] AC 573 is a landmark decision reflecting the same assumption. There, the plaintiff claimed damages for false imprisonment in circumstances in which he was arrested for a charge of '*unlawful possession'* under the Liverpool Corporation Act 1921. The legislation did not grant a power of arrest for the offence. The defendants contended that at the time of the arrest they reasonably suspected the plaintiff of the offence of receiving stolen goods, for which there was a power of arrest. The House of Lords held that this was not a ground of defence in circumstances where at the time of the arrest the plaintiff was given different – and invalid – grounds for his detention. At no point was it ever suggested that in fact the applicant was entitled only to nominal damages. When Lord du Parcq specifically stated that the plaintiff was in these circumstances entitled to recover damages for false imprisonment (at p. 603), it is far from obvious that he actually contemplated merely a nominal award. Indeed, in *Kambadzi v. Secretary of State for the Home Department* Lord Brown (at para. 108) observed that the judges in *Christie v. Leachinski* would be '*surprised by the ... suggestion ... that assuming such detention to be unlawful it is to be compensated by no more than a nominal sum in damages'*.

76. The facts of *Gildea v. Hipwell* [1942] IR 489 afford an even more striking example. There the High Court made an order committing the appellant to Mountjoy prison following a

determination that he had been in contempt of court. Some time after the order was made he was arrested on foot of the order and detained - but in Sligo prison rather than Mountjoy prison. The High Court judge having determined that the confinement of the plaintiff in a different place of detention was permissible having regard to the Criminal Justice Administration Act 1914, the Supreme Court overturned this decision remitting the matter for the determination of damages. Stressing that once detention was established the onus fell to the defendant to establish lawful authority for that detention, the court determined that the order, enabling detention at Mountjoy prison, could not authorise detention at Sligo prison. If the contention urged by the defendants in the instant action was correct, this is as strong a case for the negation of an award of compensatory damages as one might expect to find. There was no contingency – the Court *had* directed that the appellant be detained and the only issue was whether he was detained at the correct location. The error was entirely *bona fide,* the mistake as to the location of his detention being based on a misunderstanding as to the proper place of detention having regard to the county in which the plaintiff had been arrested on foot of the order. The High Court judge held that this was not actually a misunderstanding at all.

77. Nowhere in the judgment is it suggested that the appellant was by reason of the fact that he was liable to detention necessarily limited to recovering nominal damages. The jury at the first hearing of the matter provisionally assessed damages in respect of fifteen days detention at the sum of £13 16s 6d, which seems to have represented the plaintiff's unrecovered legal costs of obtaining his release together with general damages of exactly 5s (the unrecovered solicitor/client costs are identified in the High Court judgment - see p. 494). The Supreme Court adopted the position that the plaintiff was entitled to a new trial on the issue of damages, a conclusion consistent only with the belief that a fresh jury was entitled to award more than the nominal sum for general damages that seemed to form the basis for the first award.

78. All of this confirms that Lady Hale's description in *Lumba* of the approach of the Courts to an award of compensatory damages for the tort of false imprisonment prior to that case is irrefutable, if understated. She said of what she described (at para. 214) as '*a middle course between compensatory and exemplary damages'* the following (at para. 217):

> '*In reality, this may well be what was happening in the older cases of false imprisonment, before the assessment of damages became such a refined science'*.

79. Lord Walker similarly adopted the position that the common law had always recognised that an award of more than nominal damages should be made to vindicate an assault on an individual's person or reputation even where there was no special damage (at para. 308).

80. The Northern Irish cases are particularly helpful. In *Oscar v. Chief Constable of the Royal Ulster Constabulary* [1992] NI 290 damages were awarded where the illegality in the detention arose because of the failure of the arresting constable to advise the appellant of the reason for his arrest. The nature of the illegality meant, according to Hutton L.C.J. (as he then was) that the appellant was entitled to neither aggravated nor exemplary damages. However, he explained, '*[u]nlawful detention of a citizen is a grave matter and a person unlawfully detained is entitled to proper compensation'* ([1992] NI at p. 319). This, it must be stressed, was in the specific context of a detention for which the arresting officer had lawful authority, the illegality of which was merely procedural. In *Dodds v. Chief Constable of the RUC* [1998] NI 393 (in which the Northern Irish Courts considered the correct approach to quantum in such a claim in the light of the guidelines laid down by the Court of Appeal for England and Wales

in *Thompson v. Commissioner of Police of the Metropolis* [1998] QB 498) McDermott L.J. (at p. 403) specifically instanced an error of a '*purely technical nature, for instance reference to a wrong statutory provision'* as requiring the payment of compensation (although acknowledging that in that circumstance damages would be '*very much reduced'*). Conversely, MacDermott L.J. explained, '*if a person is detained after his innocence becomes clear a fair award of damages could be more'.* The decision, incidentally, shows the importance of context in the calculation of damages for the tort: the court decided that awards higher than those applied in England and Wales may in some cases be appropriate because in part '*many arrests are under the Prevention of Terrorism legislation and so carry a particular stigma'*.

81. That understanding was reflected in the decisions in other common law jurisdictions and in the leading textbooks right up to the decision in *Lumba*. In *Ruddock v. Taylor* (2005) 222 CLR 612, at p. 651 (para. 141), Kirby J. identified the principal function of the tort of false imprisonment as providing '*a remedy for injury to liberty',* damages being awarded '*to vindicate personal liberty'.* In *New South Wales v. TD* [2013] NSWCA 32 compensatory damages were awarded for the detention of a person in the incorrect institution, although she could have been lawfully detained in the right one. In both *New South Wales v. Abed* [2014] NSWCA 419 and *Caie v. Attorney General of New Zealand* [2001] NZHC 259, [2005] NZAR 703 damages were awarded where the illegality in the detention arose from a failure to record the reason for the arrest. Similar statements can be found in the case law of some states in America, e.g.'*the plaintiff makes out a case for compensatory damages when he shows that he has been illegally detained without lawful process'* (*Montgomery Ward and Co. v. Wickline* 188 Va. 485, 490 (Sct. Va. 1948)).

82. *Clerk and Lindsell on Torts* (17th Ed. 1995) explained of damages in false imprisonment actions that '*[w]here liberty has been interfered with damages are given to vindicate the claimant's rights even though no pecuniary damage has been suffered'* (at para. 12-80). *Salmond and Heuston on the Law of Torts* (20th Ed. 1992) stated (at p. 129) in the same context that '*when the liberty of the subject is at stake questions as to the damage sustained become of little importance'. McGregor on Damages* (18th Ed. 2009) at para. 37-013 observed the overlap between damages for false imprisonment and for defamation stating '*damages by way of vindication are included in the heads of damage under which awards are made, an element of vindication will sometimes make its appearance in damages for false imprisonment'.* Citing *Roberts v. Chief Constable of the Cheshire Constabulory* [1999] 2 All ER 326 ('*Roberts'*), Grubb and ors '*The Law of Damages'* (2002) recorded the law as follows (at para. 16.11):

> '*If a person is wrongly detained because of a technicality, he remains entitled to substantial damages despite the fact that he was in fact liable to detention and his detention could have been but was not, legalised by taking some formal step'.*

83. Looking at the authorities in this way, I do not think it surprising that *Roberts* was decided by the Court of Appeal for England and Wales as it was. There, the claimant sought, and recovered damages of £500 for false imprisonment in respect of a period of two hours and twenty minutes in police detention when his continued detention ought to have been (but was not) reviewed before being formally renewed. It was urged that, on the basis that if the police had acted properly and carried out a review the respondent would have been detained anyway, no more than nominal damages should have been awarded. Clarke L.J. expressed himself initially impressed with that contention, noting that it seemed wrong that a person who, but for the mistake that had been made, would have been detained throughout the entire period in

question should obtain damages for his detention during that period. However, he ultimately determined that this was not the correct approach. He explained:

> '*the reason why the continued detention was unlawful was that no review was carried out. The wrong was not, however, the failure to carry out the review but the continued detention. If the wrong had not been committed the respondent would not have been detained .... It follows that as a matter of principle, he is entitled to be compensated for having been detained for those 2 hours and 20 minutes.'*

84. As I describe in more detail later (and as indeed the comments in *Dodds v. Chief Constable* to which I have earlier referred make clear), in fixing on a case by case basis the award of compensatory damages to be made in favour of an individual plaintiff whose liberty has been unlawfully constrained, a court is entitled to take account of the conduct of the plaintiff giving rise to the detention and of the fact that the illegality may in consequence have been technical or procedural in nature. There will be cases in which a plaintiff in this situation may end up obtaining a low award. However, there is a fundamental and critical difference of principle between a rule which demands that compensation be determined on the basis of a fiction that ignores an essential aspect of the tort, and the acknowledgment that the court enjoys a flexibility in assessing damages to take account of the circumstances in which the wrong was committed. As a result, the starting point is that the plaintiff in this situation is entitled to *some* compensatory damages. Any other conclusion ignores the illegality that lies at the core of the cause of action.

