

# Damages and the ‘essence’ of false imprisonment

*GE v Commissioner of An Garda Síochána* [2022] IESC 51

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## Introduction

A defendant (D) will commit the tort of false imprisonment where, without lawful justification (consent, valid warrant, etc), they intentionally confine a plaintiff (P) to a restricted space. In Blackstone’s terms, ‘to constitute the tort of false imprisonment there are two points requisite: 1. The detention of the person; and, 2. The unlawfulness of such detention’.<sup>1</sup> In *GE v Commissioner of An Garda Síochána*,<sup>2</sup> Ireland’s Supreme Court answered a question about the damages recoverable where Blackstone’s two conditions have been met: can P recover substantial (rather than nominal) damages for false imprisonment against D where, had P not been *unlawfully* detained by D, P could and would have been *lawfully* detained by D for the same period, under identical conditions?

This question was recently authoritatively addressed by the UK’s Supreme Court (*Lumba v Secretary of State for the Home Department*)<sup>3</sup> and Australia’s High Court (*Lewis v ACT*).<sup>4</sup> In *Lumba* and *Lewis*, as in *GE*, the question arose because (a) some defect in the procedure pursuant to which D detained P rendered the resulting detention unlawful, but (b) D contended that, had they not detained P pursuant to the defective procedure, they both could and (as a matter of fact) *would* have lawfully detained P by following the correct procedure. In *Lumba*, the detention was found unlawful because it was effected pursuant to a secret Home Office policy. However, it was accepted that if D had not detained P pursuant to this secret policy, they both could and would have lawfully detained P pursuant to the official policy. In *Lewis*, the detention was found unlawful on the basis that D failed to properly notify P of a meeting where his detention was converted from periodic to full-time. Again, it was accepted that if D had not (unlawfully) detained P pursuant to this defective procedure, D could and *would* have (lawfully) detained P after giving proper notice.

In *Lumba* and *Lewis*, P recovered nominal damages. The basis for that result is easy to see. If P would have been detained by D even absent D’s wrong (ie absent the *unlawful* detention), D’s wrong seems to have caused P no counterfactual loss; not restricting where P could go, who P could meet, the opportunities P could exploit, or otherwise exacerbating P’s suffering. And if we think that, generally, private law damages aim to ‘put the party who has been injured ... in the same position as he would have been in if he had not sustained the wrong’,<sup>5</sup> substantial damages

<sup>1</sup>W Blackstone *Commentaries on the Laws of England* (Oxford: Clarendon, 1765–1769) Book 3, p 127.

<sup>2</sup>[2022] IESC 51, [2022] ILRM 393.

<sup>3</sup>[2011] UKSC 12, [2012] 1 AC 245.

<sup>4</sup>[2020] HCA 26.

<sup>5</sup>*Livingstone v Raywards Coal* (1880) 5 App Case 25 at 38.

might look inappropriate where, materially, P is *already* in the position he would have been in had he not sustained the wrong.

In *GE*, Ireland's Supreme Court unanimously diverged from *Lumba* and *Lewis*, making a small substantial award of €7,500 on similar facts. Hogan J delivered the only judgment. Here, I argue that Hogan J's grounding of the Court's conclusion in the 'inherent importance of personal liberty' is insecure absent further specification of the sense of 'liberty' at issue. I distinguish two conceptions of liberty, suggesting that the *Lumba-Lewis* approach has obvious appeal on one such conception, but not the other.

## Facts

P arrived in Ireland as an asylum seeker. His asylum application was rejected. He then applied for subsidiary protection, but left Ireland whilst that application was pending. This meant that should he return, an immigration officer could lawfully refuse him permission to land (Immigration Act 2004, s 4(3)) and he could be lawfully arrested and detained (Immigration Act 2003, s 5(2)). Accordingly, when P returned to Ireland, he was lawfully refused permission to land and was then detained by D (the police). On a *habeas corpus* application, this 26-day detention was found unlawful: the warrant grounding it did not record the refusal of permission to land, nor the reasons for P's arrest and detention.<sup>6</sup>

P then sued D in false imprisonment. At least in the Supreme Court, D did not dispute they had committed this tort.<sup>7</sup> Instead, D looked to limit the damages payable to P by rehearsing the argument accepted in *Lumba* and *Lewis*. That is, D contended that since they could and would have detained P lawfully (by correctly executing the warrant) had they not detained P unlawfully, their wrong caused P no loss and only nominal damages should be awarded. This argument was rejected by the High Court,<sup>8</sup> Court of Appeal,<sup>9</sup> and Supreme Court for similar reasons.

