# SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

| | |
|---|---|
| **Case Title:** | **Eastman v The Australian Capital Territory** |
| **Citation:** | **[2019] ACTSC 280** |
| **Hearing Dates:** | 1 October 2019 – 4 October 2019 |
| **Decision Date:** | 14 October 2019 |
| **Before:** | Elkaim J |
| **Decision:** | 1. Judgment for the plaintiff in the sum of $7,020,000.<br>2. The defendant is to pay the plaintiff's costs of the proceedings. |
| **Catchwords:** | **CIVIL PROCEDURE** – Claim for compensation after plaintiff was convicted and imprisoned for murder in 1995 – conviction was quashed in 2014 – civil proceedings stayed in 2016 – plaintiff re-tried in 2018 – plaintiff acquitted – civil proceedings revived<br>**HUMAN RIGHTS –** Miscarriage of Justice – wrongful conviction and unlawful detention – Right to liberty and security of person – Compensation for wrongful conviction<br>**COMPENSATION – QUANTUM –** Entitlement to and Assessment of compensation – Right to compensation – act of grace payment – ex gratia payment – public law damages<br>**STATUTES – INTERPRETATION –** *Human Rights Act 2004* (ACT) s 23 – meaning of 'reversed' – whether or not the plaintiff's conviction was reversed – whether or not there was a miscarriage of justice – *Financial Management Act 1996* (ACT) – whether or not it provides for the compensation dictated by the *Human Rights Act 2004* (ACT) |
| **Legislation Cited:** | *Court of Claims Act* (NY Consolidated Law) § 8-B<br>*Court Procedures Rules 2006* (ACT) r 1619<br>*Crimes Act 1900* (ACT) ss 424(1), 430<br>*Criminal Justice Act 1988* (UK) ss 5A, 133<br>*Financial Management Act 1996* (ACT) s 130<br>*Human Rights Act 2004* (ACT) ss 18, 23, 31<br>*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14(6)<br>*Legislation Act 2001* (ACT) s 142<br>*Supreme Court Act 1993* (ACT) s 20<br>*New Zealand Bill of Rights Act 1990* (NZ) |
| **Cases Cited:** | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27<br>*Beckett v New South Wales* [2013] HCA 17; 248 CLR 432 |

*Commissioner for v Railways (New South Wales) v Cavanough* (1935) 53 CLR 220
*Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234
*Eastman v Chief Executive of the Department of Justice and Community Safety* [2012] ACTSC 189; 274 FLR 255
*Eastman v Director of Public Prosecutions (No 2)* [2014] ACTSCFC 2; 9 ACTLR 178
*Hartigan v Treasurer of the Australian Capital Territory* [2018] ACTSC 271; 338 FLR 324
*In re Smith*, 333 S.W.3d 582 (Tex, 2011)
*Lee v McGrath* [2018] ACTSC 173
*Lewis v Australian Capital Territory* [2018] ACTSC 19; 329 FLR 267
*Lewis v Australian Capital Territory* [2019] ACTCA 16
*Matsoukatidou v Yarra Ranges Council* [2017] VSC 61; 51 VR 624
*Maxwell v Murphy* (1957) 96 CLR 261
*MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657
*Morro and Ors v Australian Capital Territory* [2009] ACTSC 118; 4 ACTLR 78
*Nudd v The Queen* [2006] HCA 9; 225 ALR 161
*R (on the application of Adams) (FC) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 AC 48
*R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2
*Robertson v City of Nunawading* [1973] VR 819
*Ruddock v Taylor* [2003] NSWCA 262; 58 NSWLR 269
*Rufo v Simpson*, 103 Cal Rptr 2d 492 (Ct App, 2001)
*Sharon Rufo v Orenthal James Simpson et al, Frederic Goldman et al v Orenthal James*, *Louis H. Brown et al v Orenthal James Simpson*, Cal Super Ct, SC031947, SC036340, SC036876, 2 October 1997
*Strano v Australian Capital Territory* [2016] ACTSC 4; 11 ACTLR 134
*Tankleff v State of New York* (NY Ct Cl, No 2013-045-038, 27 November 2013)
*Wotton & Ors v Queensland & Anor* [2016] FCA 1457; 352 ALR 146

**Texts Cited:**

Australia's declarations and reservations deposited 13 August 1980, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 1197 UNTS 411 (entered into force 13 November 1980) art 14
Christine E. Sheehy, 'Compensation for Wrongful Conviction in New Zealand' (1999) 2 *Auckland University Law Review* 977
*Collins English Dictionary* (online at 10 October 2019)
Ministry of Justice (NZ), *Compensation for Wrongful Conviction and Imprisonment* (Backgrounder, May 2015)
National Registry of Exonerations, *Exonerations in 2018* (Report, 9 April 2019)
*Oxford English Dictionary* (2 ed, 1989)

Rachel Dioso-Villa, 'Out of Grace: Inequity in Post-exoneration Remedies for Wrongful Conviction' (2014) 37 *University of New South Wales Law Journal* 349
Sally Lipscombe and Jacqueline Beard, *Miscarriage of justice: compensation schemes* (House of Commons Library, SN/HA/2131, 6 March 2015)

| | |
|---|---|
| **Parties:** | David Harold Eastman (Plaintiff) |
| | The Australian Capital Territory (Defendant) |
| **Representation:** | **Counsel** |
| | L De Ferrari SC with P Tierney (Plaintiff) |
| | P Garrison AM SC with H Younan and D Crowe (Defendant) |
| | **Solicitors** |
| | Ken Cush & Associates (Plaintiff) |
| | ACT Government Solicitor (Defendant) |
| **File Number:** | SC 330 of 2015 |

**ELKAIM J:**

1. The plaintiff seeks compensation from the defendant under ss 18(7) and 23 of the *Human Rights Act 2004* (ACT) (the *HRA*). These sections state:

> **18(7) Right to liberty and security of person**
>
> Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.
>
> **23 Compensation for wrongful conviction**
>
> (1) This section applies if—
>
> (a) anyone is convicted by a final decision of a criminal offence; and
>
> (b) the person suffers punishment because of the conviction; and
>
> (c) the conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.
>
> (2) If this section applies, the person has the right to be compensated according to law.
>
> (3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

2. A brief background to the proceedings is as follows:

(a) On 10 November 1995 the plaintiff was convicted of the murder of Australian Federal Police Assistant Commissioner, Colin Winchester. He was sentenced to life imprisonment without parole and immediately taken into full-time custody.

