

Go directly to jail. Do not collect \$20,000.

Snapshot

- In *New South Wales v JR* [2024] NSWCA 308 ('JR'), the Court of Appeal unanimously applied *Lewis v Australian Capital Territory* (2020) 271 CLR 192 ('*Lewis*') to deny substantial compensatory damages to suspects wilfully detained beyond the investigation period prescribed by the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA').
- This further entrenches the use of counterfactual reasoning in the trespasses when assessing compensatory damages for false imprisonment.
- This raises questions about the effectiveness of the trespasses to protect citizens from violations by the State of common law rights and provide adequate compensation for the violation of such rights.

Lewis v Australian Capital Territory

In *Lewis*, the Territory sentenced Mr Lewis to periodic detention for inflicting actual bodily harm. Mr Lewis breached conditions of this periodic detention. Sentencing legislation obligated the Sentence Administration Board ('SAB') to consequently commit Mr Lewis to full-time detention after holding an inquiry, which it did. However, it failed to provide Mr Lewis natural justice before ordering his full-time detention and, therefore, the Supreme Court found that the Territory had falsely imprisoned Mr Lewis for 82 days.

At trial, Refshauge J awarded Mr Lewis \$1 nominal damages for the false imprisonment. His Honour held that if Mr Lewis had not been falsely imprisoned, then, in the counterfactual world without the false imprisonment ('the counterfactual'), the SAB would have acted properly and lawfully imprisoned Mr Lewis as it was legally obligated to do. His Honour further held that if he were wrong in awarding just nominal damages, then he would have ordered \$100,000 general damages.

The Court of Appeal agreed with the award of nominal damages.

Mr Lewis appealed to the High Court arguing, among other things, that the Court should award substantial compensatory damages for false imprisonment, not by reference to the counterfactual, but for the bare fact that he was falsely imprisoned for 82 days.

Gageler J, Gordon J and Edelman J delivered separate judgements with similar reasoning. All agreed that if liability is established then the compensatory principle requires the court to analyse the counterfactual when assessing damages for false imprisonment. If in the counterfactual the plaintiff would have been lawfully imprisoned, then the plaintiff has not proved loss caused by being falsely imprisoned and should be awarded nominal damages (leaving aside a potential claim for aggravated or exemplary damages). The judges adopted the Supreme Court of the United Kingdom's position in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 ('*Lumba*'), which had started gaining traction in the Federal Court.

The High Court therefore unanimously agreed with Refshauge J's finding that Mr Lewis would have been lawfully imprisoned anyway and affirmed the award of nominal damages.

New South Wales v JR

In 2015, the NSW Police arrested three young men ('the Accused') whom police suspected had committed a sexual assault. The Police wilfully kept the Accused detained for several hours longer than the 'investigation period' permitted under the LEPR before they were charged and refused bail. The Police did this to record the Accused's conversations in the holding cell. A court later found the Accused not guilty of the charges.

The Accused sued for compensation for the hours they were unlawfully held beyond the investigation period. The District Court found the State liable for false imprisonment and awarded each of the Accused \$5,000 in general damages, \$5,000 in aggravated damages, and \$20,000 in exemplary damages.

The State appealed. In late 2024, the Court of Appeal of New South Wales delivered a unanimous judgement in *JR* that applied *Lewis* to overturn the compensatory damages awarded to the Accused.

The Court followed Gageler J's approach in *Lewis*, where his Honour held 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.' (At 209 [36]) It therefore held that the correct counterfactual was that the Police would have commenced the charging procedure for each of the Accused before the expiration of the investigation period. It reached this conclusion based on accepted evidence that the officers had informed the Accused during interviews in the investigation period that they intended to charge them. It further held that, after being charged, the Accused then would have been denied bail and lawfully imprisoned. It concluded that, because the Accused would have been lawfully imprisoned in this counterfactual, they had not proved loss and should be awarded only \$100 nominal damages for the false imprisonment.

The Court further overturned the \$20,000 awarded for aggravated damages and upheld a reduced award of \$10,000 exemplary damages. It cited *New South Wales v Riley* (2003) 57 NSWLR 496 for the proposition that exemplary damages are appropriate when an award of compensatory damages does not sufficiently express the Court's disapproval of the defendant's conduct. In this case, the Court held it was appropriate to punish the State for the officers' wilful decisions to unlawfully detain the Accused beyond the investigation period. Such conduct was in contumelious disregard of the Accused's rights and ought to be punished.

Analysis

Just prior to judgement in *Lewis*, Professor Jason Varuhas strongly advocated for the High Court not to follow *Lumba* because, in his opinion, that decision failed to properly critically analyse and understand the purpose of the tort of false imprisonment, being that it exists to protect and vindicate our right to liberty. ('*Lewis v Australian Capital Territory: Valuing freedom*' (2020) 42(1) *Sydney Law Review* 123) Professor Varuhas explained that trespasses are 'vindicatory' torts that exist to provide compensation for unlawful interference with individual rights. He pointed to the common law's plaintiff-friendly evidentiary onuses to establish liability and its long history of awarding substantial compensatory damages for the mere infringement of the protected rights, separate from and additional to compensatory

damages for 'real world' damage caused by a trespass, such as mental or physical injury or property damage. He argued that the loss caused by a loss of liberty is a form of loss – 'normative damage' – that should be valued, not by considering whether the plaintiff would have been lawfully imprisoned in any event, but rather by considering the objective circumstances of the false imprisonment, such as the manner, duration and conditions of the imprisonment. He warned that introducing a counterfactual analysis to measure the loss suffered by the plaintiff's false imprisonment risked weakening the protection that the common law provides against the State's unlawful interference with citizens' right to liberty according to law.