One further aspect of factual detail merits comment. Whilst it was clear on *GE*'s facts that D *could* have lawfully detained P by following the correct procedure, no finding of fact was made on what *would* have happened absent D's wrong.<sup>10</sup> Indeed, in the Court of Appeal, Murray J noted that it was very doubtful that D would *ever* have lawfully detained P, because D fundamentally misunderstood the prerequisites of a lawful detention under section 5(2) of the 2003 Act.<sup>11</sup> This plausibly distinguishes *GE* from *Lumba* and *Lewis*, making it a more appropriate case for substantial damages. Even so, Hogan J's reasoning seems to proceed on the counterfactual assumption most favourable to D, ie absent D's wrong, D both could and *would* have lawfully detained P.<sup>12</sup>

## Judgment

Hogan J's judgment comprises five key claims. First, subject to an important caveat, at common law *all* instances of false imprisonment entitle the victim to substantial damages 'mark[ing] the importance of the right ... infringed'.<sup>13</sup> For Hogan J, nominal awards in *GE*-type cases would 'seriously devalue the tort of false imprisonment'<sup>14</sup> and 'would take from the inherent importance of personal liberty'.<sup>15</sup> As

<sup>6</sup>*GE v Governor of Cloverhill Prison* [2011] IESC 41.

<sup>7</sup>Hogan J does not discuss the relationship between breach of public law duties and the (private law) unlawfulness of resulting detentions: cf *Lumba*, above n 3.

<sup>8</sup>[2018] IEHC 293.

<sup>9</sup>[2021] IECA 113.

<sup>10</sup>*Ibid*, at [68].

<sup>11</sup>*Ibid*, at [93].

<sup>12</sup>In England post-*Lumba*, it appears nominal damages will be awarded if D *could* lawfully have detained P, regardless of what *would* have happened: *R (Hemmati) v Secretary of State for the Home Department* [2019] UKSC 56 at [112]. For criticism see *GE*, above n 9, at [51]; *Lewis*, above n 4, at [92]–[94] (Gordon J), at [181]–[182] (Edelman J), and at [39] (Gaegeleer J).

<sup>13</sup>*GE*, above n 2, at [42].

<sup>14</sup>*Ibid*, at [76]. *Lumba*, above n 3, at [209] (Lady Hale), and [343] (Lord Brown).

<sup>15</sup>*GE*, above n 2, at [88].

authority, he cites passages from pre-*Lumba* false imprisonment cases, pre-*Lumba* textbooks, and minority dicta from *Lumba* itself.

None of the cited pre-*Lumba* material squarely addresses the precise remedial question at issue in *GE*. Instead, Hogan J infers an answer to that question from the material's preoccupation with 'vindicating liberty'. Absent further specification of 'vindication' or 'liberty', this inference is tenuous. Even accepting that damages for false imprisonment should vindicate liberty, in order to yield *GE*'s result, we need a reason why *nominal* damages would be inadequate to that task on *GE*'s facts. Indeed, D's argument in *GE* was precisely that, because P's detention was inevitable, little was lost in the way of liberty and there was correspondingly little to vindicate. It is difficult to locate in Hogan J's judgment any reason for rejecting the colourable conceptions of 'vindication' or 'liberty' this argument presupposes.<sup>16</sup>

Hogan J's second claim qualified the first: he accepted that nominal damages will 'perhaps' be appropriate for 'purely technical or fleeting' false imprisonments.<sup>17</sup> He disambiguates 'purely technical or fleeting' by giving an example: a prankster locks a lecture theatre, opening it before those inside realise they have been detained.<sup>18</sup> There, nominal damages would be justified because 'the students ... would [not] have suffered any real loss of liberty'.<sup>19</sup>

