

‘WHAT WORLD ARE WE IMAGINING?’: COUNTERFACTUAL REASONING AND THE ‘BUT FOR’ TEST IN *LEWIS V ACT*

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*Counterfactual causal analysis raises fundamental philosophical questions with far-reaching practical implications for the assessment of compensatory damages. Australian courts frequently skirt around this vexed issue rather than pursuing a coherent, principled approach. The High Court has recently provided much-needed practical guidance on the operation of counterfactuals and the ‘but for’ test. This case note examines *Lewis v Australian Capital Territory* (‘*Lewis*’), in which the High Court reaffirmed the centrality of counterfactuals and the ‘but for’ test to the assessment of compensatory damages. This case note canvasses the facts of *Lewis*, analyses the High Court’s application of counterfactual causal reasoning to give effect to the fundamental compensatory principle, and examines the competing ‘but for’ and ‘material contribution’ causal tests. This case note draws parallels between *Lewis* (a false imprisonment claim) and *Berry v CCL Secure Pty Ltd* (a misleading conduct claim), arguing that the two cases (handed down on the same day) are an unambiguous indication from the High Court that Australian courts should apply counterfactual reasoning when calculating loss, subject to certain exceptional circumstances where the ‘but for’ test malfunctions. This case note also addresses the High Court’s sensible rejection in *Lewis* of the availability of substantial ‘vindicatory damages’ in the absence of loss.*

I INTRODUCTION

Counterfactual analysis is a frequent feature of Australian litigation, yet difficulties arise from the ‘indeterminacy of meaning’ intrinsic to the ‘but for’ (or *sine qua non*) test.¹ The ‘but for’ test requires an assumption that those applying it ‘share an ability to specify some definite possible world that is “similar” to our

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1 Michael Moore, ‘Causation in the Law’ in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (Stanford University, Winter 2019) [5.1.1].

actual world save that in that world the defendant did not do what she did in the actual world'.² It is easier said than done to craft a hypothetical in which no fact or circumstance is changed except the wrongful act.³ Professor Moore provides a useful practical illustration of this difficulty:

Suppose a defendant negligently destroyed a life preserver and a sailor drowns for want of one. When we say '[b]ut for the defendant's act of destroying the life preserver', *what world are we imagining?* We know we are to eliminate the defendant's act, but what are we to replace it with? A life preserver that was, alternatively, destroyed by the heavy seas? A defendant who didn't destroy the life preserver because she had already pushed the victim overboard when no one else was around to throw the life preserver to the victim? And so on and so on.⁴

In *Lewis v Australian Capital Territory* ('*Lewis*'), the High Court squarely confronted this practical and metaphysical⁵ quandary in the context of a false imprisonment claim. In four separate sets of reasons, their Honours engaged in a detailed analysis of counterfactuals, unanimously dismissing an appeal from the Court of Appeal of the Australian Capital Territory ('ACT').⁶ Gageler J, Gordon J and Edelman J held that the appellant, Mr Lewis, was not entitled to compensatory damages because, *but for* his unlawful imprisonment, he would have been imprisoned lawfully and so suffered no loss.⁷ Kiefel CJ and Keane J held that the appeal should fail on an anterior point, namely that Mr Lewis' liberty was already so qualified by his sentence and the relevant Act that he suffered no loss.⁸ The Court also unanimously rejected, as a matter of principle, Mr Lewis' claim for substantial 'vindicatory damages' or 'substantial damages to vindicate a right' irrespective of loss.⁹

Part II of the case note canvasses the facts of *Lewis* and the decisions below. Part III sets out the High Court's analysis of the 'compensatory principle', primarily by reference to the judgment of Edelman J. This part addresses two competing causal tests: the 'but for' test and the 'material contribution' test. Part IV examines the Court's application of the 'but for' test and the Court's conclusion that the correct counterfactual is one in which Mr Lewis was imprisoned lawfully. Part IV draws parallels between the Court's reasoning in *Lewis* and *Berry v CCL Secure Pty Ltd* ('*Berry*')¹⁰ and argues that the two recent cases, taken together, are

2 Ibid.

3 *Lewis v Australian Capital Territory* (2020) 381 ALR 375, 424 [178] (Edelman J) ('*Lewis*'), citing *Bartlett v Australia & New Zealand Banking Group Ltd* (2016) 92 NSWLR 639, 659 [83] (Macfarlan JA), 662 [101] (Meagher JA); *Martinez v Griffiths* [2019] NSWCA 310, [36] (Meagher JA).

4 Moore (n 1) [5.1.1] (emphasis added).

5 Justice James Edelman, 'Unnecessary Causation' (2015) 89 *Australian Law Journal* 20, 20. 'The meaning of a causal rule requires us to ask the metaphysical question of what relationship is required before we can conclude that an outcome (O) is caused by an event (E)'.