85. *Roberts* is (insofar as I can ascertain) the first case in which the contention advanced by the defendants here was asserted: that a plaintiff in an otherwise well-founded action for false imprisonment could *as a matter of principle* obtain only nominal damages if his detention could and would have been effected lawfully or that the availability of compensatory damages was caveated by a rule of causation of the kind accepted in *Lumba, Parker* or *Lewis*. I have been unable to locate a single statement in any case, periodical article or textbook from any common law jurisdiction before the decision in *Roberts* so suggesting. Even allowing for the fact that damages in actions for false imprisonment have traditionally arisen in the course of jury actions thereby limiting the scope for close judicial analysis of the basis on which those damages were awarded, it seems remarkable that such a significant and doctrinally relevant limitation on the reach of the remedies afforded by this aspect of the law remained undiscovered until the start of the twenty-first century.

86. While it is certainly true that no authority is identified in either *Lumba* or *Lewis* (except for *Roberts*) in which an argument to the effect embraced by those decisions was *rejected*, the overwhelming sense of the authorities and texts strongly suggests that they significantly revised the general assumptions as to the role of damages in an action for false imprisonment. In a cause of action of such antiquity, prevalence and constitutional importance, the absence of authority in support of such a constraint on the scope of the remedies of this kind speaks loudly, and louder still when authorities can be identified with ease in which such a case, had it been understood to enjoy any prospect of success, could easily have been but never was made.

87. Moreover, if the contention advanced by the defendants in this case is correct, logically the same theory applies to trespass to goods and to land, and indeed to every tort in which there exists a defence of lawful authority. Entry onto land or seizure of goods dependant upon a

warrant or order found to be defective must, necessarily, sound only in nominal damages if the tortfeasor could (or perhaps could and would) have obtained that authority had they been aware of what the law requires. There may well be good arguments of policy as to why that should be so, just as there will be a strong basis for contending that such a rule diminishes the principle of legality. What is relevant is that nowhere across the geographical spread and temporal breadth of the common law does any court ever appear - until very recently - to have so decided.

88. I thus cannot accept that prior to the decision in *Lumba* the common law of false imprisonment imported a stipulation whereby a plaintiff was precluded in principle from recovering compensatory damages if – had they not been unlawfully imprisoned – he or she would or could have been lawfully imprisoned. I can say with some confidence that there was no such principle acknowledged in the law of this State at the time of the adoption of the Constitution. The issue, therefore, is whether the courts here should – or can – now develop the remedy in the way suggested by that decision and the various authorities from other jurisdictions applying or modifying it.

Constitutional rights and the common law of tort

89. That question must be addressed in the first instance having regard to the protection afforded by the Constitution to the right of personal liberty and the circumstances in which a remedy in damages is required for an interference with that right. The conclusion reached by the Supreme Court in *Meskell v. CIE* [1973] IR 121 that damages lay for a breach of constitutional rights *and* that those damages could be sought 'horizontally' against private persons, as well as the State and its agents, provoked an inevitable debate around the relationship between the '*constitutional tort'* and common law causes of action. That was

settled by the proposition, advanced in *Hanrahan v. Merck Sharpe and Dohme* [1988] ILRM 629, further explained in *McDonnell v. Ireland* [1998] 1 IR 134 and applied most recently in *MC v. Clinical Director of the Central Mental Hospital* [2020] IESC 28 that liability for constitutional damages would arise only if there was no common law (or for that matter, statutory) cause of action covering the activity held to comprise a breach of constitutional rights, or that any cause of action that did apply was '*basically ineffective'* to defend and vindicate the constitutional right in question. I have explained the process of categorisation that this involves in the course of my judgement in *Used Car Importers of Ireland Ltd. v. Minister for Finance and ors.* [2020] IECA 298 at paras. 395 to 396. Clearly, the tort of false imprisonment is the mechanism by which the State has implemented its obligation to defend and vindicate by an award of damages the right of the citizen not to be deprived of his or her liberty save in accordance with law (*W. v. Ireland (No. 2)* [1997] 2 IR 141 at p. 164 to 165 per Costello J.), and it follows that it is not possible to obtain damages for violation of the right of personal liberty outside the framework of that tort (*DF v. Garda Commissioner and ors.* [2014] IEHC 213).

90. The reason for this approach is important. It lies in the view that it is the Oireachtas that has the initial function through its laws (including, by default, the common law) of implementing the obligation of the State in the defence and vindication of constitutional rights by means of actions for the recovery of damages. The courts intervene to supply such a remedy only where there has been a failure by the legislature to obtain adequate protection *via* statute or the common law. The point of departure for the consideration of whether in any given circumstance an action may be maintained for damages for breach of constitutional rights is thus that the existing law exhausts the constitutional obligation to afford a remedy in damages, where that obligation arises. It would, Costello P. said in *W. v. Ireland (No.2)* at p. 167, be

contrary to the constitutional function of the courts to establish new causes of action to protect constitutional rights where the common law or statute established legal claims which themselves adequately protected the interests in question. The basic concept is not dissimilar from that underlying the presumption of constitutionality as applied, most notably, to the determination of the validity of a statute having regard to the provisions of the Constitution.

91. The understanding of constitutional torts that has been thus adopted by the Supreme Court has a negative aspect that is frequently stated, and sometimes criticised. It means that the power of the courts to intervene so as to avoid restrictions on the scope of specific torts as they may be applied to the facts of particular cases is significantly limited - even though this may mean that a person whose constitutional rights have been injuriously impacted by the actions of a third party resulting in damage to him or her has no private law remedy. The same principle dictates that the courts must operate on the basis that the common law as incorporated into the law of the State by Article 50 of the Constitution reflects the Oireachtas' interpretation of how and when breaches of fundamental rights protected by the law of torts should be remedied. That decision must be respected in precisely the same way as its decision to limit a cause of action in any particular respect. It follows that the power of the courts to intervene so as to *reduce* the scope of that protection and the reach of the remedies that carry with it must, symmetrically with the limitation on their jurisdiction to create new causes of action save in the case of basic ineffectiveness, be similarly constrained. While, of course, the common law by its very nature develops on an incremental basis, the imposition of a limitation on the pre-existing power of the courts to render an award of damages for a tort through which the State implements its obligation to defend and vindicate a constitutionally protected interest at the very least requires rigorous justification in logic and principle. Obviously, any such limitation must also be consistent with the degree of protection the Constitution itself requires.

'But for' causation

92. It might be said that in at least one sense the decision in *Lumba* as applied in *Parker* and confirmed in *Hematti* rests upon something of a contradiction. The professed object of the decisions is to *align* the theory of compensatory damages in false imprisonment with that generally applicable at common law. However, in order to achieve this a counterfactual is devised to reflect the policy underlying false imprisonment that seems to be entirely new to the law and particular to that tort. The counterfactual analysis usually applied to issues of causation – what *would* have happened had the wrongful act not occurred – is changed to the paradigm of what *should* have occurred.