(b) On 3 September 2012, the ACT Supreme Court ordered that there be an inquiry into the plaintiff's conviction. The order was made under s 424(1) of the *Crimes Act 1900* (ACT).

(c) The inquiry, conducted by Acting Justice Martin, began on 11 November 2013. It ended on 29 May 2014. The report (the 'Martin Report') recommended that the plaintiff's conviction be quashed (Exhibit E, page 447).

(d) On 22 August 2014 the ACT Full Court quashed the conviction and ordered a new trial pursuant to s 430(2)(d) of the *Crimes Act*. The plaintiff was released on bail.

(e) The plaintiff had been in custody for 6,860 days. He was aged 50 when he went to prison and almost 69 when released.

(f) The plaintiff commenced these (civil) proceedings on 11 September 2015. He seeks compensation arising from his imprisonment between 10 November 1995 and 22 August 2014.

(g) The civil proceedings were stayed on 30 June 2016 pending the outcome of the second criminal trial.

(h) The second trial commenced on 18 June 2018. It concluded on 22 November 2018 with the plaintiff's acquittal.

(i) Consequent upon his acquittal the plaintiff revived his civil proceedings.

**The evidence**

3. The plaintiff's evidence in the case was made up of the following:

(a) Oral evidence by the plaintiff.

(b) A statement by the plaintiff dated 3 June 2019 (Exhibit A).

(c) A photograph of the plaintiff taken shortly after his release on 22 August 2014 (Exhibit B).

(d) A chronology (Exhibit C).

(e) Notices admitting and disputing facts (Exhibit D).

(f) A "Tender Bundle" containing a selection of documents covering different topics (Exhibit E). The topics included court records, court transcripts, correspondence, assorted reports, medical records, inmate applications and complaints, correspondence with the defendant and the Martin Report.

(g) A letter from the defendant to the plaintiff's solicitor dated 30 July 2019 together with a draft deed of release (Exhibit F).

(h) A folder of "Eastman Judgments" (Exhibit G).

4. The defendant relied on an affidavit by Mr Stephen Miners sworn on 15 July 2019 (Exhibit 1). Mr Miners was cross-examined.

5. In general terms the plaintiff's statement concentrated on his years in prison, while his oral evidence was more concerned with the time since his release in August 2014. The plaintiff was not cross-examined. Accordingly I accept his evidence.

6. During his oral evidence the plaintiff said that the matters that had most affected him included the death of his sisters and mother while he was in prison and, now that he was out of prison, the realisation that he had lost the opportunity to be married and have children and to pursue a career. He acknowledged that there were still some prospects for him to have a partner and to work but he said these prospects were slim. The opportunities that he said he had lost would no doubt have been apparent to him as his prison term continued.

7. A number of the documents in Exhibits E and G were objected to on the grounds of relevance. I allowed the tender on the basis that the parties would make submissions on their relevance in final addresses.

8. One matter that I will discuss now is the relevance of the judgments in Exhibit G. They were relied upon to establish certain facts which are recorded in the judgments. In my view these individual facts are not relevant other than as an explanation of the applications and procedures which took place during the plaintiff's incarceration.

9. I agree with the plaintiff's submission that if he is entitled to compensation, it should be compensation for his years in prison and not for any other person simply being in prison. In other words it is appropriate to take into account what was experienced by the plaintiff, which might include delays in various legal processes, as well as the personal experiences that he endured in prison, in assessing compensation. This is to be contrasted with an objective assessment of 'a person' spending almost 19 years behind bars.

**Section 23**

10. Both parties have pointed out that s 23 of the *HRA* has its origins in Art 14(6) of the International Covenant on Civil and Political Rights (the ICCPR), which states:

> When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

11. The plaintiff has highlighted the "re-ordering" of the text in s 23 of the *HRA*. The defendant has stressed the manner in which Art 14(6) has been implemented in other countries, in particular the United Kingdom and New Zealand.

12. I see no ambiguity in s 23(1) which might confuse its meaning. I also see no reason to allow the plain words of the subsection to be influenced by the treatment and implementation of Art 14(6) in other countries or jurisdictions.

13. In my view the principles of statutory interpretation mandated by the High Court (for example in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27) and dictated by the *Legislation Act 2001* (ACT), are consistent with this approach. It is worth setting out [47] from *Alcan*:

> This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy.

14. The role of s 31 of the *HRA* in interpreting the rights provided by the *HRA* must also be taken into account. This section states:

> **31 Interpretation of human rights**
>
> (1) International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.
>
> (2) In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:
>
> (a) the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;
>
> (b) the undesirability of prolonging proceedings without compensating advantage;
>
> (c) the accessibility of the material to the public.
>
> *Note* The matters to be taken into account under this subsection are consistent with those required to be taken into account under the Legislation Act, s 141 (2).
>
> (3) For subsection (2) (c), material in the ACT legislation register is taken to be accessible to the public.

15. Section 31 emphasises "the desirability of being able to rely on the ordinary meaning" of the *HRA* and, in the note, specifically says that its application is to be consistent with the *Legislation Act*.

16. My approach is also consistent with that taken by Bell J in *Matsoukatidou v Yarra Ranges Council Council* [2017] VSC 61; 51 VR 624, dealing with the Victorian Charter of Human Rights and Responsibilities. His Honour said at [73]:

> As stated in *PJB v Melbourne Health (Patrick's Case),* the scope and application of the human rights in pt 2 of the Charter are to be ascertained by a process of interpretation that takes account of the beneficial purposes of the Charter:
>
> > [human] rights are interpreted purposively and, in the words of Warren CJ in *Re Application under the Major Crime (Investigative Powers) Act 2004*, 'in the broadest possible way'. Following that decision, Hargrave J said in *Director of Public Prosecutions v Ali (No 2*) that the general approach was to interpret the rights in the Charter 'broadly and in a non-technical sense.' Speaking of the *New Zealand Bill of Rights Act 1990*, Elias CJ said in *R v Hansen* that the 'meaning of the right is to be ascertained from the "cardinal values" it embodies.' In reference to the *Canadian Charter of Rights and Freedoms*, Dickson J said in *R v Big M Drug Mart Ltd.* that the 'meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.' Reasonable and demonstrable limitation of the right is not taken into account when identifying its scope.
>
> *Kracke* decided that s 24(1) of the Charter was to be so interpreted.