Again, D's argument in *GE* was that P had suffered no real loss of liberty *either* because, absent D's wrong, P could/would anyway have been detained. Hogan J must therefore be understanding 'real loss of liberty' in a different sense, but we are not told what that sense might be, and so what ultimately distinguishes these cases. Without further argument, for instance, it is unclear how two obvious differences between *GE* and the prankster case – (a) the detention's *duration*; and (b) P's *awareness* – could justify treating them differently in damages. If very short false imprisonments of which P is wholly unaware should attract only nominal damages, it is natural to think this is because these imprisonments cause little distress and do not much compromise P's effective control over their own life. But this seems also to be true of the detentions in *Lumba*, *Lewis*, and *GE*, where P would have suffered all the distress and loss-of-control occasioned by detention absent D's wrong. Hogan J might say that the cases are distinct because although neither P in *GE* nor the students suffer any 'real loss of liberty' consequent on the *wrong* (the students because the wrong is fleeting and unnoticed, P in *GE* because detention was inevitable), P in *GE* uniquely suffers a 'real loss of liberty' consequent on the *detention* (whilst the students' detention is fleeting and unnoticed, P in *GE* was detained for a long time and was aware of it). But this is to measure 'loss' against an idiosyncratic baseline: generally in private law, losses are recoverable only if caused by D's *wrong*. Certainly, we might look to justify altering that baseline by invoking the 'inherent importance of personal liberty'. We would then confront the same basic question we saw above – why are *nominal* damages insufficient? – but now with the additional constraint that our answer could not imply that liberty was *so* important as to require a substantial award even where an unlawful detention was 'technical or fleeting'.

Thirdly, although he described the damages in *GE* as 'vindicatory', Hogan J clarified that '[t]he vindicatory element of any damages award is *not itself a separate head of damages*'. Instead, 'the sum awarded by way of compensation ... reflects the desire to vindicate the importance of the right ... infringed'.<sup>20</sup> Here, he echoes substantial judicial/academic opinion in considering a distinct category of 'vindicatory' damages superfluous in private law given other remedies' vindicatory potential.<sup>21</sup> Hogan J does not much discuss 'vindication' beyond false imprisonment, nor do his conclusions

<sup>16</sup>Hogan J's inference from these earlier authorities is supported by the absence of any pre-*Lumba* false imprisonment authorities entertaining the denial of substantial damages on a *Lumba-Lewis* counterfactual basis: J Varuhas *Damages and Human Rights Rights* (Oxford: Hart Publishing, 2016) p 63; *GE*, above n 9, at [85]–[88].

<sup>17</sup>*GE*, above n 2, at [31], [55], [76], and [88].

<sup>18</sup>*Ibid.*, at [33].

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.*, at [42]; [56]; *Simpson v Governor of Mountjoy Prison* [2019] IESC 81 at [120] (MacMenamin J).

<sup>21</sup>A Burrows 'Damages and Rights' in D Nolan and A Robertson (eds) *Rights and Private Law* (Oxford: Hart Publishing, 2012) pp 303–307; *Lumba*, above n 3, at [101] (Lord Dyson); *Lewis*, above n 4, at [170]–[176] (Edelman J).

expressly proceed from abstract reflection on the general nature/purpose of damages.<sup>22</sup> Analytical restraint of this sort plausibly has much to recommend it. Nonetheless, it leaves uncertain how far the practice of awarding compensation directed toward ‘mark[ing] the importance of the right ... infringed’ might extend in Irish law.