On that analysis, Mr Lewis should have received substantial damages for 82 days of false imprisonment. However, an award of \$100,000 may seem like a windfall given the unique circumstances of the case. First, Mr Lewis's right to liberty had already been curtailed by legislation *before* the false imprisonment because Mr Lewis's actions obligated the SAB to commit him to full time imprisonment, albeit after holding an inquiry. Second, the State's failure to provide natural justice was unintentional. The SAB had notified Mr Lewis of the hearing by sending several letters to different addresses – in accordance with its usual practice – assuming that the deemed notice provisions in the relevant legislation was sufficient to give him notice of the inquiry. However, the Court found that natural justice in this case required that Mr Lewis be actually aware of the inquiry and the SAB satisfied that he had decided not to attend. That said, 82 days false imprisonment is a significant period, and it does not seem right that he receive practically nothing for it.

Contrast that outcome with *JR*, where the Accused received only nominal damages in quite different circumstances. In *JR*, the LEPRa obligated the Police to *release* the Accused after the investigation period expired, as opposed to Mr Lewis whose right to liberty had been curtailed by his own actions. And, further, the Police had *deliberately* held the Accused for longer than the investigation period to obtain incriminating evidence. Whereas, in *Lewis*, the SAB did not appreciate that its several and genuine attempts to notify Mr Lewis of the inquiry was inadequate until after a judge pronounced on the scope of its natural justice obligation. It does not seem right that such a wilful false imprisonment was compensated by only nominal damages.

Whether substantial compensatory damages should be awarded for a false imprisonment committed by the State when the imprisonment could have been done lawfully raises questions of balancing vindication of our right to liberty according to law against the reality that humans are imperfect and sometimes mistakes will happen when following procedure. On the one hand, courts may be concerned that certain plaintiffs profit from an innocent or technical failure to follow procedure. On the other hand, these procedures exist to restrain heavy-handed action by the State and should not be ignored. At its worst, focussing on a counterfactual where the State always acts lawfully relieves the State of having to follow the law when imprisoning people because it can lazily rely on a counterfactual where it would have done so.

However, the State may not always get such a free pass. In Simon Frauenfelder's careful analysis of *Lewis*, Frauenfelder agrees with Professor Varuhas's concerns that *Lewis* risks undermining the trespasses as useful actions to protect individuals from unlawful conduct by the State. ('Rewriting history: 'Lewis v ACT' and counterfactual analysis in unlawful imprisonment' (2024) 55(1) Australian Bar Review 92) Frauenfelder relies on *Berry v CCL Pty Ltd* (2020) 271 CLR 151 ('*Berry*') to argue that *Lewis* places the legal onus on a plaintiff seeking compensatory damages to plead and prove on the balance of probabilities that they either *could* or *would* not have lawfully imprisoned in the counterfactual. However, Frauenfelder argues that the tort's protective function would be undermined if the court could not infer some loss from the bare fact of the false imprisonment, thus placing an evidentiary burden on the State resisting paying damages to prove that it *could* and *would* have lawfully imprisoned the plaintiff. He further argues that the relevant question is whether the *same wrongdoer* – not another officer in the same position – if given another chance, could and would have lawfully imprisoned the plaintiff. Moreover, if the wrongdoer acted fraudulently, maliciously, or unreasonably, then, as *Berry* clarified in another context, the natural inference is that the wrongdoer would not have acted any differently if it had a lawful option open to it. Thus, the onus on the State to prove lawful imprisonment in the counterfactual should be harder to discharge.

If that were applied to the facts of *JR*, then that would require the State to show that the same officers who falsely imprisoned the Accused would have lawfully imprisoned them in the counterfactual. The fact that they wilfully committed the tort such that the Court punished them by awarding exemplary damages would suggest

that the State's onus of proving lawful imprisonment in the counterfactual should have been a difficult one to meet. The Court acknowledged Gageler J's statement in *Lewis* that 'it cannot be simply assumed that a power to detain could have been exercised lawfully and would have been exercised lawfully' (at 210 [39]) when finding that the Accused would have been charged within time in the counterfactual. But, with respect, one wonders if it gave enough weight to the deliberate wrongdoing by the officers.

It remains to be seen how *Lewis* affects awards of compensatory damages in other trespasses. Will damages awarded for assaults and batteries committed by the State due to a failure to follow procedure now be harder to obtain because the State may argue that it would have followed the proper procedure in the counterfactual? Will State trespass on land without proper authority be similarly affected? If yes, will victims of trespasses committed by the State be discouraged from vindicating their rights in court because the time and cost of vindicating their rights will not be worth the risk of an award of nominal damages? Frauenfelder suggests that one result of *Lewis* could be a 'chilling effect' in this area. One hopes not.

Perhaps *Lewis* signals that exemplary damages will play a more prominent role in vindicating the rights of the plaintiff in trespasses rather than compensatory damages. Gordon J suggested in *Lewis* that exemplary damages can also vindicate the rights protected by trespasses and will keep an emboldened executive in check. (At [73] 219). Respectfully, that is not an ideal alternative. Such damages are 'rarely awarded' and usually only in cases of wilful wrongdoing when the defendant has acted with contumelious disregard of the plaintiff's rights. They were not available for Mr Lewis' 82 days of false imprisonment given the absence of wilful wrongdoing. Respectfully, the courts should resist increasing the burden on plaintiffs seeking damages for trespasses committed by the State by forcing them to seek exemplary damages in place of compensatory damages.