93. This case provides a good example of what that means in practice. The counterfactual urged by the defendants here is one in which the historic misunderstanding of the authorities as to the requisite elements of a detention order under s. 5(2) is erased, to be replaced by an appreciation of the law that no-one ever actually entertained. Usually, when courts apply a counterfactual analysis to find that a loss is irrecoverable because it would have been sustained whether or not a wrong had been committed, the court is deciding whether a particular event would have happened anyway. The counterfactual relied upon here depends on an event that would *never* have happened. I have been unable to identify any other instance in which the law, when determining the recoverability of an alleged loss, proceeds on the basis of such a construct. 'But for' causation as applied across the law of torts is a predominantly factual inquiry. The test suggested by *Parker* and *Hemmati* converts it into an exclusively legal one. Even if those decisions are viewed, as Edelman J. suggested in *Lewis*, as looking to what *would* have happened as well as what ought to have occurred, they are still dependant upon an

assumption of legality operative in a context where the focal point of the action is that the defendant has violated the law.

94. The claim in false imprisonment is thus not being brought into order with the rest of the law of tort. It is being remodelled to incorporate a new normative hypothesis that appears to have no analogue in any other form of action. The judgments formulate a test of causation that assumes that the authorities would have acted lawfully within the context of a claim in which the whole point is that they did not. The judgment of Gageler J. presents an entirely sensible justification for this: the law would be an ass if the counterfactual assumed that the same illegality would be repeated. One response to that is (as he did) to modify the counterfactual accordingly. Another is to decide that this shows that 'the counterfactual' has no proper role in the analysis at all. I agree with the view expressed in one recent discussion which characterises the approach adopted in these cases as one that '*turns the tort on its head: the starting presumption in favour of liberty is supplanted by an irrebuttable presumption of legality in favour of government'* (Varuhas '*The Socialisation of Private Law: Balancing Private Right and Public Good'* (2021) 137 LQR 141 at p. 151).

95. I do not think it unsurprising in these circumstances that there is significant disagreement as to what the new governing principle actually is. In England and Wales, the principle appears to be guided by what *should* have happened. According to Gageler J. in *Lewis* the test is partly factual and partly normative – what *would* have happened in fact and on the balance of probabilities, applied with the assumption that all actors conduct themselves strictly in accordance with law. According to Gordon J. the counterfactual intrudes but rarely, and only where imprisonment is '*inevitable'* (the test being met in that case because the statute *required* detention). As with Lady Hale, Gordon J. was of the view that this position would only rarely

arise (although that is not necessarily borne out by how the law has subsequently developed in England). Edelman J. posits a test by reference to what *would* and *could* have happened. On the facts of *Lewis*, the claimant would have been detained. However, that does not assist the defendants in this case.

96. There is, similarly, a striking lack of clarity around how this works. A plaintiff in a civil action bears the burden of proof of each aspect of its claim. In an action in tort, they must prove a wrong, damage and causation. They must establish that the loss for which they contend was caused by the wrong. They must accordingly often prove that but for the wrongful act the loss would not have been sustained (see Burrows '*Remedies for Torts, Breach of Contract and Equitable Wrongs'* 4th Ed. 2019 at p. 52). If the contention advanced by the defendants in this case were well placed, it might be said to logically follow that even though a defendant must prove the legality of a detention, the plaintiff must prove that the unlawful detention would not have occurred anyway. It is notable that none of the judgments in either *Lumba* or *Lewis* engage fully with this question and, where they do, they do so inconsistently. Gagelar J., for example, thinks the counterfactual merely has to be proven on the balance of probabilities. Gordon J. adopts the position that imprisonment must be '*inevitable'* (not probable). A requirement that the counterfactual contended for by the defendant be '*inevitable'* or that he bears the burden of proving it would not accord with the general law, the only possible reason for a novel approach being that the very nature of the tort of false imprisonment requires a further adjustment to the usual rules. The cause of action, in other words, is *different.*

97. An approach which placed the burden on the plaintiff, as a precondition of obtaining compensation for an admittedly unlawful detention, of proving that the unlawful detention would not have occurred anyway would cut to the core of the tort as hitherto understood and,

in particular, the rationale for requiring the defendant in such an action where detention is established to prove its legality. It would also make little sense: the defendant would have the onus of proving that the detention was authorised in law, while the plaintiff would have the burden of establishing that there was no other lawful mechanism by which the detention could have been imposed.

98. Viewing the end point of the argument in this way I think that Lord Brown (with whom Lord Rodger agreed) was correct when he addressed Lord Dyson's response to *Roberts* in the following terms (at para. 344):

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

The compensatory principle

99. None of this is to say that the forging of a new rule of causation cannot in theory be justified. Allowing a plaintiff to obtain damages for loss of his liberty when he would have lost it anyway is, the argument goes, not consistent with the general operation of the compensatory principle. Accordingly, to ensure that that principle is properly operated, a rule of causation must be developed that will allow the tort to function within the parameters of the general law.

100. In *Lewis*, the claimant's case was described by Edelman J. (at para. 154) as follows:

> '*He asserted that substantial damages were always available for false imprisonment as a tort that is actionable per se 'simply because the plaintiff's right not to be imprisoned was in fact infringed'. The argument that substantial damages are available simply for the infringement of a right has been described as seeking 'to overhaul the orthodox compensatory principle' and as 'seeking to alter the whole of our conventional understanding of damages … [by] a radical, novel and fascinating re-interpretation of the law'. The argument should not be accepted.'*

101. The last quotation is from (as he now is) Lord Burrows' '*Remedies for Torts, Breach of Contract and Equitable Wrongs* (4th Ed. 2019) at p. 46. Lord Burrows was in fact addressing an argument that is far broader than that arising in this case, namely the theory that the basic award of damages in all cases of tort and contract is non-compensatory, being instead intended to provide a substitute for and hence to vindicate a right. That thesis suggests that every infringement of a right triggers an award of damages with compensatory damages being merely additional consequential damages insofar as losses have been suffered: *ubi jus ibi remedium*. Edelman J. directs a significant part of his judgment to demonstrating the difficulties facing that claim. It is hard to disagree with the proposition that neither authority nor principle supports the contention that there is any such overarching theory just as it is clearly *not* the case either at common law, or (as I will explain) as a matter of the constitutional law of this jurisdiction that *every* violation of a right results in '*substantial'* damages.

102. An excessive focus upon abstract theory in resolving an issue of the kind presenting itself in this case risks obscuring the reality that the common law of torts comprises a bundle of

causes of action developed – sometimes untidily – to respond to particular exigencies and in ways that meet the needs of the law as revealed by its experience. The common law has thus not always developed in straight lines towards neatly defined and symmetrically proportioned categories. This is to take but one example why – as it was put by Lord Hoffmann in *Kuwait Airways Corporation v. Iraqi Airways Co. (No. 3)* [2002] 3 All ER 209, at p. 242 – there is no uniform causal requirement for liability in tort, but varying causal requirements depending on the basis and purpose of liability. Lord Nicholls in the same case explained why this is so – '*the inquiry is whether the plaintiff's harm or loss should be within the scope of the defendant's liability* ***given the reasons why the law has recognised the cause of action in question'*** (at p. 228, emphasis added).

103. So it is with the '*compensatory principle'*. This reflects sound logic, but it is a mistake to assume that it can be applied with unyielding rigidity. Some torts afford protection to basic rights recognised by the common law. A relentless application of the compensatory principle and rules of '*but for'* causation underlying it may operate in some circumstances to deprive a victim of wrongdoing from obtaining a meaningful remedy following an unlawful interference with those interests in such a way as to defeat the object of the cause of action in the first place. As Lord Nicholls said of the principle in *Attorney General v. Blake* [2000] 4 All ER 385 at p. 391, '*the common law, pragmatic as ever, has long recognised that there are many commonplace situations where a strict application of this principle would not do justice between the parties'*.