17. The plaintiff says that he easily meets the conditions in s 23(1) giving rise to his right to compensation under subsection (2). I agree. Although the plaintiff carries the onus of proof I think the best approach to explaining this conclusion is by dealing with the points of resistance made by the defendant.

18. I would add that I cannot see anything within Art 14(6) which would suggest that a plain reading of s 23 would produce any different result to that which arises from an equally plain reading of Art 14(6).

19. The defendant conceded the following:

(a) The final conviction of the plaintiff on the charge of murder.

(b) The consequential imposition of punishment of the plaintiff.

20. These concessions disposed of the necessity for the plaintiff to prove the requirements of ss 23(1)(a) and (b).

21. As to subsection (c), the defendant made two points: Firstly the conviction was not "reversed" and secondly there had not been a "miscarriage of justice". The reversal argument had two limbs.

22. The first limb of the reversal point was that the conviction was not reversed by the Full Court on 22 August 2014, because the Court ordered a re-trial. Therefore, said the defendant, there was not a reversal because a conviction remained a possible result of the re-trial. If the re-trial resulted in a conviction then there would not have been a reversal.

23. The defendant's submission is, with respect, implausible. When the Full Court quashed the conviction so that the plaintiff went from being a convicted person back to being an innocent (until proven guilty) person, his conviction was reversed.

24. Even more simply put: The plaintiff started off as an innocent person. He then became a convicted person. On 22 August 2014 he returned to being an innocent person. His conviction was unequivocally reversed.

25. The fact that a second trial could perhaps have led to him returning to being a convicted person is beside the point. When the conviction was quashed it was reversed.

26. I note here that the order made by the Full Court in *Eastman v Director of Public Prosecutions (ACT) (No 2)* [2014] ACTSCFC 2; 9 ACTLR 178 was that the "conviction be quashed and that there be a new trial". This order was made pursuant to s 430 of the *Crimes Act 1900* (ACT), which states:

> **430 Action on report by Supreme Court**
>
> (1) The Full Court must consider the report of a board into an inquiry.
>
> (2) Having regard to the report, the Full Court must, by order—
>
> (a) confirm the conviction; or
>
> (b) confirm the conviction and recommend that the Executive act under either of the following sections of the *Crimes (Sentence Administration) Act 2005* in relation to the convicted person:
>
> (i) section 313 (Remission of penalties);
>
> (ii) section 314 (Grant of pardons); or
>
> (c) quash the conviction; or
>
> (d) quash the conviction and order a new trial.
>
> (3) The registrar must give a copy of the order, together with any reasons given for the order, to the Attorney-General and the convicted person.
>
> (4) This section does not give the convicted person a right to an order of the Full Court mentioned in subsection (2) (b), (c) or (d), or to an Executive pardon or remission.

27. It can be seen that under s 430, the Full Court was given four alternatives for orders it might make after it had regard to the Martin Report. The alternative chosen was that

provided by subsection (2)(d). There is no available alternative of "reversing" the conviction. However I cannot see any interpretation of the quashing of a conviction which does not amount to a reversal of that conviction. This conclusion, I think, is consistent with the decision of the High Court in *Commissioner for v Railways (New South Wales) v Cavanough* (1935) 53 CLR 220.

28. The second limb of the reversal argument is that the quashing of the conviction does not show that there has "conclusively" been a miscarriage of justice. This is because, as already referred to above, an order was made for a re-trial. If the re-trial had secured another conviction then there could not have been a conclusive miscarriage of justice.

29. Relying on the English authority of *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 the defendant submitted that the new or newly discovered facts must show that the plaintiff was innocent beyond reasonable doubt. As pointed out by the defendant this decision followed an amendment to the *Criminal Justice Act 1988* (UK) which had previously required that it was necessary to show that the new or newly discovered fact, if previously known, would have led the prosecution not to have commenced proceedings against a defendant because that defendant had no case to answer.

30. The *HRA* does not pose any similar sort of condition as in the United Kingdom legislation, either before or after the amendment.

31. The defendant submitted that the new or newly discovered facts in this case did no more than point "to a likelihood that a jury would acquit the defendant". The defendant continued that "there must be a likelihood or significant possibility of that acquittal" (defendant's written submissions at [20]).

32. The defendant then went on to submit that the defects in the original trial affected only that trial. Absent those defects it could not be said that a prosecution ought not to be brought. Further the matters giving rise to the miscarriage of justice were not of a 'new type' which if introduced in a second trial would lead to a verdict of 'not guilty'.

33. The first difficulty with the defendant's submission is that the plaintiff was acquitted in the second trial. While it cannot be said that he was acquitted because certain evidence used in the first trial was absent, the reversal of his conviction was conclusively endorsed by the result of the re-trial in 2018.

34. More importantly, in the context of this plaintiff, once his conviction was quashed the plaintiff returned to a starting point where he was innocent until proven guilty beyond reasonable doubt. Once he returned to that status of innocence, that was a conclusive result which would remain intact unless and until his guilt was established beyond reasonable doubt.

35. Further, if the defendant's argument was accepted, the scope of s 23 would be confined to only those few cases where there was subsequent new evidence (for example the DNA of another person, a confession by another person or the establishment of an alibi) which showed the crime had been committed by someone other than the convicted person. It would not apply to cases where subsequent discoveries established a trial had been improperly conducted leading to a miscarriage of justice. I do not accept that s 23 has this limitation. If the defendant's argument is

that it could lead to guilty persons receiving compensation, then suffice to say, certainly in this case, if the plaintiff had been convicted in the second trial his claim for compensation would have been severely limited, if not extinguished.

36. Alternatively, if he had not faced another trial, his claim could have been met with a defence that there had been no miscarriage of justice because he was in fact guilty. The burden on the defence would have been to establish his guilt only on a balance of probabilities. An example of this occurring, in the context of a civil proceeding for compensation by relatives of a deceased victim, is the 'OJ Simpson' case in America (*Sharon Rufo v Orenthal James Simpson et al, Frederic Goldman et al v Orenthal James*, *Louis H. Brown et al v Orenthal James Simpson* (Cal Super Ct, SC031947, SC036340, SC036876, 2 October 1997). An appeal was dismissed in *Rufo v Simpson* (103 Cal Rptr 2d 492 (Ct App, 2001)).