6 *Lewis* (2020) 381 ALR 375, 377 [2] (Kiefel CJ and Keane J), 386 [42] (Gageler J), 403 [122] (Gordon J), 426 [185] (Edelman J).

7 Ibid 381 [21], 386 [42] (Gageler J), 398 [96] (Gordon J), 424 [177], [179] (Edelman J).

8 Ibid 377 [2]–[3] (Kiefel CJ and Keane J).

9 Ibid (Kiefel CJ and Keane J, agreeing with Edelman J), 382 [22] (Gageler J, agreeing with Gordon J), 388 [51], 397 [95], 399 [104] (Gordon J), 404 [125], 414 [153], 421 [170], 421–2 [172] (Edelman J). Edelman J held that the two submissions 'amounted to the same point ... with a different title': at 421 [170]. For convenience, the two points are addressed as one in this case note.

10 (2020) 381 ALR 427 ('*Berry*').

an unambiguous indication from the High Court that Australian courts should apply counterfactual 'but for' reasoning when calculating loss, subject to certain exceptional circumstances where the 'but for' test malfunctions. Part V analyses and supports the High Court's wholesale conceptual rejection of Mr Lewis' claim for 'vindicatory damages' and 'substantial damages to vindicate a right'. Part VI concludes the case note.

II KEY FACTS AND DECISIONS BELOW

Mr Lewis smashed a glass into a person's face and pleaded guilty to intentionally or recklessly inflicting actual bodily harm.¹¹ He was sentenced to 12 months' imprisonment, to be served on weekends¹² as 'periodic detention' under the relevant ACT statutory regime, *Crimes (Sentence Administration) Act 2005* (ACT) ('*CSA Act*').¹³ Mr Lewis failed to report for periodic detention three times.¹⁴ As required by the *CSA Act*, the Chief Executive applied for an inquiry by the Sentence Administration Board ('Board').¹⁵ Under the *CSA Act*, where the Board finds that an offender has failed to attend two or more detention periods, the Board *must* cancel the periodic detention as soon as practicable.¹⁶ The Board conducted two inquiries, as the first lacked a quorum.¹⁷ At its second inquiry, in July 2008, the Board cancelled Mr Lewis' periodic detention order. In January 2009, Mr Lewis was arrested and imprisoned for 82 days.¹⁸

Mr Lewis successfully challenged the decision of the Board to cancel his periodic detention, on the basis of denial of procedural fairness.¹⁹ Mr Lewis then sought damages from the ACT for 82 days of false imprisonment. At trial, Refshauge J of the ACT Supreme Court held that Mr Lewis was unlawfully imprisoned, but awarded only nominal damages on the basis that Mr Lewis' detention was inevitable under the statutory regime.²⁰ The ACT Court of Appeal dismissed Mr Lewis' appeal.²¹

11 *Lewis* (2020) 381 ALR 375, 388 [52] (Gordon J).

12 *Ibid* 403 [123] (Edelman J).

13 *Ibid* 388–9 [52]–[53] (Gordon J); *Crimes (Sentence Administration) Act 2005* (ACT) ch 5, as at 8 July 2008 ('*CSA Act*').

14 *Lewis* (2020) 381 ALR 375, 389 [54] (Gordon J).

15 *Ibid* 389 [55]; *CSA Act 2005* (ACT) s 59.

16 *Lewis* (2020) 381 ALR 375, 389 [57] (Gordon J); *CSA Act 2005* (ACT) s 69.

17 *Lewis* (2020) 381 ALR 375, 389 [58] (Gordon J).

18 *Ibid*.

19 *Ibid* 403–4 [123] (Edelman J). In *Lewis v Chief Executive of the Department of Justice and Community Safety* (2013) 280 FLR 118 (Refshauge ACJ), the primary judge was not certain that Mr Lewis knew of the Board's hearing date: at 152–3 [204]–[205].

20 *Lewis* (2020) 381 ALR 375, 389 [60] (Gordon J), 404 [124] (Edelman J); *Lewis v Australian Capital Territory* (2018) 329 FLR 267, 325 [386]–[388] (Refshauge J).

21 *Lewis* (2020) 381 ALR 375, 390 [62] (Gordon J); *Lewis v Australian Capital Territory* [2019] ACTCA 16 (Elkaim, Loukas-Karlsson and Charlesworth JJ).

III HOW DOES THE COMPENSATORY PRINCIPLE OPERATE?

In *Lewis*, Edelman J engaged in a detailed review of general compensatory principles.²² His Honour commenced with the classic statement from *Haines v Bendall*²³ that compensation should, as far as money can, put the party in ‘the same position as he or she would have been in if the contract had been performed or the tort had not been committed’.²⁴ His Honour noted that this ‘does not explain the manner in which money is awarded to put the victim in the position they would have been in if the wrong had not occurred’.²⁵ Similarly, Gordon J stated that the boundaries of the principle ‘cannot be stated in abstract terms’²⁶ and Gageler J noted that the principle is more easily stated than applied.²⁷ The gulf between principle and practice is evidently wide.