104. The most striking example of the modification of the compensatory principle provoked by that realisation arises in cases of trespass to land or chattels. The unauthorised entry on to or use of land or unauthorised taking of a chattel may not always cause a readily identifiable

loss. The defendant might enter the plaintiff's land or take his goods in circumstances where the property itself is not damaged by that wrongful action and in which the plaintiff would not have put his property to any use had the infringement of his rights not occurred. The plaintiff is no worse off after the tort than he was before it was committed. Indeed some of the older cases contain vivid examples of how he could be *better* off (his horse has been exercised, his grass has been cut and so forth).

105. Nonetheless, the law has designed a remedy by way of damages measured not by the plaintiff's loss, but by the benefit obtained by the wrongdoer from the trespass. These '*user damages'* are thus available in actions for trespass to land and goods, and depend on the cost to the wrongdoer of a deemed licence of the land or property in question. They are mirrored in certain actions for breach of contract and for interferences with rights of intellectual property and misuse of private information. The user principle has been acknowledged in this jurisdiction as applicable in cases of trespass to land (see for example *Eustace and ors. v. Drogheda Borough Council and anor.* [2019] IEHC 455).

106. As a category of damages, however, these are exceptional because they may be awarded even though the plaintiff may find itself in exactly the same position it would have been in had the tort not occurred. What is important for present purposes is that the reason for the exception lies in an acknowledgement that in at least some circumstances the common law of tort in fashioning a remedy focussed upon the right rather than the loss: '*the person who makes wrongful use of the property prevents the owner from exercising his right to obtain the economic value of the use in question, and should therefore compensate him for the consequent loss'* (*per* Lord Reed, *Morris Garner & anor v One Step (Support) Ltd* [2018] UKSC 20 at para. 30). Lord Sumption explained such awards in the same case on the basis that '*they are*

justified by the nature of the right the wrongdoer has infringed' (at para. 110). The reason for the exception was similarly explained by Lord Nicholls in *Attorney General v. Blake* (at p. 392):

> '*these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss. Nevertheless the common law has found a means to award him a sensibly calculated amount of money. Such awards are probably best regarded as an exception to the general rule.'*

107. In the course of his judgment in *Lewis,* Edelman J. explains how the law of tort responds to wrongs in two different ways – by rectifying a wrong where it can be undone, and by compensating for its consequences where it cannot. The compensatory principle governs the latter process. '*User damages',* he explains, come within the former category. Rectification is possible in the case of injuries to property through the device of a deemed licence. It is one of a number of situations in which the law directs payments to *rectify a wrong* as opposed to *rectify the consequence of the wrongdoing.* These include circumstances in which damages *in lieu* of specific performance, or in place of the delivery of a chattel, are awarded. With the user fee cases the rationale, he said, was the same. The remedy attempts to rectify the wrongful act by requiring payment of an amount that would have made the use lawful. It is, effectively, the cost that would have been attached to the permission that ought to have been obtained for use of the goods or land. A wrongful act or omission on this reasoning is one capable of being rectified if it is continuing, if it involved an act that can be done or undone '*and which could never have been licensed by payment of a fee'* (at para. 47).

108. All of this may, in one sense, be true. However, if '*user damages'* are actually a rectificatory remedy, this is only because that is how the law has decided to categorise them. It makes sense to say that a rectificatory remedy is one directed to an act that can be done or undone, but the addition of the coda '*which could never have been licensed by payment of a fee*' is neither inherent in that category nor obvious. Perhaps as it developed, or (as is more likely) as it is now analysed, the law designs a construct whereby the owner of the land, chattel or information, is deemed to have given their permission and extracted a price, the '*user damages'* being the enforcement of that bargain. The problem is that there was no bargain. There is accordingly rectification only by a fiction. The critical question is why it has been decided that there should be such a pretence.

109. The real point of these cases is that they show that the law has in some circumstances afforded to the concept of loss or damage a wider meaning, thus enabling the imposition of liability for more than nominal damages upon a person who has used the property of another without their consent (*Stoke-on-Trent City Council v. W&J Wass Ltd.* [1988] 3 All ER 394, at p. 402 *per* Nicholls L.J.). This is done in order to give effect to a policy choice that in at least some circumstances if a plaintiff proves that there is been a violation of his or her rights albeit without demonstrable loss they '*are entitled to substantial compensation for the mere invasion of their rights'* (*Devenish Nutrition Ltd. v. Sanofi-Aventis SA* [2009] Ch. 390, at p. 444 (para. 36) *per* Arden L.J.).

110. All of this works reasonably smoothly for interferences with property-based interests which can be reduced to a rational economic formula. In *Lewis,* Edelman J. explained (at para. 155):

> '*It would be incoherent for Mr. Lewis to be awarded damages as a means to attempt to rectify the wrongful act of his imprisonment by requiring payment of a user fee when his consent was irrelevant to the lawfulness of the act and his imprisonment by statute could never have been a matter the subject of a monetary payment for permission'*.

111. This is clearly true. An individual's interest in his liberty or person cannot be traded, and an award of damages for a violation of rights of the person cannot therefore be calibrated according to such a model. The question is whether the capacity to adapt conventional principles of loss and damage and the rules of causation that underlie them is limited to the protection of those interests that can be commodified and reduced to rational economic formula, or whether it enables the recognition and accommodation of the citizen's right to his or her liberty save where deprived in accordance with law, allowing a plaintiff to obtain compensation where that entitlement has been violated. Whatever about its theoretical nicety, there is and can be no doubt but that historically it adopted the latter course of action.

112. To acknowledge this is not to demand either an overhaul of existing principle or the construction of a new theoretical edifice of rights, wrongs and damages. The response of the law has been more pragmatic. The compensatory principle and corresponding counterfactual analysis afford the starting point in any analysis of loss and causation. It cannot be applied uniformly in every situation, because the law has created exceptions in which the principle cannot function to obtain the objectives of some causes of action. In those circumstances, an approach must be adopted which accommodates the purpose of the tort. For interferences with property rights that cause no compensatable loss, the user fee affords the model adapted for

that purpose. It is unsurprising that the law also enabled compensation for unlawful interference with freedom and in doing so that it did not accommodate a 'counterfactual' in the identification of that loss of the kind suggested in *Lumba, Parker* and *Lewis.* It should be stressed that there is nothing illogical about this, or at least nothing any more illogical than determining that in calculating compensatory damage for a tort the essence of which is that a defendant has acted without lawful authority, damages are calculated on the basis that it actually acted lawfully. A counterfactual of the kind contended for by the defendants is not applied to the tort of false imprisonment because it would undermine the foundation of a cause of action which is directed to compensating for a loss of freedom imposed without lawful authority and for which a loss of freedom *with* lawful authority cannot be a valid surrogate.

113. The error in the approach urged by the defendants here is that it assumes that without the rule for which they contend the law is compensating for violation of a right alone, and not for any consequent loss. That argument is based upon an illusion. The plaintiff is being compensated for his loss of freedom. The question is when does the law view it as appropriate to afford such compensation ? The answer is that it does so when his freedom has been unlawfully interfered with, not when his liberty was unlawfully taken *and* could have not been lawfully interfered with. All common law jurisdictions operated until a decade ago on the basis that an unlawful deprivation of liberty might merit compensatory damages by reason of the illegality and confinement alone, and irrespective of whether a defendant could show that the person who was unlawfully detained might have suffered a loss of liberty anyway. The law did not, as I explain shortly, require a trier of fact to ignore the circumstances in which the detention occurred, enabling instead a sensible and sensitive application of judgment to the award of damages taking account of all relevant factors. Historically, this was often obtained through

the medium of a jury. That is how the right not to be deprived of liberty without legal authority was vindicated at common law.

Public policy and damages

114. Thus, the real question is why that practice should now be changed and whether – whatever the justification may be – this Court is competent to effect such an alteration having regard to the constitutional considerations to which I have earlier referred. For the reasons I have explained, the justification for such a change does not lie in the need to align the law governing false imprisonment with other torts – there is no requirement to effect any such alignment and, anyway, the proposed solution (whatever exactly that may be) creates at least in some of its guises a special new rule for false imprisonment. However, there is an important and obvious reason of policy and (it might be said) of commonsense for why it might be changed.