Fourthly, Hogan J considered his conclusions on the common law reinforced by constitutional considerations. Under Article 40.3.1 of Ireland’s Constitution, the state has an obligation to ‘defend and vindicate the personal rights of the citizen’ and under Article 40.3.2 ‘in the case of injustice done ... [to] vindicate the life, person, good name and property rights of every citizen’. Irish courts have frequently cast the common law of torts as a mechanism for discharging these vindicatory obligations.<sup>23</sup> This being so, because he considered nominal damages were generally insufficient to vindicate the (constitutional) right to liberty in the face of its violation by unlawful detention, Hogan J thought Article 40.3 precluded the incorporation of *Lumba* and *Lewis* into Irish law. Later, without elaboration, he said that nominal damages in *GE*-type-cases ‘would be inconsistent with the rule of law-based democratic State envisaged by Article 5 of the Constitution’.<sup>24</sup>

The Constitution is of dubious analytical assistance here. In some prior cases, nominal damages were awarded for constitutional rights violations on the basis that the violation did not make P worse off.<sup>25</sup> Because *GE* plausibly falls into the same category, Hogan J’s constitutional argument requires, without obviously suggesting, some basis for distinguishing these earlier cases.

Fifthly, Hogan J held that P’s damages should reflect a reduction for contributory negligence. In Ireland, contributory negligence can operate to reduce the defendant’s liability in damages for *all* torts.<sup>26</sup> The Irish version of the defence therefore differs from its English counterpart, which is inapplicable where the defendant’s tort is one – like intentional trespass to the person – to which the complete common law defence was inapplicable.<sup>27</sup> Hogan J’s argument would therefore be unavailable in England.<sup>28</sup> Its logic is nevertheless easily grasped: P rendered himself liable for lawful detention by leaving Ireland and then returning whilst his subsidiary protection application was pending; and this constituted a failure to exercise ‘reasonable care for his own protection’ within the meaning of section 34(1).

## Comment

We have seen that the idea that damages for false imprisonment ought to vindicate personal liberty requires disambiguation in order to yield *GE*’s result and contain it within reasonable boundaries.

Indeed, on at least one natural conception of ‘liberty’ and its relationship to false imprisonment, the substantial award in *GE* looks wholly superfluous for liberty’s vindication. On the conception I have in mind, ‘liberty’ is identified with ‘autonomy’, ie individuals’ capacity to make choices from a wide range of options whilst being guided by their own genuine values/commitments. The tort of false imprisonment is then understood as a more-or-less efficient institutional instrument for protecting this highly prized capacity. Because being detained by others usually makes it more difficult for one to live autonomously, liberty-as-autonomy appears well served by a general legal prohibition on detention

<sup>22</sup>Cf *Lumba*, above n 3, at [95] (Lord Dyson), at [176]–[180] (Lord Hope), at [195] (Lord Walker), at [212]–[218] (Lady Hale), at [222]–[237] (Lord Collins), at [254]–[256] (Lord Kerr); *Lumba*, above n 4, at [139]–[176] (Edelman J); *GE*, above n 9, at [92]–[113].

<sup>23</sup>*Hanrahan v Merck Sharp & Dohme* [1988] ILRM 629; *DF v Garda Commissioner* [2014] IEHC 213.

<sup>24</sup>*GE*, above n 2, at [76]. On false imprisonment’s role as a rule of law safeguard: Blackstone, above n 1, Book 1, pp 123–141; *AV Dicey Introduction to the Study of the Law of the Constitution* (London: MacMillan, 10th edn, 1960) pp 193–210; *Ledwith v Roberts* [1937] 1 KB 232 at 260.

<sup>25</sup>*Kearney v Minister for Justice* [1986] IR 116; *Redmond v Minister for the Environment* [2004] IEHC 24, [2006] 3 IR 1; *SF v Director of Oberstown Children Detention Centre* [2017] IEHC 829, [2018] 3 IR 466.

<sup>26</sup>Civil Liability Act 1961, s 34(1).

<sup>27</sup>*Pritchard v Co-operative Group* [2011] EWCA Civ 329.

<sup>28</sup>Cf *R (NAB) v Secretary of State for the Home Department* [2011] EWHC 1191 (Admin).

enforceable at the suit of those detained, and that is what the tort of false imprisonment gives us. However, if we conceive of the tort as a safeguard for liberty-as-autonomy, a substantial award of damages in *GE*-type cases can easily be made to look superfluous. If P would inevitably have been detained, he would always have had the same limited options available to him, and D's tort did not compromise P's autonomy. Although D formally violated a legal prohibition, then, that violation did not set back the object of value – P's autonomy – explaining the prohibition's justification. D's wrong was, in that sense, only 'technical', as a nominal award reflects.