37. Accordingly I reject the defendant's argument arising from the word "reversed".

38. The second point is whether there "has been a miscarriage of justice". I think the answer to this point lies in the decision of the Full Court in *Eastman (No 2)*. The defendant submitted that the flaws in the forensic evidence existed at the time of the first trial. Therefore, the flaws could not be regarded as a new or newly discovered fact showing conclusively that there had been a miscarriage of justice. It is not, however, the flaws that were new. Rather it is the discovery and identification of the flaws that was new.

39. At [11] the Full Court quoted from the 'Martin Report':

> 1832. The issue of guilt was determined on the basis of deeply flawed forensic evidence in circumstances where the applicant was denied procedural fairness in respect of a fundamental feature of the trial process concerned with disclosure by the prosecution of all relevant material. In addition, evidence of inadequacies and flaws in the case file and case work of the key forensic scientists were unknown to everyone involved in the investigation and trial.

40. The final words of the just quoted passage highlight my conclusion. The inadequacies and flaws were "unknown to everyone involved in the investigation and trial". To repeat, it is the subsequent discovery of the inadequacies and flaws that is a new or newly discovered fact.

41. The Full Court, at [247], referring to the discovery of the flaws said:

> Had the flaws in Mr Barnes' evidence, and the forensic evidence associated with it, been available as a ground of appeal, it would have been treated by a court of criminal appeal as giving rise to a substantial miscarriage of justice that required the conviction to be quashed. There would have been no room for the application of the "proviso" because Mr Barnes' evidence was "completely untrustworthy, and ought not to [have been] allowed to enter into the reasons for any verdict of guilty".

42. Then at [249]:

> It cannot be in the interests of justice to allow the conviction to stand when this central feature of the circumstantial case against Mr Eastman has been demonstrated to be baseless. The reception of Mr Barnes' evidence, and the evidence of other experts used to support it, created a substantial miscarriage of justice.

43. If the tainted evidence had been known to be flawed at the time of trial it would not have been led or admitted. The revelation after the trial that the evidence was baseless is sufficient, in my view, to constitute new or newly discovered facts. As made very

plain in the report and the Full Court's decision, the discovery of the baseless evidence showed "conclusively that there had been a miscarriage of justice".

44. The Martin Report leaves no doubt as to the extent of the miscarriage of justice and the lack of knowledge of the existence of the flawed evidence until after the trial. In addition to [1832] quoted above, this is evident from the following paragraphs:

> 1824. In this discussion I have avoided endeavouring to classify evidence that has emerged in the Inquiry as either 'fresh' or 'new' evidence. In my view, in particular circumstances, the distinction is of no practical consequence.
>
> 1825. Of critical importance are the inadequacies and flaws in Mr Barnes' case file and case work. These features are coupled with evidence demonstrating that Mr Barnes lacked independence and objectivity. While it might be argued that diligent work by the defence would or should have discovered the inadequacies and flaws, and perhaps My Barnes' lack of independence, it is apparent that Mr Barnes was adept at deflecting attention from these matters. Notwithstanding at least two years intensive work, with the advantage of direct access to the AFP and Mr Barnes, the inadequacies, flaws and lack of independence were not discovered by Mr Ibbotson. In these circumstances it is difficult to criticise the defence in this regard.
>
> 1831. The applicant did not receive a fair trial according to law. He was denied a fair chance of acquittal. As a consequence, a substantial miscarriage of justice has occurred. (footnotes omitted)

45. The defendant however raised this point, submitting that the miscarriage of justice referred to by the Full Court and the Martin Report was a 'different' miscarriage of justice to that required by s 23(1)(c).

46. In *R (on the application of Adams) (FC) v Secretary of State for Justice* [2011] UKSC 18; [2012] 1 AC 48, Lord Phillips of Worth Matravers PSC suggested that, in the context of s 133 of the relevant United Kingdom Act, the test for a miscarriage of justice should be:

> A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.

47. In *Eastman (No 2)* at [46] the Full Court referred to the discussion by Gleeson CJ in *Nudd v The Queen* [2006] HCA 9; 225 ALR 161:

> …He concentrated on the way in which the miscarriage of justice ground in the common form of criminal appeal statutes is applied in Australia and, in particular, how the "proviso" operates. Gleeson CJ explained that the miscarriage of justice ground embraces both "outcome and process as requirements of justice according to law" that are "fundamental and familiar" (225 ALR at 162 [5]). The Chief Justice said (225 ALR at 163-164 [6]-[7]):
>
> > Some irregularities 'may' involve no miscarriage of justice if the appellate court forms a certain opinion about the strength of the case against the appellant. The corollary of that proposition is that a defect in process may be of such a nature that its effect cannot be overcome by pointing to the strength of the prosecution case. It is impossible to state exhaustively, or to define categorically, the circumstances in which such a defect will occur. In *Mraz v R* [(1955) 93 CLR 493 at 514], Fullagar J said that 'every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed' and that, if there is a failure in any of those respects 'and the appellant may thereby have lost a chance which was fairly open to him of being acquitted', then there is a miscarriage of justice. That well-known passage relates **the failure of process to the loss of a chance of acquittal**. Even though it is impossible and undesirable to attempt to reduce miscarriages of justice to a single formula, there is at least one circumstance in which a failure of process cannot be denied the character of a

> miscarriage of justice on the ground of the appellate court's view of the strength of the prosecution case. That is where the consequence of the failure of process is to deprive the appellate court of the capacity justly to assess the strength of the case against the appellant. **There may be other circumstances in which a departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case. If there has been a failure to observe the conditions which are essential to a satisfactory trial and, as a result, it appears unjust or unsafe to allow a conviction to stand, then the appeal will be allowed.**
>
> The concept of miscarriage of justice is as wide as the potential for error. Indeed, it is wider; for not all miscarriages involve error. Process is related to outcome, in that **the object of due process is to secure a just result. Justice, however, means justice according to law, and the observance of the requirements of law according to which a criminal trial is to be conducted has a public as well as a private purpose. An unjust conviction is one form of miscarriage. Another is a failure of process of such a kind that it is impossible for an appellate court to decide whether a conviction is just.** Another is a failure of process which departs from the essential requirements of a fair trial.

48. I also note here the inclusion, unlike s 23, of the words "beyond reasonable doubt", in s 133(1) (which is fully set out below at [67]). In addition ss 133(5) and (5A) of the United Kingdom Act, when read together, illustrate that a quashed conviction is a reversal of that conviction where the conviction was quashed "on a reference", the equivalent of the s 424 (*Crimes Act*) inquiry which led to the Martin Report.