115. Mr. Lewis – to take that example - was convicted of a serious crime of violence, and his claim arose from the activation of a legal requirement that he serve a sentence imposed for that crime. The damages to which Mr. Lewis was found to be entitled were measured by the trial judge in that case at over $100,000 in respect of 82 days imprisonment. This was in respect of a detention arising from his own misconduct which was inevitably going to be imposed anyway. The law does not generally enable damages to be recovered where a State authority has caused damage to a citizen through an action subsequently found to be in breach of public law (*Glencar Exploration plc. v. Mayo County Council* [2002] 1 IR 112). Absent proof of the constituents of the tort of misfeasance in public office, a breach of fair procedures – even if it results in a loss which might have been avoided through compliance with the law – is not

usually actionable in damages. Yet, the application of the principles of false imprisonment urged by the claimant in *Lewis* required that compensation be awarded where the public law decision was such as to vitiate the legality of a detention *irrespective* of whether it was merited or would have arisen in any event.

116. Moreover, it is impossible not to notice how the combination of centralised decision making and the expansion of public law over the past half century has created a situation in which the State can be faced with the price of a single and *bona fide* error in the formulation of warrants, orders, or the making of quasi-judicial decisions with persons (and potentially significant numbers of them) being detained in a manner that is not consistent with law with consequent exposure to substantial claims for damages. This case affords a good example: it must be remembered that a distinguished and highly experienced judge of the High Court found that the plaintiff had been *lawfully* detained. The officers of State who decided on the form of the detention order used can hardly be criticised for thinking likewise.

117. The courts in this jurisdiction have not ruled conclusively on one of the issues of liability considered in *Lumba* - that is whether a procedural error in an administrative process of the kind in issue in that case renders a confinement '*false'* for the purposes of the private law action (but see *MC v. Clinical Director of the Central Mental Hospital* where constitutional damages in circumstances that seem to have come close to a confinement were sought and refused). I am less than convinced that, had the facts of *Lewis* presented itself before a court in this jurisdiction, (a) there would have been any declaratory order made that a legally inevitable detention was or could be vitiated by a lack of fair procedures or (b) that any such finding would translate into an action for false imprisonment. Indeed, I note that in their joint judgment in *Lewis* Kiefel C.J. and Keane J. observed that had the claimant in that case sought *habeas*

corpus he would have been refused such relief. That said, however, the prospect of invalid detentions of this kind presents itself today on a possible scale that was, until recently, highly unlikely. The opportunity to recalibrate the tort to reflect that reality may seem almost irresistible, particularly when it is believed that it might be achieved with little cost ('*he would have been detained anyway'*).

Damages and the Constitution

118. In determining whether, and if so how, the law in this jurisdiction can accommodate these issues, it is necessary to return to the constitutional guarantee of personal liberty. In *DF v. Garda Commissioner and ors.* Hogan J. struck out claims for damages for breach of the constitutional right to liberty in proceedings in which damages were also claimed for the common law tort of false imprisonment. The former could not be sustained in circumstances in which there was a common law action which provided an effective remedy. What is important for present purposes is that he adopted the view that whatever the extent of the obligation of the State to provide a remedy in damages for interferences with the right of personal liberty that obligation was fully discharged by the tort of false imprisonment (at paras. 22 and 23):

> '*the tort of false imprisonment … may accordingly be regarded as a complete and full vindication of the guarantee of personal liberty in Article 40.4.1° Liability for false imprisonment is strict and is not based on notions of fault or negligence. By providing a mechanism for the protection of individual liberty in this fashion the common law may thus be said to give full effect to this particular constitutional guarantee.*

The claim for damages for breach of the constitutional right to liberty accordingly adds nothing to the common law action for false imprisonment …'

119. The question of whether the cause of action in damages for breach of a constitutional right carried with it a power (or obligation) to award damages reflecting the inherent value of the right violated has been agitated from the infancy of the constitutional tort (see Cooney and Kerr '*Constitutional Aspects of Irish Tort Law'* (1981) DULJ 1). As of now it remains unresolved. As I have noted earlier, Lord Collins in *Lumba* observed different views on this question across those jurisdictions in which such a cause of action had been recognised with the courts in both Canada and New Zealand being sympathetic to the proposition that such an award should be available. In considering how Irish law should respond to that question it may not be irrelevant that the courts in many of those jurisdictions that have adopted a remedy in constitutional tort have expressly referenced the development of their laws in this way to the decision in *Meskell v. CIE* [1973] IR 121, and the well-known description of Ó Dálaigh C.J. in *State (Quinn) v. Ryan* [1965] IR 70, at p. 122 of the power of the courts to innovate a remedy to defend and vindicate constitutional entitlements (see *Simpson v. AG* [1994] 3 LRC 202 at p. 236 (New Zealand Court of Appeal), *Fose v. Minister of Safety and Security* [1998] 1 LRC 198, at p. 223 (South African Constitutional Court), *Taylor v. AG* [2016] 1 LRC 220, at p. 241 (New Zealand High Court), and *Basu v. State of West Bengal* [1997] 2 LRC 1, at p. 23 (Supreme Court of India)). In some of these jurisdictions the Irish cases have been relied upon while identifying an entitlement to damages that '*respond to the wrong inherent in breach of a fundamental right'* (*Taylor v. AG* at para. 61).

120. As a matter of Irish law as it presently stands two things in that regard are, I think, clear. The first is that the fact that a constitutional right has been violated in such a way as to give rise to a cause of action in damages does not automatically and without more give rise to an obligation to award substantial damages in order to reflect the inherent value of the right that has been breached. That emerges from a sequence of decisions in which nominal damages alone have been awarded for such breaches, the cases cited by the defendants of *Kearney v. Ireland, SM v. Ireland* and *Redmond v. Ireland* all being examples of this.

121. The second appears at the other extremity. There is no doubt but that one of the circumstances in which exemplary damages will be awarded to a plaintiff is where the actions of the defendant of which he complains have involved a violation of the plaintiff's constitutional rights. This is the effect of the decision in *Crowley v. Irish National Teachers' Organisation* [1991] 2 IR 305. There, the Court awarded exemplary or punitive damages (it made it clear that the terms were interchangeable) for the deliberate breach by the defendants of the plaintiff's constitutional right to free primary education. The case – which was framed in conspiracy – arose from industrial action taken by teachers at a primary school resulting in its closure and comprising a direction to teachers in the surrounding areas not to accept pupils from the school at the centre of the dispute. The plaintiff received no education for ten months in consequence of the action.

122. It is evident from that decision that in formulating the circumstances in which exemplary damages would be awarded in Irish law, the Supreme Court was departing from the constraints imposed in England by the decision of the House of Lords in *Rookes v. Barnard* [1964] AC 1129 (see *O'Brien v. Mirror Group Newspapers Ltd.* [2001] 1 IR 1). Instead a more flexible test was proposed, directed (at p. 317) to '*the nature of the wrong that has been committed*

and/or the manner of its commission which are intended to mark the court's particular disapproval of the defendant's conduct in all of the circumstances of the case and its decision that it should publicly be seen to have punished the defendant for such conduct'. Damages *could* be awarded on this footing for a breach of a constitutional right: the Court felt that were the position otherwise the law would not be discharging the obligation expressed by Ó Dálaigh C.J. in *State (Quinn) v. Ryan* to which I have earlier referred. They would not, however, be awarded for all such breaches: indeed, the Chief Justice observed that the court should not in every case involving a breach of a constitutional right be concerning itself with exemplary damages, noting that in many types of assault or defamation, constitutional rights were breached of necessity, but in which no question of awarding exemplary damages would arise (at p. 320).