Edelman J drew a distinction between two forms of compensation and warned against conflating the two: remedies which rectify the wrongful act itself, and remedies which compensate for ‘adverse consequences suffered as a result of the wrong’.²⁸ Gordon J likewise noted the different purposes of different remedies: ‘[s]ome remedies seek to redress the infringement of a “right” by vindication of that “right”, some seek to rectify or correct the act that gave rise to the liability, while other remedies seek to address the loss or injury suffered’.²⁹ Her Honour emphasised the tailored nature of relief.³⁰

A Rectifying the Wrongful Act Itself

Edelman J sets out a number of examples of compensation which is directed to rectifying a wrongful act including: specific performance, restraints on future infringements, delivery up, substitutive compensation (or a ‘substitutionary remedy’), and damages based on the ‘user principle’.³¹ His Honour devoted significant attention to ‘user principle’ damages, which seek ‘to rectify the wrongful act by requiring payment of an amount that would have made the use lawful’.³² Such damages may be awarded even where the plaintiff has not suffered actual detriment, including no loss of an opportunity to license the relevant asset,³³ and are ‘often calculated by a hypothetical negotiation between a willing licensor and a willing licensee’.³⁴ For example, reasonable royalties may be payable for unauthorised use of intellectual property rights.³⁵ This form of damages is not

22 *Lewis* (2020) 381 ALR 375, 407–14 [139]–[152].

23 (1991) 172 CLR 60.

24 *Ibid* 63 (Mason CJ, Dawson, Toohey and Gaudron JJ).

25 *Lewis* (2020) 381 ALR 375, 408 [140].

26 *Ibid* 391 [66].

27 *Ibid* 384 [32].

28 *Ibid* 408 [140]–[141].

29 *Ibid* 386 [44].

30 *Ibid*.

31 *Ibid* 408–10 [142]–[144].

32 *Ibid* 410 [145].

33 *Ibid*.

34 *Ibid* 412 [148] (Edelman J).

35 *Ibid* 409–10 [144] (Edelman J).

always available; if it is unlikely that a wrongful act is a type of act for which permission could be lawfully negotiated (eg, an assault), then it is unlikely that 'user principle' damages will be awarded.³⁶ Gordon J held that 'user principle' damages operate 'not merely to compensate the plaintiff but to deny the defendant the value of the property'³⁷ which is 'relief of a different kind directed to different objectives' than compensatory damages available for false imprisonment.³⁸

B Compensating the Consequences of the Wrong

Edelman J explained that in the vast majority of cases, the focus is on 'rectifying the consequences of the wrong rather than rectifying the wrongful act itself'.³⁹ This requires a close analysis of causation, which 'establishes a link between a physical event and a physical outcome'.⁴⁰ Any attempt to establish this link necessarily raises the question; what is the applicable causal test?

1 'But For' Causation

Edelman J framed the relevant causal inquiry as

whether the defendant's wrongful act was necessary for the loss: 'did the defendant's act make a difference' to that outcome? That question is posed as a counterfactual: would the loss have lawfully occurred without the defendant's wrongful act? In other words, would the plaintiff have suffered the same loss but without a violation of their rights?⁴¹

His Honour held that an act which does not make a difference to the outcome is 'not a cause of the loss'.⁴² This is an articulation of 'but for' causation.

2 Material Contribution – Exceptional Cases

Edelman J held that, while it is more difficult to justify⁴³ attribution of responsibility to a defendant where the 'but for' test is not satisfied, there are 'exceptional cases' where a defendant may be held liable 'if their actions *materially contributed* to a loss which would have occurred in any event'.⁴⁴ Causation of loss in the 'strict sense' may not be required⁴⁵ where, for example:

- several factories pollute a river, but no one factory was necessary for the nuisance in isolation;⁴⁶ or

36 Ibid 413 [149] (Edelman J).

37 Ibid 395 [83].

38 Ibid 395 [84].

39 Ibid 413 [150].

40 Ibid 413 [151] (Edelman J).

41 Ibid 413–14 [151] (citations omitted).

42 Ibid 414 [151].

43 Ibid.

44 Ibid 414 [152] (emphasis added).

45 Ibid.

46 *Duke of Buccleuch v Cowan* (1866) 5 M 214, cited in *Strong v Woolworths Ltd* (2012) 246 CLR 182, 192–3 [22] (French CJ, Gummow, Crennan and Bell JJ).