49. Also relevant in *Adams* is this passage in the judgment of Lord Hope of Craighead, at [96]:

> If one accepts, as I would do, Lord Bingham's reasons for doubting whether Lord Steyn was right to find support for his reading of article 14(6) in the French text and in para 25 of the explanatory committee's report on article 3 of the Seventh Protocol, one is driven back to the language of the article itself as to what the words "miscarriage of justice" mean. Taken by itself this phrase can have a wide meaning. It is the sole ground on which convictions can be brought under review of the High Court of Justiciary in Scotland: Criminal Procedure (Scotland) Act 1995, section 106(3). But the fact that these words are linked to what is shown "conclusively" by a new or newly discovered fact clearly excludes cases where there may have been a wrongful conviction and the court is persuaded on this ground only that it is unsafe. It clearly includes cases where the innocence of the defendant is clearly demonstrated. But the article does not state in terms that the only criterion is innocence. Indeed, the test of "innocence" had appeared in previous drafts but it was not adopted. I would hold, in agreement with Lord Phillips (see para 55 above) that it includes also cases where the new or newly discovered fact shows that the evidence against the defendant has been so undermined that no conviction could possibly be based upon it. In that situation it will have been shown conclusively that the defendant had no case to answer, so the prosecution should not have been brought in the first place.

50. The findings of the Martin Report plainly showed that the evidence of Mr Barnes had so "undermined" the trial "that no conviction could possibly be based upon it".

51. Then if one returns to the plain meaning of s 23(1)(c) I can see no reason to not conclude that the very apparent miscarriage of justice (as described by the Full Court and the Martin Report) which was identified by the Martin Report (the new or newly discovered fact) was not a ground for the conviction being reversed. The words of s 23(1)(c) are a comfortable fit.

52. Finally, on this point, although in the context of a malicious prosecution, I adopt the words of Professor Salmond quoted by the plurality of the High Court in *Beckett v New South Wales* [2013] HCA 17; 248 CLR 432 at [6]:

> What the plaintiff requires for his action is not a judicial determination of his innocence, but merely the absence of any judicial determination of his guilt.

53. I reject the defendant's arguments arising from s 23(1)(c). Accordingly I am satisfied the plaintiff has established the conditions required by s 23(1).

54. Section 23(1) having been overcome, the plaintiff has "a right to be compensated according to law" pursuant to s 23(2).

55. The defendant says that s 23(2) "does not equate to the creation of a freestanding right to compensation or the creation of a statutory cause of action for wrongful conviction". In *Maxwell v M*urphy (1957) 96 CLR 261 (*Maxwell)* Williams J, dealing with the NSW Compensation to Relatives Act, said, at 273-274:

> This section does not contain a complete description of the new cause of action. By itself it does no more than alter the rule of the common law that actio personalis moritur cum persona (a person's right of action dies with the person) to a certain extent by providing that in certain circumstances persons can be sued for damages although the injured party has died. To obtain a complete description of the new cause of action it is necessary to go to ss. 4, 5 and 6 which define the persons for whose benefit it is created, the nature of the damages that can be recovered, and the manner in which the cause of action can be enforced. It is apparent that the new cause of action falls into the third class of cases in which a liability may be established founded upon a statute defined by Willes J. in *Wolverhampton New Waterworks Co. v. Hawkesford* (1859) 6 C.B. (NS) 336, at 356 (141 ER 486, at 495), that is, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. (Translation of Latin maxim added).

56. Thus the defendant submitted that if s 23(2) created a new statutory cause of action it had to say a lot more than it did, it had to create a framework stipulating, for example, whose benefit the action is for, the type of damages that can be recovered and the means of enforcement.

57. The difficulty with the submission is to understand what else besides creating a cause of action the words "the person has the right to be compensated" could mean. The right is given and must be capable of being enforced. Unlike the United Kingdom no section in ACT legislation imposes an obligation on a statutory body to pay compensation.

58. In *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 Wilson J, in the High Court, said at 245:

> The concept of a "cause of action" would seem to be clear. It is simply the fact or combination of facts which gives rise to a right to sue.

59. The sort of detail suggested by the defendant may be useful and preferable, but it is not essential. I am satisfied that the s 23 does give the plaintiff a cause of action. This conclusion means I do not need to deal with the defendant's argument based on s 20 of the *Supreme Court Act 1933* (ACT), or to decide if my power in this case was limited to the making of a declaration. No suggestion was made by the defendant that the Court lacked jurisdiction to hear the matter. Also, no suggestion was made that the defendant was not the correct defendant.

60. The defendant next submitted that:

"the right in s 23(2) of the HRA is a statement that creates an obligation on the Territory to provide a remedy for wrongful conviction and that this obligation is satisfied by the availability of act of grace payments under the FMA" (referring to the *Financial Management Act 1996* (ACT)).

61. Thus the defendant submitted that the right to compensation stated in subsection (2) does not arise because the plaintiff already has access to an administrative process to obtain compensation through the act of grace procedure provided by s 130 of the *Financial Management Act 1996* (ACT) (*FMA)*. The defendant appears to be saying that a right to compensation can be satisfied by the possibility of compensation under the discretionary terms of the *FMA*.

62. Section 130 of the *FMA* states:

> **130 Act of grace payments**
>
> (1) If the Treasurer considers it appropriate to do so because of special circumstances, the Treasurer may authorise the payment by a directorate or territory authority of an amount to a person (the ***payee***) although the payment of that amount (the ***relevant amount***) would not otherwise be authorised by law or required to meet a legal liability.
>
> (2) The authorisation may provide for the relevant amount to be paid by—
>
> (a) more than 1 instalment and on the dates specified in the authorisation; or
>
> (b) periodical payments of an amount, and for the period, specified in the authorisation.
>
> (3) An authorisation may be expressed to be subject to conditions to be complied with by the payee.
>
> (4) If a condition is contravened, the Treasurer may by written notice addressed to the last-known address of the payee require the payee, within 30 days of receipt of the notice, to pay an amount equal to all or part of the relevant amount.
>
> (5) If the payee does not pay the amount specified in the notice under subsection (4), the amount may be recovered by the Territory as a debt.
>
> (6) If the payment of an amount by a directorate or territory authority is authorised under this section, the Treasurer must—
>
> (a) direct that the amount be paid from an existing appropriation for the directorate or territory authority stated by the Treasurer; or
>
> (b) authorise payment of the amount under section 18 (Treasurer's advance); or
>
> (c) authorise payment of the amount by appropriation to the relevant directorate or territory authority.
>
> (7) The public money of the Territory is appropriated for subsection (6) (c).
>
> (8) A payment made by a directorate or territory authority under this section must be reported in notes to the financial statements of the directorate or territory authority that relate to the financial year when the payment was made.
>
> (9) The notes must indicate in relation to each payment under this section the amount and grounds for the payment.
>
> (10) The notes relating to a payment under this section must not disclose the identity of the payee unless disclosure was agreed to by the payee as a condition of authorising the payment.