123. In resolving whether there is a requirement to recognise a further heading of damages to vindicate the constitutional right in issue in cases arising between these two situations, two decisions of the Supreme Court are of importance. The first is *Grant v. Roche Products (Ireland) Ltd.* [2008] IESC 35, [2008] 4 IR 679. There, the defendants sought orders dismissing as an abuse of process the plaintiff's fatal injury claim because they had tendered by open offer a sum equal to that awardable in an action of that kind. The action arose from the death by suicide of the plaintiff's son while undergoing a course of medication manufactured by those defendants on whose behalf the offer was made. Central to the rejection of the application was the explanation by Hardiman J. (with whose judgment Murray C.J. and Geoghegan J. agreed) of the relationship between the private law of tort and the State's duty to defend and vindicate the personal rights of the citizen under Article 40.3 of the Constitution (at para. 79):

> '*There is thus authority, both judicial and academic, for the proposition that the law of tort is, at least in certain circumstances, an important tool for the vindication of constitutional rights, and no authority for the proposition that it is concerned exclusively for the allocation of damages and with nothing else whatsoever'*.

124. There is a certain ambiguity in declarations that the law of torts is '*vindicatory'*. An award of nominal damages may achieve '*vindication'* by affording a mechanism through which a plaintiff can agitate a grievance around a breach of his or her rights thus '*marking'* the illegality with a judicial determination to that effect, as well as by securing the legal costs he or she has incurred in establishing this. To that extent, describing the award by reference to a '*vindicatory'* purpose adds little to the analysis. The problem in *Grant* was that the defendants were seeking to prevent the plaintiff from obtaining the satisfaction of any judicial determination of their claim.

125. While *Grant* contains a firm expression of the overarching function of the law of torts, it does not specifically address itself to the question of how, precisely, that function is reflected in the *calculation* of damages. This was considered in *Simpson v. Governor of Mountjoy Prison and ors* [2019] IESC 81, [2020] 1 ILRM 81. There, the plaintiff endured seven and a half months of imprisonment in joint occupancy cells which lacked in-cell sanitation. He was in a '*lock up'* regime which meant that he was frequently in his cell for 23 hours per day. The absence of in-cell sanitation in circumstances where the plaintiff both shared a cell and was for substantial periods of time unable to leave it, was held to represent a breach of rights to privacy and the person as guaranteed by Article 40.3.2° of the Constitution. The Court determined that he was entitled to damages for that infringement and that the common law did not provide him with a remedy.

126. In determining the proper approach to such damages, MacMenamin J. (with whom Clarke C.J. and O'Donnell, McKechnie and O'Malley JJ. agreed) declined to embark upon an award of '*vindicatory'* damages, noting both that the existence of such a heading of damages had not been argued but observing that this would represent a significant development in the law (at para. 120):

> *'Arguably, a case could be made for what has been called "vindicatory damages". However, the basis for such an award cannot be said to be well-established in our law or elsewhere in the common law world. In fact, there are elements in the idea of such damages which might link such an award to punitive and exemplary damages which do not arise here. The idea of vindicatory damages raises fundamental questions as to their range and scope. To recognise a new heading of damages would also raise the matter as to whether such a new heading should be seen as being an addition to, or substitution for, some existing category. Such a case has not been argued.'*

127. In addressing whether compensatory damages should be awarded in line with existing headings, MacMenamin J. identified five relevant principles (at para. 125):

> *'In considering the question of damages, it seems to me that a court may apply the following basic principles. First, there must be a restitutionary element, seeking to put a claimant in the same position as if his or her constitutional rights had not been infringed. Second, it is necessary to ask whether what arose in a particular case was not simply some procedural error. Third, a court's approach should be an equitable one, having regard to the particular facts of an individual case and*

> *the seriousness of the violation. Fourth, if and where necessary, a court awards damages under the various headings of common law, such as non-pecuniary loss including pain, suffering, psychological harm, distress, frustration, inconvenience, humiliation, anxiety, and loss of reputation. Fifth, punitive damages will not generally be awarded save in very grave cases, such as where there was a direct intent or purpose in bringing about a significant consequence or detriment.*

128. Importantly for present purposes, when MacMenamin J. referred to the award being '*equitable'* he made it clear that this included a consideration of the gravity of the breach: it was intended to reflect *'that the seriousness of the violation requires more than a mere declaration'* (at para. 126). He explained (at para. 127):

> *'Ultimately, all these considerations place the question of remedy within the category of compensatory damages. An award of compensatory damages can serve a vindicatory purpose. It will recognise that what happened was wrong and did have an effect upon the appellant over and beyond other constitutional infringements where a declaration would be adequate. To mark the wrong in this case, therefore, the vindication must go further than a mere declaration and contain a just financial redress.'*

129. The need to obtain '*vindication'* of the right through an award of damages is thus related to the gravity of the breach, and its impact on the plaintiff. Where the breach has '*an effect'* on the plaintiff, '*vindication'* may require financial redress. *Simpson* and indeed many other cases in which damages have been awarded for breach of constitutional rights have arguably included within such an '*effect'* mental distress and upset in a more generous and flexible way than the common law (see *Cosgrave v. Ireland* [1982] ILRM 52 and *Sullivan v. Boylan* [2013]

IEHC 104, [2013] 1 IR 510). A '*procedural error'* may result in no damages being awarded, while such damages are more likely to be awarded where the breach is '*serious'.* While damages will be awarded under common law headings, the guiding principle is directed by the first point – placing the plaintiff in the position they would have been in had their constitutional rights not been violated. In this case, that is of some importance when addressing those versions of the test adopted in other jurisdictions that assume that the defendants would have acted lawfully. The constitutional right that has been violated is the right not to be deprived of one's liberty save in accordance with law. Yet, the thesis urged by the defendants is that the Court should measure damages for a breach of that right on the basis of a rigid assumption that ignores the illegality attending the detention. Rather than putting the plaintiff in the same position he would have been in had the breach of his constitutional right not occurred, the analysis calculates damages on a basis that requires the Court to ignore a central feature of the breach – its illegality.

130. *Simpson* is important because it decides – contrary to a submission that lay at the heart of that case - that a finding that there has been a constitutional wrong does not automatically entail as its consequence '*significant damages'* (at para. 48). The damages awarded in that case were, it should be stated, *compensatory.* Although they were low, they were *not* nominal. Moreover, as of now, the case makes clear that Irish law does not recognise a species of '*vindicatory'* damages comprising a distinct heading under which a monetary award will be made for the sole purpose of '*marking'* a constitutional violation or to reflect the inherent value of a constitutional right that has been breached. However, the prospect that such an award might be enabled by the law has not been outruled. Indeed, there are some decisions strongly suggesting that the courts enjoy a power to make an award under this heading (see *Nolan v. Sunday Newspapers Ltd.* [2019] IECA 141 at paras. 94 to 95).

Considerations relevant to the award of damages in an action for false imprisonment

131. Because the action for false imprisonment is the implementation of the State's obligation to defend and vindicate the right of the citizen not to be deprived of his or her liberty save in accordance with law, the assessment of damages must both meet the requirements of the common law while not dipping below the minimal requirements fixed by the constitutional cases. The Supreme Court's explanation in *Simpson* of the role of damages in cases of breaches of constitutional rights clearly envisages account being taken of the circumstances in which the breach has occurred: this clearly follows from MacMenamin J.'s elaboration upon the need for the remedy to be '*equitable'* and his reference in that connection to account being taken of the seriousness of the violation.

132. Although there is authority questioning whether this is possible in the award of damages at common law for the tort of false imprisonment (see *Caie v Attorney-General of New Zealand*) this Court should seek to align its approach to damages for false imprisonment to that adopted in *Simpson*. That is an approach which envisages a flexible, case by case determination. In any event, there is a significant body of authority suggesting that at common law both the conduct of the claimant and basis for the imprisonment may be taken into account in determining the award of compensatory damages and that, it appears to me, follows from the nature and purpose of the award in the first place.