- a fraudulent misrepresentation is a factor that induces a plaintiff to make an adverse decision, but the plaintiff would have made the same decision in any event.⁴⁷

The limitations of the ‘but for’ test to which Edelman J alludes have been considered extensively in academic literature.⁴⁸ In particular, the ‘but for’ test is often said to be inadequate in cases of ‘overdetermination’⁴⁹ and ‘underdetermination’.⁵⁰

A classic example of ‘overdetermination’, raised in *Lewis*, is where a ‘property is jointly destroyed by multiple fires all of which were sufficient to destroy the property but the defendant wrongdoer only caused one of the fires’.⁵¹ Another example is where ‘two hunters carelessly shoot and a mountain walker is hit by both bullets each of which would have been sufficient to kill instantly’.⁵² Is neither hunter liable? That seems an absurd consequence of the ‘but for’ test.

A classic example of ‘underdetermination’ is that of 10 small fires, none of which were independently sufficient to burn a barn down, but which combined to do so. As Bant and Paterson explained, ‘none of the fires taken singly counts as a relevant “cause” on the “but for” test, seemingly denying the obvious positive contribution made by each to the outcome’.⁵³ Professor Stapleton has highlighted that the ‘but for’ test is under-inclusive in circumstances where:

- the defendant’s contribution to the outcome is neither necessary nor sufficient (eg, three persons jointly push a car off a mountain where the force of any two of them was required);⁵⁴ or
- the extent of the defendant’s contribution to the outcome is difficult to quantify (eg, the defendant is one of a number of professional advisers who influenced the plaintiff’s decision).⁵⁵

Professor Stapleton has suggested that ‘courts grasp at vague undefined labels such as “substantial factor” and “material contribution”’ in an attempt to resolve this under-inclusiveness.⁵⁶ It is beyond the scope of this case note to fully canvass

47 *Lewis* (2020) 381 ALR 375, 414 [152] (Edelman J).

48 See, eg, Richard W Wright, ‘Causation in Tort Law’ (1985) 73 *California Law Review* 1735, 1775–7; Edelman (n 5); Jane Stapleton, ‘An “Extended But-For” Test for the Causal Relation in the Law of Obligations’ (2015) 35(4) *Oxford Journal of Legal Studies* 697.

49 ‘[W]here there is more than one independently sufficient factor to produce the result that in fact occurred’: Elise Bant and Jeannie Marie Paterson, ‘Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law’ (2017) 24 *Torts Law Journal* 1, 15.

50 ‘[W]here there are multiple reasons that, taken singly, are insufficient to produce the plaintiff’s decision to act, but suffice when combined in one or more ways’: *ibid* 15.

51 *Lewis* (2020) 381 ALR 375, 426 [184] (Edelman J). This example derives from *Anderson v Minneapolis, St P & S S M Ry Co*, 179 NW 45, 49 (Commissioner Lees) (Minn, 1920).

52 Jane Stapleton, ‘Factual Causation’ (2010) 38(3) *Federal Law Review* 467, 474 (‘Factual Causation’).

53 Bant and Paterson (n 49) 15.

54 American Law Institute, *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (2010) § 27 illustration 3.

55 Stapleton, ‘Factual Causation’ (n 52) 476; Bant and Paterson (n 49) 18. Bant and Paterson have canvassed the potential benefits of the ‘material contribution’ test, arguing that the ‘but for’ test is ‘deeply problematic’ in assessing ‘the effect of a particular wrongful act on a plaintiff’s decision-making process’: at 16, 18.

56 Stapleton, ‘Factual Causation’ (n 52) 475–6.

or attempt to resolve the perennial disagreement over the 'notoriously elastic' material contribution test.⁵⁷

IV DOES THE 'BUT FOR' TEST APPLY, AND IF SO, WHAT IS THE CORRECT COUNTERFACTUAL INQUIRY?

A Mr Lewis' Submission

Mr Lewis argued that he was entitled to compensation for 'genuine loss' suffered during 82 days of false imprisonment,⁵⁸ specifically 'non-pecuniary damage including loss of liberty and injury to dignity and feelings'.⁵⁹ He argued this on the two alternative bases that:

- a counterfactual inquiry and the 'but for' test were not applicable, and instead the correct test was whether the relevant acts were 'sufficient in combination with other conditions to produce the harm';⁶⁰ and
- if the 'but for' test did apply, the correct counterfactual was that Mr Lewis simply was not imprisoned at all.⁶¹

Both arguments were rejected.⁶²

B Consideration by the High Court

1 *Is the 'But For' Test Applicable?*

The High Court held that the 'but for' test was applicable in the circumstances. Edelman J usefully articulated the operation of the 'but for' test as follows:

[T]he test for causation of loss asks whether the wrongful act was necessary for the loss. The 'but for' or counterfactual approach 'directs us to change one thing at a time and see if the outcome changes'. The change is the removal of the wrongful act. If the loss would lawfully have occurred but for the wrongful act then the wrongful act was not necessary for the loss. The counterfactual approach thus involves a hypothetical question where no other fact or circumstance is changed other than those which constituted the wrongful act.⁶³

Edelman J acknowledged the limitations of the 'but for' test (discussed above), but elected not to throw out the baby with the bathwater. His Honour concluded that 'the existence of these exceptional circumstances cannot justify abolishing the causal requirement that the wrongdoing must be necessary for the loss'.⁶⁴ 'If a loss would have lawfully occurred even without the wrongful act', his Honour held,

57 Bant and Paterson (n 49) 16 n 71.

58 *Lewis* (2020) 381 ALR 375, 424 [177] (Edelman J).