63. The immediately apparent deficiency in the defendant's submission is that s 23(2) gives a qualifying person a "right to be compensated". Section 130 does not give any

such person a right. At best, it gives that person a right to ask to be compensated, with the decision as to compensation remaining firmly within the discretion of the Treasurer (s 130(1)). An act of grace payment is an ex gratia payment. It is only made upon the exercise of the discretion to make any payment at all.

64. The Treasurer "may" make the payment if the Treasurer "considers it appropriate to do so". The application for the payment is not necessarily successful even if any particular criteria are met. Once the payment has been sought it is within the discretion of the Treasurer as to whether or not it is made, as is the amount of the payment. This is very different to having a right to a payment.

65. The fact that the Treasurer has made an offer of an act of grace payment is meaningless. The Treasurer's offer is described in Mr Miners' affidavit. The issue here is not whether there has been an offer of a sum of money, rather it is whether the availability of an act of grace payment is sufficient to satisfy an applicant's right to a payment under s 23 (assuming the applicant otherwise qualifies under s 23(1)).

66. The defendant's position is said to be supported by reference to compensation schemes in the United Kingdom and in New Zealand. The defendant submitted that:

> The United Kingdom and New Zealand, both having ratified the ICCPR and both having enacted statutory bills of rights, have put into place schemes for the payment of compensation for wrongful conviction. In the United Kingdom, a scheme was introduced by statute. In New Zealand, scheme was introduced by way of guidelines, approved by Cabinet, for the making of *ex gratia* payments for wrongful conviction. In both jurisdictions, the courts have confirmed that those schemes, with the supervisory power of a judicial review court, meet the requirements of Art 14(6) of the ICCPR.

67. However when the specific statutory provisions are examined it can be seen that they are very different to the scheme provided by the *FMA*. Section 133(1) of the *Criminal Justice Act* (UK) states:

> Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted. (emphasis added)

68. Again, the obligation to pay compensation is the distinction with the *FMA* which provides for no more than a payment at the discretion of the Treasurer. The other important distinction is the specific referral to the Secretary of State. No referral, or even mention, is made of the Treasurer in s 23(2), let alone a suggestion that compensation is placed in the hands of any particular person or authority.

69. The New Zealand scheme that allows for compensation and ex gratia payments to be made to persons wrongly convicted and imprisoned was introduced on a trial basis in 1998 (but is now formally in effect). It has been criticised as not "satisfying the demands" of Art 14(6) of the ICCPR (see for example, Christine E. Sheehy, 'Compensation for Wrongful Conviction in New Zealand' (1999) 2 *Auckland University Law Review* 977).

70. More importantly, the *New Zealand Bill of Rights 1900* (NZ) does not impose any obligation, in circumstances such as those described in s 23(1) of the *HRA*, to pay compensation. The system in New Zealand is purely voluntary. Unlike s 23(2) there is

no right to compensation. The government expressly declined to include Art 14(6) of the ICCPR in the *Bill of Rights*. The reservation to the ICCPR is stated in these terms:

> The Government of New Zealand reserves the right not to apply article 14(6) to the extent that it is not satisfied by the existing system for ex gratia payments to persons who suffer as a result of a miscarriage of justice.

71. The defendant's submission that the New Zealand scheme of ex gratia payments meets the requirements of Art 14(6), or by extension s 23(2), can therefore not be sustained.

72. The defendant relied on the reservation made by Australia to Art 14(6) (Australia's declarations and reservations deposited 13 August 1980, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 1197 UNTS 411 (entered into force 13 November 1980) art 14). It states:

> Australia makes the reservation that the provision of compensation for miscarriage of justice in the circumstances contemplated in paragraph 6 of article 14 may be by administrative procedures rather than pursuant to specific legal provision.

73. Firstly the reservation does not bind the Territory. Secondly the reservation, by use of the word "may" allows for mechanisms other than administrative procedures. Thirdly, unlike the United Kingdom, s 23 does not specifically refer compensation to an administrative body.

74. Fourthly, the point is not whether or not the right could be addressed by an administrative procedure. The real question is whether the procedure could allow for a discretion as to whether or not to make the payment of compensation. If the procedure dictated a payment of compensation I would have more sympathy for the contention. But the *FMA* does not direct a payment. It does no more than provide a mechanism for a payment at the discretion of the Treasurer. And, as stated by the defendant, s 130 has a much wider scope than only dealing with claims under s 23.

75. If the defendant's argument concerning the *FMA* had merit, then any entitlement to a payment under s 23 could be easily defeated by the offer of a nominal figure as an act of grace payment. This could not have been the intention of the Legislature. On first principles of interpretation, because the *FMA* simply does not give an applicant a right to a payment, the defendant's submission must fail.

76. The defendant pointed out that McWilliam AS J in *Hartigan v Treasurer of the Australian Capital Territory* [2018] ACTSC 271; 338 FLR 324 found the Treasurer's decision to award compensation susceptible to judicial review. This was said to reinforce the submission that s 130 was the source of compensation under s 23. But her Honour did not go as far as contended by the defendant. She said the decision to refuse compensation could be reviewed but specifically declined to say there could be a review of the amount of compensation. Her Honour said, at [53]:

> The plaintiff may not have any legal right to a particular outcome under s 130 of the Act, but what he does have is a legal right or an interest to ensure that the law is correctly applied by the Treasurer in a decision that is directly affecting him. For these reasons, I find that the decision is amenable to judicial review.

77. There are two other reasons to reject the defendant's argument advancing the *FMA* as satisfying the requirements of s 23(2).

78. Firstly, s 23(2) gives a right to "compensation". The *FMA* allows for payment of an "amount" of money. The size of the amount may, coincidentally, equate to

compensation, but it also may not. The payment of an "amount" will therefore not necessarily be the compensation envisaged by s 23(2).