133. Thus, compensatory damages are '*sums calculated to recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred*

by reason of the commission of the wrongful act' (*Conway v. Irish National Teachers Organisation and ors.* at p. 317). As awarded for the tort of false imprisonment, such general damages have two elements – compensation for loss of liberty and for injury to feelings (*per* Hutton L.C.J. in *Oscar v. Chief Constable of the RUC* [1992] NI 290, at p. 319). The former comprises the loss of time considered primarily from a non-pecuniary viewpoint. Injury to feelings includes indignity, mental suffering, disgrace and humiliation. It necessarily incorporates a reputational aspect, including any attending loss of social status and, as was noted in *Dodds v. Chief Constable of the RUC* any stigma associated with a particular arrest. In addressing both aspects of general damages judges and, as appropriate, juries may take account of a wide range of factors relevant to these considerations. Lord Diplock in *Maharaj v. AG of Trinidad and Tobago* [1978] 2 All ER 670, at p. 680 referred to damages recoverable for the tort of false imprisonment as being *'at large'.* That is repeated in the leading texts (*see Clerk and Lindsell on Torts,* 22nd Ed. 2018 at para. 15-139).

134. It must follow that a plaintiff who has engaged in serious misconduct is in a weaker position in seeking to recover damages for injury to his reputation or feelings as a consequence of a detention following that misconduct than one who has not. The impact on reputation and the extent to which '*injury to feeling'* is legally cognisable must, logically, accommodate whether the person was in fact liable to arrest in the first place and why this is so. The older cases thus show that evidence disclosing the reason for an arrest will be admissible in mitigation in an action in false imprisonment and may prompt a jury to make a low or even nominal award (see *Chinn v. Morris* (1826) 2 C&P 361; *Thomas v. Powell* (1837) 7 C&P 807; *Linford v. Lake* (1858) 3 H&N 276). That, as I have noted, was the end result of the deliberations of the first jury in *Gildea v. Hipwell.*

135. That is reflected in the modern cases. In *Oscar v. Chief Constable* , at p. 320 a distinction was drawn in determining damages for an unlawful detention following an unlawful arrest, and in doing so in a case where there had been overholding, those damages being reduced in the latter circumstance because '*injury to feeling is likely to be less'*. A similar conclusion underlies the low damages awarded in *R v. Governor of Brockhill Prison ex parte Evans* [1999] QB 1043 in respect of the innocent but wrongful detention of a prisoner after her sentence had expired. In *Dodds v. Chief Constable* [1998] NI 393, 403 MacDermott J. said that where an imprisonment was of a '*purely technical nature'* damages would be reduced to reflect this. The same conclusion was reached by the New Zealand High Court in *Attorney-General v. Niania* [1994] 3 NZLR 106, where Tipping J. reduced an award of compensation made at first instance to reflect the distinction between cases of false imprisonment where there were no grounds for the arrest and cases where grounds for arrest existed but an arrest did not take place or was otherwise imperfect: the court, it was held, was required to '*bring[ ] this point to account when assessing damages.'* In *Lumba* Lord Brown similarly contemplated that those falsely imprisoned should not be compensated identically '*irrespective of how deserving they were of liberty rather than restraint'* (at p. 353). Indeed, I note that in *Savickis v. Governor of Castlerea Prison* [2016] IECA 268, [2016] 3 IR 310 this Court has acknowledged the potential relevance of the conduct of a plaintiff in assessing damages for assault, while in both *R(NAB) v. Secretary of State for the Home Department* [2011] EWHC 1191 at paras. 14 to 18 and *R(Antonio) v. Secretary of State for the Home Department* [2017] EWCA Civ. 48 at para. 82 the relevance of the plaintiff's contributory conduct to the determination of damages in an action for false imprisonment was confirmed by the High Court and thereafter the Court of Appeal for England and Wales**.**

136. *Simpson* makes clear that this is also the case where the wrong involves violation of a constitutional right – one of the five factors relevant to the determination of quantum as identified by MacMenamin J. was whether '*what arose in a particular case was not simply some procedural error'*. In contrast, cases in which the detention was the end result of significant and serious (albeit *bona fide*) breaches of the law by the State have resulted in substantially higher awards (see *Raducan v. Minister for Justice and ors.* [2011] IEHC 224, [2012] 1 ILRM 419 where an award was made of €2,500 for each of three days of unlawful detention).

137. The difference between this approach, and that adopted in *Lumba* and in *Lewis* is important. While those cases envisage a negation of any entitlement to compensatory damages, and therefore (absent grounds for an award of punitive or aggravated damages) an entitlement to only nominal damages where a detention is unlawful for purely procedural reasons and/or where the detention could and would have been effected lawfully, the correct analysis has as its starting point that in all cases of unlawful detention the plaintiff is entitled to an award of compensatory damages. That may be reduced, depending on the facts, to take account of the plaintiff's conduct and, therefore, of the reasons the detention is unlawful. In some cases in seeking to obtain the '*equitable'* outcome urged in *Simpson,* this may result in a plaintiff obtaining very low damages. However, one would expect that in most cases even where the plaintiff's own conduct has rendered him liable to lawful detention, the plaintiff will retain an element of the compensatory award to which he or she would otherwise be entitled so as to reflect the fact that his detention was not effected lawfully (a matter for which he can rarely, if ever, be responsible).

138. In thus positing an element of vindication through an award of compensatory damages the approach I suggest undoubtedly comes close to envisaging an award under a distinct heading of '*vindicatory'* damages. However, in limiting any such entitlement to cases in which a plaintiff establishes a basis for compensatory damages in the first place, I believe it is more correctly viewed as an irreducible element of the compensatory award to which a plaintiff will by reason of the illegality usually be entitled irrespective of how that illegality arose. Critically, it allows the court in fixing damages to both acknowledge the illegality and to tailor any reduction to reflect the particular facts and circumstances of the case. This was, essentially, the approach adopted by Lord Walker in *Lumba* and it reflects the analysis applied in *Simpson.* While the correct approach to the quantification of that aspect of the compensatory award may require argument in a future case**,** noting the overlap between the common law of tort and the constitutional protection afforded to personal liberty, the calculation of that threshold might, in my view, be usefully conducted having regard to international norms for the assessment of compensation for unlawful detention as authoritatively formulated by the appropriate human rights bodies (see, most recently, the decision of the European Court of Human Rights in *Vasilecskiy and Bogdanov v. Russia*, App. No. 52241/14 and 74222/14 judgement of 10 July 2018).

139. This does not produce a neat end point, and it might be said with some force that to leave damages for false imprisonment '*at large'* is to generate undesirable uncertainty. However, it is a terminus that respects the history of the tort, acknowledges the limitations on the powers of the courts in this jurisdiction to narrow the scope of common law actions which are intended to defend and vindicate constitutional rights and affords a framework for the assessment of compensation where it is determined that it should be awarded. If it is undesirable that damages for this tort be left '*at large'*, that is a matter that is appropriately dealt with by the Oireachtas.

In the absence of such intervention, and as the law develops, it may prove appropriate for the courts here to follow the lead of those in other jurisdictions and to formulate guidelines by which awards for the tort of false imprisonment can in the future be calibrated with greater uniformity. Whether it is desirable that suich guidelines be formulated and, if so, how they should be framed is a matter that could only be done following specific argument on that issue and in an appropriate case.

The relevance of the plaintiff's credibility

140. In this case, the argument is not made by the State that the compensatory damages that were awarded should be reduced. The defendants presented one and only one proposition – that the plaintiff was not entitled to be awarded any compensatory damages. They have failed in that contention, and accordingly the issue of reducing the award does not arise.

141. The plaintiff, however, says that the award should be increased because the trial judge wrongly took into account her view that the plaintiff had, in the course of the trial, tendered evidence that was false. I do not believe it open to this Court to interfere with the decision of the trial judge in this regard.

142. Because the Court is seeking both to objectively assess the award that should be made so as to compensate the plaintiff for his or her loss of liberty *and* in so doing to determine the impact upon the particular plaintiff of the detention, the court is quite entitled to take into account, in the course of that assessment, the veracity of the plaintiff's evidence. That does not mean that the court is enabled to refuse to grant the plaintiff relief by way of damages simply because he is found to have been untruthful in some aspects of his evidence. Damages

at common law (unlike those in equity and, possibly, those for a free standing constitutional violation not protected by the common law of tort) are a matter of right and not of discretion, and it requires either proof that a claim is entirely fraudulent or based upon such persistent dishonesty as to be abusive of the process of the court, or statutory intervention, to deprive a plaintiff who has been untruthful to the Court in some part of his evidence of *any* award of damages. As it happens, in *Simpson* the plaintiff was found to have lied in evidence to the extent that for that reason alone the High Court refused to make any award of damages in his favour. That conclusion was not accepted by the Supreme Court.