59 *Ibid.*

60 *Ibid.*, quoting HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985) 249.

61 *Lewis* (2020) 381 ALR 375, 396 [87] (Gordon J), 424 [177] (Edelman J).

62 *Ibid* 381 [21], 386 [42] (Gageler J), 398 [96] (Gordon J), 424 [177], [179] (Edelman J). For Kiefel CJ and Keane J, the appeal failed on an anterior point: at 376 [2].

63 *Ibid* 424 [178] (citations omitted).

64 *Ibid* 426 [184].

‘then exceptional justification is required before responsibility can be imposed on a defendant who *merely contributed* to the manner in which the damage occurred’.⁶⁵ Mr Lewis did not identify an exceptional justification.⁶⁶

Gordon J held that Mr Lewis was not entitled to compensatory damages because his was a rare case where the counterfactual showed that imprisonment was inevitable.⁶⁷ Gordon J drew a distinction between the role of counterfactuals in establishing *legal liability* as distinct from *quantum of loss*.⁶⁸ Her Honour held that ‘[o]n the question of liability for the tort of false imprisonment, there is no role for a counterfactual analysis that would seek to replace what did in fact happen with what would otherwise have happened’.⁶⁹ By contrast, ‘when assessing compensatory damages, some counterfactual analysis is necessary’ in order to apply the fundamental compensatory principle.⁷⁰ To ignore the counterfactual at that stage would be ‘blind to the realities of the situation’.⁷¹ Gageler J similarly observed that, when attributing tortious liability, the relevant inquiry is ‘how things came about’ rather than ‘what made a difference’,⁷² whereas counterfactual analysis enters at the subsequent stage of assessing entitlement to compensatory damages.⁷³ Gordon J set out two examples of loss and demonstrated the necessity of counterfactual reasoning in computing the quantum of damages:

A person unlawfully imprisoned may lose wages through an inability to work while detained, or they may simply lose time. Each of these is a compensable loss – the former by an award of special damages and the latter by way of general damages. It is difficult to reach that conclusion without a counterfactual. Why is the money a person would have earned in the time they were unlawfully detained something which is compensable? Precisely because they *would have* earned that money if they had not been unlawfully imprisoned. On the other hand, if the person would inevitably have been lawfully imprisoned for the relevant period of time, what is their loss or injury?⁷⁴

65 Ibid (emphasis added); by contrast, Stapleton has argued that (despite the ‘seductive simplicity’ of but for causation) courts should no longer regard ‘necessity as the fundamental form of causal relation’ and should instead recognise ‘that a factor is a factual cause if it contributes *in any way* to the existence of the phenomenon’: Stapleton, ‘Factual Causation’ (n 52) 476 (emphasis in original); Bant and Paterson have advocated an ‘a factor’ test in place of the ‘but for’ test in some circumstances: Bant and Paterson (n 49) 15–22.

66 *Lewis* (2020) 381 ALR 375, 426 [184] (Edelman J).

67 Ibid 388 [50], 392 [76]. Gordon J also held that Hart and Honoré’s ‘alternative causes’ analysis did not assist Mr Lewis because the true ‘cause’ of his harm was the operation of the *CSA Act* itself, not the Board’s lack of procedural fairness: at 399 [102].

68 Ibid 392 [72], 394 [81].

69 Ibid 387 [45].

70 Ibid 388 [50] (Gordon J). Gordon J held that Mr Lewis’ reliance on *Ashby v White* (1703) 2 Ld Raym 938; 92 ER 126, *Plenty v Dillon* (1991) 171 CLR 635 and *Gulati v MGN Ltd* [2017] QB 149 was ‘misplaced’: at 392 [75], 395 [86].

71 *Lewis* (2020) 381 ALR 375, 391 [67] (Gordon J).

72 Ibid 383 [29], citing Jane Stapleton, ‘Perspectives on Causation’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 61, 61–2. See also Jane Stapleton, ‘Unnecessary Causes’ (2013) 129 (January) *Law Quarterly Review* 39, 39, 54–5.

73 *Lewis* (2020) 381 ALR 375, 383 [29] (Gageler J).