79. Secondly, the *FMA* provides for a payment that "would not otherwise be authorised by law or required to meet a legal liability". This is precisely the opposite intent to s 23(2) which specifically, once the threshold conditions of s 23(1) have been met, creates a legal entitlement to compensation.

80. This last point even seems to have been accepted by Mr Miners in his affidavit sworn on 15 July 2019. He describes the application being made to the Treasurer and the advice given to him by his department. Mr Miners says at [29] and [30]:

> I am conscious that there are a number of matters in dispute between the parties, involving questions as to whether s 23 of the HRA may give rise to an enforceable right to compensation and, if so, questions as to liability and the quantum of compensation payable by the Territory.
>
> On the basis that those questions are yet to be answered, and that on my understanding an act of grace payment may only be authorised where there is no debt or legal liability to the Territory, I have redacted the amount of the offer to Mr Eastman in the letter of Mr Barr dated 4 July 2019. (emphasis added)

81. The same point is made even more emphatically in the letter from the Under Treasurer dated 24 July 2019 (Exhibit E, page 215):

> As you are aware, section 130 of the Financial Management Act 1996 allows the Treasurer to make payments that would not otherwise be authorised by law. Decisions on act of grace payments are entirely at the discretion of the Treasurer.

82. If s 130 of the *FMA* has, as a pre-condition to the making of a payment, that there is no debt or legal liability to the Territory, then it cannot be responding to s 23(2). Even if I was restricted to making a declaration of the plaintiff's entitlement to compensation, that would have created a legal liability in the defendant.

83. Perhaps a little cynically, it might also be said that if s 130 gives effect to s 23(2) then the making of the act of grace offer on 4 July 2019 was an admission by the Treasurer that he was obliged to make the offer because the plaintiff had established all of the conditions set by s 23(1). That of course is not the position taken by the defendant in this Court, a position taken notwithstanding that at the commencement of his oral submissions the learned Solicitor-General stated:

> First, by way of introduction, your Honour, the defendant recognises that the plaintiff was acquitted on 27 August 2014 of the murder of Colin Winchester. Prior to that, he served almost 19 years in prison and that was pursuant to a conviction that the Full Court determined should never have happened.
>
> The defendant plainly accepts that the circumstances that gave rise to the plaintiff's conviction were circumstances that in broad terms warranted compensation. That compensation, the defendant says, he is effected by the process of a payment authorised under section 130 of the Financial Management Act with appropriate conditions intended to bring to finality the consequences of Mr Eastman's initial conviction. (Transcript 133.6)

84. The next point to be dealt with is the temporal argument put by the defendant. The defendant says the *HRA* does not act retrospectively. This is emphasised, submitted the defendant, by s 23(1)(a) stating "if anyone is convicted" rather than "if anyone has been convicted".

85. It followed, said the defendant, that if the tainted conviction occurred before the *HRA* came into force, on 1 July 2004, then s 23 did not apply absent a specific statement in

the legislation that it, or parts of it, applied retrospectively. There was no such statement. The defendant continued that the position was different in respect of s 18(7) where the effect of the *HRA* commencing in July 2004 would be to only deny compensation for any damage suffered before the commencement date.

86. The defendant took me to this general statement of principle in *Maxwell*, at [7]:

> The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.

87. The plaintiff's written Submissions in Reply were somewhat vague on this point, stating, at [20]:

> Precisely why a provision which creates a right to compensation for miscarriages of justice (once there has been a conviction reversed) should be read in the manner contended for by the Defendant - if one applied purposive, contextual principles of construction - it is rather unclear.

88. I do at least agree with the plaintiff's submission that the temporal issue is dependent upon a purposive construction of the section (as required by the *Legislation Act*). Although s 23(1)(a) refers to a conviction being reversed in the present tense, this is a reference to the reversal occurring after the commencement of the Act.

89. In my view the purposive approach to be adopted is that s 23 applies to all convictions reversed after 1 July 2004, and that the assessment of damages is permitted back to the date of conviction (or at least the date on which the punishment commenced). This is the only way of reading the section if its intended purpose is accepted as the intention to right the wrongs of a previous conviction.

90. I also think my approach is consistent with *Maxwell* because the trigger for compensation in s 23 is the reversal of the conviction, not the conviction itself.

91. Lastly on the temporal argument, I agree with these general observations made by the Full Court of the Supreme Court of Victoria in *Robertson v City of Nunawading* [1973] VR 819 at 824:

> The other statement, that of Dixon, J, is as follows:--
>
> > "The general rule of the common law is that the statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events."
>
> It is to be observed that this principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that: Maxwell on Interpretation of Statutes, 12th ed., pp. 216-7. The principle is concerned with the case where the enactment would apply to these antecedent facts and circumstances in such a way "as to impair an existing right or obligation" or "as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events".

## Compensation

92. Compensation, without more, will generally be seen as "money that someone who has experienced loss or suffering claims from the person or organisation responsible" for the loss or suffering (*Collins English Dictionary* (online at 10 October 2019)

'compensation' (def 1)). The *Oxford English Dictionary*, I think more aptly for this case, refers to a "counterbalance, rendering of an equivalent, requital, recompense" ((2 ed, 1989) 'compensation' (def 1)).

93. I think it important to state at the outset that I am bound to approach the assessment of compensation on the basis that the plaintiff is an entirely innocent person who has suffered, through almost 19 years of imprisonment, the consequences of a miscarriage of justice. The Martin Report stated, at [1836]:

> I am fairly certain that the applicant is guilty of the murder of the deceased, but a nagging doubt remains.

94. This 'suspicion' of guilt must be ignored, because:

    (a) The plaintiff's conviction was quashed. He returned to being an innocent person.

    (b) Since the Martin Report the plaintiff has been re-tried and acquitted.

    (c) Quite properly, it is no part of the defendant's case that the plaintiff is other than innocent.

95. The plaintiff's original formula for the assessment of compensation was made up of two parts. Firstly there was compensation of an 'all encompassing' nature. There was no claim for special damages, such as past economic loss or medical expenses (for example arising from prison induced medical conditions). The quantum of the general claim was calculated by attributing a specific figure to each day in custody. Thus the figures of $1,400 and $1,500 per day (multiplied by 6,860 days) produced results of $9,604,000 and $10,290,000 respectively. Pre-judgment interest was then claimed on these figures.