143. However, the court in assessing the plaintiff's evidence as a whole is clearly entitled to have regard to his demeanour and where, as happened here, the court forms the view that the plaintiff's evidence has contained falsehoods, to take that into account in assessing the credibility of the plaintiff's evidence, and the evidence of the impact upon the plaintiff in particular. It is also, clearly, relevant to any claim for damages that incorporates an element to protect a plaintiff's reputation or to reflect the stigma associated with his arrest that he has given false evidence to the Court in the course of his proceedings. Contrary to a suggestion made in the plaintiff's submissions, the fact that the defendants did not cross-examine the plaintiff in relation to the impact of prison on him is not relevant. The onus of proof is on him and a judge is quite entitled to find, in whole or in part, that as a result of credibility deficits in the plaintiff's evidence he has not discharged that onus.

144. This was made clear in the decision of the Supreme Court in *Shelley-Morris v. Bus Atha Cliath* [2002] IESC 74, [2003] 1 IR 232, at p. 258 where Hardiman J. noted that the consequence of falsehoods in a plaintiff's evidence may be that he fails to discharge the onus on him in relation to particular aspects of the case. The trial judge in her judgment took the

credibility deficits in the plaintiff's evidence into account in precisely this way. This is clear from the sequence in her careful judgment.

145. Thus, having cited the judgment of Hardiman J. in *Shelley-Morris,* the trial judge proceeded to record the plaintiff's submission that he had found prison an upsetting experience and that he had not been challenged on this (at para. 90), the contention of the defendants that the plaintiff's lack of credibility should cause the Court to disbelieve him in his testimony as to the adverse effect his imprisonment had on him (at para. 91), the contention of the plaintiff that the issues on which the plaintiff's credibility had been questioned related to different matters and that they did not gainsay his account of relevant events (at para. 92) and the judge's conclusion that there were '*certain credibility issues'* that had to be taken into account in awarding compensatory damages (at para. 93). From there she identified those aspects of the plaintiff's evidence which she found to lack credibility, as I have summarised them earlier (at paras. 94 and 95). She made it clear that '*all of his has a bearing on the level of compensatory damages in this case'* (at para. 96). I see no basis on which this Court can interfere with any of this.

146. Finally, it must be noted that the trial judge in deciding quantum did not have the benefit of the decision in *Simpson*. There, the plaintiff obtained a sum of €7,500 for injury to his privacy and dignity arising in the course of a detention that extended over nine and a half months. The conditions giving rise to that award over that period were described by MacMenamin J. as '*distressing, humiliating and … far below acceptable standards …'.* During that period he was placed by the prison authorities in a position where on many days during that period he had to urinate and defecate into a container in a confined space and in the presence of another person (and sometimes in the presence of two other people). There was

no partition in the cell. The Court found that this caused inevitable stress. While of course noting that *Simpson* concerned a prisoner in lawful detention while this case did not, it must nonetheless be the case that equipped with the guidance of *Simpson* and the factors I have outlined above, a court would question whether compensatory damages for a detention of twenty five days in circumstances in which it was the plaintiff's own conduct that rendered him liable to that detention in the first place and in which the illegality arose from a procedural error in the warrant, should equate to those awarded in *Simpson*. One of the important findings in that case, it must be repeated, was that the fact of a violation of constitutional rights even accompanied by identified adverse consequences for the plaintiff does not automatically sound in substantial damages.

Conclusions

147. This takes me to the following conclusions. First, Irish law has never recognised a '*but for*' test of causation in calculating damages in actions for false imprisonment. The tort of false imprisonment as part of the common law of the State at the time of the adoption of the Constitution was a cause of action in which compensatory damages were awarded for an unlawful deprivation of liberty. The law in this jurisdiction does *not* contemplate a bright line rule precluding a person who could have been detained lawfully when they were not, from obtaining by reason of that fact alone any award of general damages. It is wrong to view compensatory damages for false imprisonment as being merely for loss of liberty and associated injury, without acknowledging the consequence of the fact that they are triggered where the containment is unlawful. The tort is the response of private law to the insult caused by that illegality. The award of damages reflected that. It is not open to the courts to now retheorise that cause of action.

148. Second, even if this is wrong, there could be no question of adopting the version of the counterfactual urged by the defendants here and seemingly accepted by the English courts. That depends on the thesis that – by whomever and to whatever standard it must be proven – compensatory damages will be refused if it is established that the detention '*could'* have been effected lawfully. That is a test which negates the essence of the cause of action, yet it is the test which the defendants in this case must establish if they are to succeed in their essential argument. Critically, the constitutional right that has been violated in cases such as this is the right to not be deprived of one's liberty save in accordance with law. Rather than putting the plaintiff in the same position he would have been in had the breach of his constitutional right not occurred, the analysis urged by the defendants calculates damages on a basis that ignores a central feature of the breach – its illegality. That is not a constitutionally permissible construct.

149. Third, the standard articulated in some of the judgments in *Lewis – could and would* have been lawfully detained – cannot be met because there was no finding by the trial judge as to what *would* have happened had the plaintiff not been detained on the basis of the flawed order. Unlike in *Lewis*, the defendants here did not *have* to detain the plaintiff and in any event the overwhelming likelihood must be that the error made the first time would have been repeated. So, even if that version of the law were to be accepted it would still not avail the defendants in the case they seek to advance. This is all the more so if the suggestion made in at least one of the judgments in *Lewis* and by Lady Hale in *Lumba* – that compensatory damages will be refused if a lawful detention were '*inevitable'* - were to be adopted as the relevant test. It was not '*inevitable'* on the facts here that the plaintiff, had he not been arrested as he was, would have been the subject of a lawful detention.

150. Fourth, where a person has been unlawfully detained and that detention is more than merely fleeting, the starting point in the determination of damages is that having been unlawfully detained the plaintiff is entitled to an award of compensatory damages. These are calculated to take account of the fact of the plaintiff's loss of liberty and the impact upon him or her of the detention including the attendant mental suffering, disgrace, injury to reputation and social standing.

151. Fifth, a court is entitled to reduce the award it would otherwise make for this composite injury to reflect the fact the plaintiff was a person who had through his conduct rendered himself liable to lawful detention in the first place and in the consequence that the event rendering the detention unlawful was purely procedural or technical in nature. The nature and extent of that reduction is a matter for the trier of fact having regard to all the circumstances. There will be cases in which the plaintiff's conduct is such that in awarding damages on that basis the court properly finds the interest of the plaintiff in his liberty to be so attenuated that the reduction is a substantial one resulting in very low compensatory damages.

152. Sixth, and following from this, once a plaintiff has established the basis for an award of compensatory damages he or she has triggered an entitlement at common law to an award which contains within it the objective of vindication. This is reflected in the common law authorities to which I have referred. Even if it were not, a person who has their liberty unlawfully constrained will usually have established that the actions of the defendant had an effect over and beyond that of those constitutional infringements in respect of which a declaration or nominal damages would be adequate. This element of the award does not have to be a substantial sum, but it must reflect the fact that for a period of time the plaintiff was deprived of his or her liberty other than in accordance with law.

153. Seventh, and finally, I see no reason having regard to the findings of the Judge to interfere with her view that she should take into account issues around the credibility of the plaintiff's evidence in fixing the amount awarded by her as damages for false imprisonment in this case.

Orders

154. I would, accordingly, dismiss this appeal. The plaintiff having been wholly successful I believe he is entitled to his costs of the appeal in full. I see no reason to interfere with the discretion of the trial judge insofar as the award of costs in the High Court are concerned. These are merely my preliminary views. If either party wishes to dispute them they are free to do so. In default of a communication to that effect within seven days of the date of this judgment the Court shall so order.

155. Whelan J. and Power J. agree with this judgment and the Order I propose.