74 Ibid 391–2 [71] (emphasis added).

Gordon J diverged semantically from Edelman J, opining that the application of the term 'causation' to the process of assessing loss is 'unhelpful'.⁷⁵ Her Honour preferred to conceptualise 'causation' more narrowly as the allocation of legal responsibility.⁷⁶

Kiefel CJ and Keane J agreed that compensatory damages were not available to Mr Lewis 'because a counterfactual analysis in relation to the issue of causation reveals that the false imprisonment caused the appellant no loss that he would not have suffered had he not been falsely imprisoned'.⁷⁷ However, their Honours expressed agreement subject to the qualification that the appeal should fail on an anterior point.⁷⁸ Namely, Mr Lewis' 'right to be at liberty was so qualified and attenuated by the effect of his sentence and the terms of the Act'⁷⁹ that he did not suffer 'any real loss at all'.⁸⁰ Their Honours noted, by close reference to the *CSA Act*, that 'until the Board was able to perform its function, the appellant was unlawfully at large in that he was liable to be arrested without warrant'.⁸¹ Accordingly,

[e]ven though the appellant's periodic detention order had not been validly cancelled by the decision of the Board, and consequently the appellant had indeed been falsely imprisoned when he was placed in full-time detention, an award of substantial damages, such as might be warranted in the case of a person lawfully at large who is falsely imprisoned, is not available ...

to Mr Lewis.⁸² Their Honours analogised the position of Mr Lewis to a plaintiff 'in a defamation action who, while able to establish that he or she has been defamed by the defendant, also happens to be a person of general bad reputation'.⁸³ While such a plaintiff may successfully establish their cause of action, they will not be entitled to substantial damages.⁸⁴

2 Given the 'But For' Test Applies, What is the Correct Framing of the Counterfactual?

Mr Lewis proposed a counterfactual in which he simply was not imprisoned.⁸⁵ The High Court rejected that submission and held that the correct counterfactual was one in which Mr Lewis was imprisoned lawfully.⁸⁶

Edelman J held that Mr Lewis' proposed counterfactual was fundamentally flawed as it 'assume[d] the answer to the very question being asked'.⁸⁷ His Honour

75 Ibid 391 [68].

76 Ibid 391 [69].

77 Ibid 377 [2].

78 Ibid.

79 Ibid 378 [6] (Kiefel CJ and Keane J).

80 Ibid 377 [3] (Kiefel CJ and Keane J).

81 Ibid 381 [18].

82 Ibid 381 [19] (Kiefel CJ and Keane J).

83 Ibid 378 [6].

84 Ibid.

85 Ibid 396 [87] (Gordon J), 424 [177] (Edelman J).

86 Ibid 386 [42] (Gageler J), 396 [90] (Gordon J), 424 [179] (Edelman J). For Kiefel CJ and Keane J, the appeal failed on an anterior point: at 377 [2].

87 Ibid 425 [180].

held that '[t]he correct method of framing the counterfactual [was] to ask 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'.⁸⁸ On the facts, his Honour answered 'yes', because a valid decision to imprison was inevitable.⁸⁹

Gordon J reached the same conclusion, expressing the correct counterfactual question as: 'what would have happened if the tort had not been committed'.⁹⁰ Her Honour reasoned that 'it is contrary to common sense to say the correct counterfactual is that Mr Lewis would not have been imprisoned, when the *CSA Act* required him to be imprisoned' and any other conclusion would directly contradict the unchallenged finding of the courts below that Mr Lewis would inevitably have been detained.⁹¹ Edelman J and Gordon J both derived support from Lord Dyson's analysis of *Roberts v Chief Constable of the Cheshire Constabulary*⁹² (a false imprisonment case) in *R (Lumba) v Secretary of State for the Home Department*.⁹³

Gageler J expressed his reasoning on this point by reference to the ACT's 'pathways to tortious liability' via the Chief Executive and the Board.⁹⁴ His Honour held that '[t]he correct approach is to look to the position that Mr Lewis would have been in had the Board not in fact conducted the inquiry that it did and had the Board not in fact gone on to make the order on which the Chief Executive in fact acted'.⁹⁵ His Honour held that this inquiry occurs 'by drawing inferences from known facts to find the counterfactual position on the balance of probabilities'.⁹⁶ Unlike the other members of the Court, Gageler J articulated the following 'policy': '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*'.⁹⁷ In other words, the correct counterfactual approach is to compare 'the position of the plaintiff in fact with the position the plaintiff would have been in had the wrongful imprisonment not occurred and had all concerned acted strictly in accordance with law'.⁹⁸ Based on this policy, in his Honour's view, the counterfactual was not in doubt on the balance of probabilities: the Board would have cancelled Mr Lewis' periodic detention and the Chief Executive would have imprisoned Mr Lewis full-time. Mr Lewis suffered no compensable loss as he

88 Ibid 424 [179].

89 Ibid.

90 Ibid 397 [94].

91 Ibid 396 [90].

92 [1999] 1 WLR 662.

