IN THE HIGH COURT OF AUSTRALIA
CANBERRA REGISTRY

No. C14 of 2019

BETWEEN:

STEVEN JAMES LEWIS
Appellant

and

THE AUSTRALIAN CAPITAL TERRITORY
Respondent

APPELLANT'S REPLACEMENT REPLY

PART I: PUBLICATION

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

PART II: ARGUMENT IN REPLY

(a) *CPCF*

2. Contrary to the Commonwealth's submissions (**CS**) [23]–[24], the reasons of Hayne and Bell JJ in *CPCF* quoted in the appellant's submissions (**AS**) [22] involved a direct rejection of *Lumba*. The other passages of their Honours' reasoning reflect their Honours' view that all questions of quantification of damages should be left for trial.

3. The more fundamental point about *CPCF* is that — as accepted by the respondent (respondent's submissions (**RS**) [18]), but not referred to by the Commonwealth (CS [22]–[23]) — no party contested the correctness of *Lumba*. It is therefore unclear why the respondent resists the submission that, in *CPCF*, the correctness of *Lumba* was assumed. As McHugh J pithily observed: "Cases are only authority for what they decide."[1] They are not authority for what they assume.[2] No judge in *CPCF* decided that *Lumba* was correct, as no party in *CPCF* argued that it was incorrect. For that reason, the appellant does not "concede" that any of the reasoning in *CPCF* is contrary to his submissions, as asserted by the Commonwealth (cf CS [23]). The fact that reasoning proceeds from an undisputed premise does not make it "consistent with" the correctness of that premise (cf CS [23]). Still less can it be said that such reasoning "supports [a] conclusion" to that effect (cf CS [25]).

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1 *Povey v Qantas Airways Ltd* (2005) 223 CLR 189 at [76].

2 See the authorities in AS fn 15.

Ken Cush & Associates
Level 1, ARTE Building
10–12 Lonsdale Street
Braddon ACT 26123

Telephone: 02 6257 9922
Fax: 02 6257 9933
Email: sam.tierney@kencush.com.au
Ref: Sam Tierney

(b) Substantial compensatory damages

4. In relation to the availability of substantial compensatory damages, the appellant makes five broad points in reply.

5. *First*, contrary to RS [21], the reasoning in *Lumba* has the consequences explained in AS [24]. So much is demonstrated by *Parker v Chief Constable of Essex Police*,[3] referred to at RS [38]. On the basis of *Lumba*, the Court of Appeal there awarded only nominal damages to a person ***unlawfully*** arrested by police because, had the illegal arrest not taken place, the person would have been arrested ***lawfully*** by police.

6. This prospect, unrecognised in any past arrest case identified by any party before this Court, is what is at stake in this matter. In light of *Parker*, the direction in *Christie v Leachinsky* for a trial for the assessment of damages was unnecessary (cf RS [29]; CS [31]). *Kuchenmeister* was decided on an entirely false basis (cf CS [32]). It may be accepted that these cases are not ***authorities*** on the point presently at issue. But the absence of any hint of an argument of the kind accepted in *Lumba* demonstrates that it is a departure from hitherto accepted orthodoxy in false imprisonment cases (AS [32]–[34]). The Commonwealth's submissions in support of leave to be heard (CS [3]–[5]) demonstrate how keenly the state desires such a departure.

7. *Secondly*, as explained at AS [37], there is no quarrel, on this branch of the case, with the "compensatory principle" (CS [8]–[9]). However, it is contrary to a substantial and longstanding body of case law concerning trespassory torts, identified at AS [35]–[37], to assert that in the application of that principle general damages are not awarded to compensate for loss or impairment of a right. So much is conceded at RS [32]. Indeed, the respondent at one point concedes "that violation of a right imports damage" (RS [23]; but see RS [35]). This case law is ignored by the Commonwealth (CS [12]).

8. *Thirdly*, both the respondent and the Commonwealth wrongly attempt to minimise the infringement of the appellant's right not to be imprisoned which occurred in this case. The appellant had been sentenced to imprisonment for 12 months ***by periodic detention*** (cf CS [10]). Unless and until the periodic detention was validly cancelled in accordance with law, the appellant had a right not to be imprisoned other than

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[3] [2019] 1 WLR 2238 (CA).

periodically.[4] It was that right which was infringed. Contrary to RS [35], it is not the case that "there was lawful justification for [the] deprivation" of the appellant's liberty. Contrary to CS [11], it is not the case that the appellant's sentence of imprisonment taken with the inevitable operation of the *Crimes (Sentence Administration) Act* "lawfully removed the right upon which his argument depends". If either of these submissions were correct, there would have been no tort.

9. The attempt to minimise the infringement of the appellant's rights is perpetuated in RS [39]–[40], which asserts a failure on the part of the appellant "to distinguish the commission of the tort (namely, the failure to follow correct procedure) from its outcome (that is, loss of liberty)". The tort was not "failure to follow correct procedure". It was false imprisonment. This is precisely the error identified in *Roberts* in the passage quoted at AS [39]. Nor, contrary to RS [59], was the appellant's interest merely an "interest in having questions affecting his liberty determined in accordance with law". It was an interest in not being imprisoned.