There is an alternative conception of liberty and its relationship to false imprisonment on which the award in *GE* looks less superfluous. This alternative conception grounds the tort's justification not in autonomy's value, but in the objectionability of having the purposes pursued with our bodies determined for us by the unilateral choice of others, ie in the distinctive moral problem of *subordination* to another's will.<sup>29</sup> The problem of subordination is distinctive because it persists even if the subordination ends up not impacting, or even *enhancing*, the confined person's autonomy. That the detainee in *Huckle v Money* was plied with beefsteaks and ale does not cause us to doubt there was something genuinely defective in his treatment, even if we discover the sustenance greatly expanded the options he could autonomously pursue.<sup>30</sup> This, we might think, is because our concern for liberty is sometimes one about *interpersonal status*, rather than personal autonomy: as free and equal moral agents, we ought to meet one another each of us a 'small scale sovereign',<sup>31</sup> neither a small-scale despot. Our bodies are not for others to use.

Understanding false imprisonment in subordination-based terms illuminates many of its otherwise puzzling features. It is wrongful to confine sleeping persons,<sup>32</sup> because although the confinement does not affect their capacity to live autonomously, it subordinates their body to the prisoner's ends. D must *intend* to confine P to commit false imprisonment (negligence will not suffice),<sup>33</sup> because only then will P's purposes be subordinated to D's determining *choice*, rather than its side effects.

Moreover, a subordination-based understanding of the tort provides resources for explaining why, in *GE*, P has sustained a 'real loss of liberty'. Where public servants follow legally specified procedures, discharging the responsibilities of offices empowered to act in the name of all, their conduct can be understood as effecting a properly public purpose distinct from any individual's private purpose. In this way, the mediation of procedure can mean that resulting imprisonments do not involve what is peculiarly problematic in false imprisonment: it means the detainee's body is not subordinated to the whim of another person with whom they ought stand in a relation of equality. Instead, the detention emanates from an office – a distinctively *public* person – specially empowered to realise the equal freedom of all private persons through, amongst other things, effecting detentions pursuant to prescribed procedures. Lawfulness marks the difference between the assertion of private authority over another's body – which, because private persons are small-scale sovereigns, could never be valid – and the assertion of *public* authority over another's body – which, in order to make small-scale sovereignty possible, must sometimes be.<sup>34</sup> Lawfulness in detention matters for that reason, regardless of its impact on autonomy. That is why 'it is of the essence of the tort of false imprisonment that the imprisonment is without lawful justification',<sup>35</sup> and why 'the cause of action ... 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'.<sup>36</sup>

<sup>29</sup>A Ripstein *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) pp 46–51.

<sup>30</sup>*Huckle v Money* (1763) 2 Wills 205.

<sup>31</sup>HLA Hart *Essays on Bentham: Jurisprudence and Political Philosophy* (Oxford: Oxford University Press, 1982) p 183.

<sup>32</sup>*Meering v Graham-White Aviation* (1919) 122 LT 44.

<sup>33</sup>*Iqbal v Prison Officers Association* [2010] QB 732.

<sup>34</sup>T Sinclair 'The power of public positions: official roles in Kantian legitimacy' in D Sobel et al (eds) *Oxford Studies in Political Philosophy*, vol 4 (Oxford: Oxford University Press, 2018).

<sup>35</sup>*R (Evans) v Governor of Brockhill Prison* [2001] 2 AC 19 at 32 (Lord Hope).

<sup>36</sup>*GE*, above n 9, at [112].

By seeing how the normative significance of the false imprisonment in *GE* was not exhausted by its impact on P's autonomy, we can see how a legal system concerned with remedying it might have more than the very shortest ('nominal') distance to travel. This does not mean that a substantial award is required in all cases. Instead, we end up where *GE* does: to find an award appropriately reflective of the wrong done, factors such as P's awareness of the detention, its impacts on P's autonomy/well-being, and D's blameworthiness will be relevant, but cannot be exhaustive.