93 [2012] 1 AC 245, 281 [93] ('*Lumba*'). See *Lewis* (2020) 381 ALR 375, 396 [89] where Gordon J referred to Lord Dyson who 'said that it was a "fallacy" not to draw a distinction between those who would otherwise have been imprisoned and those who would not'. Edelman J also referred to Lord Dyson who 'said that substantial damages should not have been awarded because but for the wrongful act Mr Roberts would still have been lawfully detained': at 426 [183], citing *Lumba* [2012] AC 245, 281 [93].

94 *Lewis* (2020) 381 ALR 375, 382–3 [27].

95 Ibid 384 [35].

96 Ibid.

97 Ibid 384 [36] (emphasis added).

98 Ibid 385 [38] (Gageler J).

'would have endured the same deprivation of liberty and indignity as he in fact endured'.⁹⁹

C Parallels between Lewis and Berry Demonstrate the Centrality of the 'But For' Test to Assessment of Loss

There are significant parallels between the counterfactual reasoning in *Lewis* and *Berry*,¹⁰⁰ another decision of the High Court handed down on the same day.¹⁰¹ Taken together, the two cases illuminate the High Court's commitment to the 'but for' test and counterfactual reasoning as a primary method of calculating loss. *Berry* was a misleading conduct claim concerning an agency agreement for the sale of polymer banknotes. The respondent's deliberate misleading conduct 'caused the appellants to give up an [agency] agreement beneficial to them yet where, *but for* the misleading or deceptive conduct, the respondent would have been entitled lawfully to terminate the agreement'.¹⁰² The majority (Bell, Keane and Nettle JJ) held that the respondent could, in principle, seek to establish that it would have lawfully terminated the agreement had it not misled the appellants.¹⁰³ In other words, a wrongdoer may 'set up a lawful means alternative while retaining the benefits of its wrong',¹⁰⁴ because the purpose of compensatory damages is compensation not punishment.¹⁰⁵ Their Honours stated that if, absent the misleading conduct, the respondent would have lawfully terminated, then the applicants 'did not suffer any loss or damage [as] they would have been *no worse off*'.¹⁰⁶ On the facts, the majority held that the appellants were entitled to damages but only because the defendant 'was not and would not have been prepared' to lawfully terminate the agreement.¹⁰⁷ This reasoning is closely analogous to the conclusion that Mr Lewis suffered no compensable loss because he would inevitably have been imprisoned absent the tortious conduct.

Further, Gageler J commented in *Lewis* that '[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 in fact been exercised unlawfully',¹⁰⁸ which echoes the conclusion in *Berry* that the respondent could avoid compensating if it could show that it *would* have (but not merely on the basis that it *could* have) legally terminated the agreement.¹⁰⁹

99 Ibid 386 [42] (Gageler J).

100 For a detailed analysis of *Berry* (2020) 381 ALR 427, see Samuel Castan Blashki, 'Navigating Hypothetical Worlds – High Court Guidance on Counterfactuals in *Berry v CCL Secure*' (2021) 26(3) *Torts Law Journal* 258.

101 Both *Lewis* (2020) 381 ALR 375 and *Berry* (2020) 381 ALR 427 were handed down on 5 August 2020.

102 *Berry* (2020) 381 ALR 427, 429 [1] (Bell, Keane and Nettle JJ) (emphasis added).

103 Ibid 437–8 [27].

104 Ibid 440 [31].

105 Ibid.

106 Ibid 43–9 [28] (emphasis added). See also Edelman J in *Lewis* (2020) 381 ALR 375, 411 [146] n 213, citing *Berry* (2020) 381 ALR 427, 438–9 [28] (Bell, Keane and Nettle JJ).

107 *Berry* (2020) 381 ALR 427, 446 [42] (Bell, Keane and Nettle JJ).

108 *Lewis* (2020) 381 ALR 375, 385 [39] (emphasis in original). Gageler J notes that no such difficulty arose on these facts: at 385 [40].

109 *Berry* (2020) 381 ALR 427, 441 [33] (Bell, Keane and Nettle JJ).

While the cause of action and facts in *Berry* are far removed from *Lewis*, the Court's analysis of counterfactual reasoning is strikingly similar. The two cases are an indication from the High Court that Australian courts should usually engage in strict 'but for' counterfactual reasoning when assessing the quantum of loss, subject to Edelman J's 'exceptional justification' proviso which permits the use of the 'material contribution' test in limited circumstances.¹¹⁰

V CAN MR LEWIS RECOVER SUBSTANTIAL DAMAGES FOR FALSE IMPRISONMENT TO VINDICATE HIS RIGHTS IRRESPECTIVE OF WHETHER HE SUFFERED ANY LOSS?