10. *Fourthly*, once it is accepted that infringement of the appellant's right not to be imprisoned itself warrants an award of substantial compensatory damages, those damages are not lessened by the fact that the appellant ***could have been*** lawfully imprisoned. That is logically irrelevant to the reality that the appellant's right was in fact infringed.

11. Both the respondent (RS [24]–[25], [56]) and the Commonwealth (CS [48]) submit that because the appellant was ***liable*** to be lawfully imprisoned, nominal damages are sufficient to vindicate the infringement of his right not be imprisoned unless a lawful justification is established. That values the appellant's freedom from imprisonment by the state at less than someone else's freedom from imprisonment by the state.

12. Further, this is precisely the kind of reasoning rejected in *Plenty v Dillon* in the passages quoted at AS [27]–[29]. Contrary to CS [27], where Mason CJ, Brennan and Toohey JJ referred to the plaintiff's entitlement "to some damages in vindication of his right", their Honours cannot have been referring to nominal damages as they were expressly rejecting the trial judge's view that the trespass was so trifling as not to warrant an award of damages. Their Honours' position was the same as that of Gaudron and

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[4] See also the primary judge's rejection of a similar argument at **CAB 29–31** [135]–[155].

McHugh JJ in this regard. The reference by Mason CJ, Brennan and Toohey JJ to the subject of damages not being argued preceded the statement that "it will be necessary to remit the assessment of damages to the Supreme Court". In this light, the Court's reasons as to damages were obviously intended to guide that assessment. While they may have been *dicta*, as explained in AS [35]–[37] they were consistent with long-established authority[5] concerning trespassory torts.

13. The Commonwealth's explanation of Holt CJ's statement in *Ashby v White* as supporting only nominal damages (CS [21]) cannot be right. As explained at AS [26], that was an action on the case, so there could not have been an award of only nominal damages. That is the error made by Viscount Haldane in *Neville* and why the citation of that case in AS fn 27 was prefaced "cf, eg" (cf CS [21]).

14. As explained at AS [41], none of this is to deny that, in the relation to the two detainees considered by Lord Dyson JSC in *Lumba*, the quantum of the awards of damages may be different. That is accounted for by differences in the damages which might be awarded under the various heads referred to in CS [12]. But the Commonwealth's submission leaves out of account the fact of the infringement of a right not to be imprisoned, which is common to both detainees.

15. *Fifthly*, the respondents pay little attention to the question of causation presented by this matter. The Commonwealth relies glibly on a "but for" analysis (CS [16]). For the reasons in AS [43], that is an insufficient tool in a case involving alternative causes. It is not apparent why the respondent contests such a characterisation of this case (RS [42]). There ***was*** "a hypothetical act or event that did not in fact occur": the lawful imprisonment of the appellant. So much is recognised in the last sentence of RS [42].

(c) Vindicatory damages

16. As for non-compensatory vindicatory damages, contrary to RS [51] *Rees* demonstrates that such damages can be awarded absent any actual loss or harm (assuming that to be so here) and, contrary to RS [55], that that is the circumstance in which such an award is appropriate. Here, the point of such an award would be to recognise the value of the right of every human being not to be imprisoned. That is why the factors

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[5] See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

referred to at RS [56] are irrelevant. And that is why there would be no difficulty or surprise if, as in *Rees*, such an award were "uniform" or "conventional" (cf RS [57]).

17. Contrary to RS [52], the award in *Jones*[6] was expressly not compensatory but "to mark the wrong that has been done". While some of the factors relevant to quantifying the award looked to harm suffered by the plaintiff, others had nothing to do with such harm. Likewise, in *Mosley*[7] the award of damages to "mark the fact that either the state or a relevant individual has taken away or undermined the right of another" was expressly distinguished from "compensatory damages" (cf also CS [43]).

18. Recognition of a head of vindicatory damages is required for the same reason it was required in *Rees*. It makes a mockery of the many statements which may be found in the cases about the fundamental common law right to liberty[8] to "vindicate" that right by an award of derisory damages (cf RS [60]; CS [19], [36]). "A plaintiff who recovers only nominal damages has effectively lost".[9] Whatever may once have been the case, an award of nominal damages is today not fit for the purpose of vindication.

(d) Costs

19. Contrary to RS [61], para 6(ii) of the notice of appeal sought an order that "the defendant pay the appellant's costs of this appeal [ie to the Court of Appeal] and the Court proceedings below [ie at trial]" [**CAB 97**]. If the respondent genuinely contests the appellant's entitlement to costs in the Court of Appeal and at trial if the present appeal is successful, that dispute should be remitted to the Court of Appeal.

Dated: 13 February 2020

John Maconachie
T: 02 9231 4461
E: jmaconachie@selbornechambers.com.au

Perry Herzfeld
T: 02 8231 5057
E: pherzfeld@elevenwentworth.com

Peter Tierney
T: 02 9336 5399
E: mail@petertierney.net

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6 (2012) 108 OR (3d) 241 at [87] per Sharpe JA (for the Court).

7 [2008] EMLR 20 at [216] per Eady J.

8 See, eg, *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520 per Mason CJ, Wilson and Dawson JJ, 523 per Brennan J, 532 per Deane J; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at [23] per French CJ, Kiefel and Bell JJ, [94]–[96] per Gageler J, [222] per Nettle and Gordon JJ.

9 *Hyde Park Residence Ltd v Yelland* [1999] RPC 655 at 670 per Jacob J.