A Mr Lewis' Submission

Mr Lewis sought substantial 'vindicatory' damages 'simply because his right to liberty was infringed and independently of any consequences of that infringement'.¹¹¹ He submitted, as a matter of principle, that 'compensation for torts that [are] actionable per se always requires substantial damages even where no actual loss is suffered'.¹¹² Mr Lewis framed this in two different ways: as 'substantial damages to vindicate a right' and 'vindicatory damages', which Edelman J held were ultimately the same point.¹¹³

B Consideration by the High Court

The High Court rejected Mr Lewis' proposed expansion of the law of remedies.¹¹⁴ Edelman J elegantly demonstrated the conceptual folly of Mr Lewis' 'new and novel' approach,¹¹⁵ concluding that '[t]here is no place for a separate species of vindicatory damages'.¹¹⁶ The quantum of vindicatory damages would be entirely at large¹¹⁷ and independent of consequences, such that compensation would be 'the same whether [Mr Lewis] was imprisoned in conditions of luxurious comfort or appalling depravity' and whether 'he were imprisoned for 82 days or 820 days'.¹¹⁸ Gordon J similarly asked: 'how could a court meaningfully determine a quantum of damages which is not moored to a compensatory or punitive

110 *Lewis* (2020) 381 ALR 375, 426 [184].

111 *Ibid* 407 [137] (Edelman J).

112 *Ibid* 407 [138] (Edelman J).

113 *Ibid* 421 [170]. Mr Lewis relied on a number of cases including *Ashby v White* (1703) 2 Ld Raym 938; 92 ER 126; see *ibid* 392 [76] (Gordon J); *Plenty v Dillon* (1991) 171 CLR 635; see *ibid* 393 [77] (Gordon J); *Gulati v MGN Ltd* [2017] QB 149; see *ibid* 395 [86] (Gordon J); *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238; see *ibid* 397 [92]–[94] (Gordon J); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 569 [155]; see *ibid* 398 [97] (Gordon J).

114 *Lewis* (2020) 381 ALR 375, 377 [2] (Kiefel CJ and Keane J, agreeing with Edelman J), 382 [22] (Gageler J, agreeing with Gordon J), 388 [51], 397 [95], 399 [104] (Gordon J), 404 [125], 414–15 [153], 421–2 [172] (Edelman J).

115 *Ibid* 416 [157].

116 *Ibid* 422 [172].

117 *Ibid* 416 [157] (Edelman J).

118 *Ibid*.

principle, or to the standard award of nominal damages?'¹¹⁹ In the words of Lord Dyson, Edelman J saw 'no justification for letting such an unruly horse loose'.¹²⁰

Gordon J persuasively argued that existing heads of damages leave no meaningful hole for 'vindicatory damages' to fill.¹²¹ Her Honour identified five existing 'weapons at hand'¹²²: exemplary damages (which 'punish' and 'deter'),¹²³ aggravated damages (which 'compensate'),¹²⁴ nominal damages (which 'mark' infractions),¹²⁵ declarations (which 'mark' breaches of public law rules)¹²⁶ and indemnity costs orders (which vindicate and offset costs).¹²⁷ Her Honour found 'no need to forge a new weapon here'.¹²⁸

Edelman J also considered the role of damages in the context of defamation, concluding that such damages operate to vindicate a plaintiff's reputation and so are 'concerned with loss'.¹²⁹

VI CONCLUSION

Lewis is a significant addition to Australian private law remedies jurisprudence, with implications extending beyond the tort of false imprisonment. Along with *Berry*, *Lewis* has reaffirmed the dominant role of 'but for' counterfactual reasoning in calculating loss. The High Court has signalled to Australian courts that counterfactuals are central to the assessment of compensatory damages. While the 'but for' test can misfire, and may be inapplicable in exceptional circumstances, the High Court has signified that it is the usual approach. Separately, the High Court sensibly rejected the novel submission that substantive damages are available as a form of vindication irrespective of loss. Courts have sufficient existing tools at their disposal to provide appropriate relief. It remains to be seen whether *Lewis* will increase uniformity in the calculation of compensation.¹³⁰ Increased certainty would be a welcome development.

119 Ibid 400 [107].

120 Ibid 423 [174] (Edelman J), quoting *Lumba* [2012] 1 AC 245, 283–4 [101] (Lord Dyson JSC).

121 *Lewis* (2020) 381 ALR 375, 400–1 [109] (Gageler J agreeing at 382 [22]).

122 Ibid 403 [120].

123 Ibid 402 [117].

124 Ibid.

125 Ibid.

126 Ibid 403 [119].

127 Ibid 403 [120].

128 Ibid 403 [121].

129 Ibid 421–2 [172].

130 See, eg, the divergence of views on whether a defendant may reduce the quantum of loss for misleading conduct by proving that a claimant who was misled into entering a loss-making transaction would have otherwise entered into an *alternative* loss-making transaction: *Wyzenbeek v Australasian Marine Imports Pty Ltd (in liq)* (2019) 272 FCR 373; *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495. See also *Lockyer Investment Co Pty Ltd v Smallacombe* (1994) 50 FCR 358.