96. Importantly, although the plaintiff's statement refers to events outside his time in custody the plaintiff makes no claim for compensation in respect of these periods. Thus there is no claim suggesting any continuing 'damage' after the plaintiff's release from custody on 22 August 2014.

97. Secondly, the plaintiff sought compensation for "public law wrongs" which he assessed at between $1.3m and $1.6m. These were styled as vindicatory damages.

98. In final oral submissions the plaintiff changed the make-up of his claim by handing up a "Draft" schedule of damages. In this document he omitted the claim for public law wrongs, at least as a separate head, and applied an annual rate instead of a daily rate. Three scenarios were presented beginning with an annual rate of $450,000 and alternatives of $500,000 and $550,000 respectively. The manner of calculating interest was also changed. I will return to interest below.

99. The defendant says different compensation amounts apply depending on whether the plaintiff is successful under s 18(7) or s 23(2). For the former, "general damages" are $1.5m to $2m plus interest. For the latter the figure is $1m to $2m plus interest. In both cases the starting date for the assessment is 1 July 2004, being the commencement date of the *HRA*.

100. There are 3704 days from 1 July 2004 to 22 August 2014. If a 'daily rate' was applied to the defendant's figures $1m equates to $269.97 per day, $1.5m equates to $404.96 per day and $2m equates to $539.95 per day. As will be seen below, however, I agree

with the defendant's submission that a daily rate is not a proper measure for the compensation.

101. I note here that the defendant's submission for s 23 compensation is substantially less than the act of grace offer made by the Treasurer on 4 July 2019 of $3.8m (Exhibit E, page 212). One would have expected that if s 130 of the *FMA* was the means by which s 23 compensation was available then the submission of s 23 compensation, including interest, would have been the same as the act of grace offer.

102. I accept that the submission on compensation needs to be seen in the context of a legal proceeding whereas the Treasurer has a discretion as to the amount of any payment. However, the difference between the Treasurer's act of grace offer and the defendant's submissions on quantum, to some degree, fortifies my conclusion that s 130 is concerned with an entirely different provision of compensation to that dictated by s 23.

103. If the plaintiff is successful under both ss 18 and 23, the defendant says he can only have one set of damages. This proposition is not disputed. The defendant says there should be no award of public law damages.

104. The defendant agrees with the plaintiff that compensation (assuming he is entitled to compensation at all) should not extend to any damage suffered after 22 August 2014.

105. Subject to primary liability, in summary the parties agree that compensation should be calculated up to the plaintiff's release. They both agree interest should be added, although applying different interest rates. The parties disagree on the starting date for the damages and interest, and on the plaintiff's entitlement to damages for public law wrongs.

106. The plaintiff submitted that the award of compensation must satisfy two objectives which were stated as follows:

> It will provide justly in monetary terms for the consequences and incidences of the breach of the human right, including the undeniable fact of loss of liberty, but also where relevant, conditions of imprisonment, public immunity and vilification, personal suffering from humiliation, frustration, grief, despair, loss of family, loss of social connections, loss of opportunities to fulfil your goals. That's the first aspect.
>
> The second aspect is because it's compensation provided in a human rights Act which is interpreted broadly and favourably to the protection of human rights, so it's a human rights Act in a statute in that same statute says you get compensation if it's breached. Then the award would also be one that would be according to law if it emphasises the gravity of the breach, and we get that from *Ramanoop* [2005] 2 WLR 1324. (Transcript 109.35)

107. The plaintiff suggested I could obtain guidance for the approach to be taken in assessing quantum from the decision of Mortimer J in *Wotton & Ors v Queensland & Anor* [2016] FCA 1457; 352 ALR 146. Her Honour deals with compensation from [1598], although in the different context of a class action arising from racial discrimination. I think the following paragraphs are useful:

> 1600 The power to order compensation for loss and damage suffered "because of" the conduct of a respondent is a statutory power. It is conferred in the context of a legislative scheme dealing with unlawful discrimination in relation to attributes identified in the four pieces of federal legislation picked up the AHRC Act. As the other subsections in s 46PO make clear, unlawful discrimination is proscribed in several different fields of activity which give rise to the need for different kinds of remedies. Unlawful discrimination may occur in a setting which aligns its consequences closely with the consequences of common law causes of action such as breach of contract

(for example, discrimination by termination of employment). Or it may occur in a setting which aligns its consequences with common law causes of action such as intentional torts (for example, physical sexual harassment). In other circumstances, the statutory cause of action for unlawful discrimination has no close relative in the common law. That is why it is important to recall that it is the words of the statute which provide the criterion for such an order, not common law principles: see *Qantas Airways v Gama* at [94] (French and Jacobson JJ).

1601 In Richardson at [26], Kenny J relied upon the observations of Gleeson CJ in I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd [2002] HCA 41; 210 CLR 109 at [26] where his Honour considered the nature of orders for damages under s 82 of the Trade Practices Act 1974 (Cth). At the time, s 82(1) provided:

> A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention.

1602 Gleeson CJ said at [25]-[26]:

> The possible existence, in different circumstances, of those and other complications directs attention to the kinds of problem inherent in the word "by" in s 82. Where the kind of contravention of s 52 of the Act that is involved is a misrepresentation, including the expression of an erroneous opinion, which induces a person to enter into a transaction which results in financial loss then, depending upon the way in which a claim for loss or damage under s 82 is formulated, it will be common for the amount of the loss or damage as claimed to be affected by factors in addition to the particular factor that was the subject of the misrepresentation. The misrepresentation will rarely be the sole cause of the loss. In statements of principle concerning the common law of contract or tort, additional factors which affect loss or damage are often discussed under the rubrics of remoteness, mitigation, or contributory negligence. Here we are concerned, not with common law principles, but with statutory rights and liabilities. However, the same problems arise, and must be dealt with in conformity with the statute.
>
> The relationship between conduct of a person that is in contravention of the statute, and loss or damage suffered, expressed in the word "by", is one of legal responsibility. Such responsibility is vindicated by an award of damages. When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose. (emphasis added)

108. Although arguably abandoned by the plaintiff in the final schedule of damages, I think I need to still deal with the claim as a separate and distinct amount in the range of $1.3m to $1.6m to be attributed to "public law wrongs" or, as stated in the written submissions, for vindication of the plaintiff. This is because my impression of the final submission on compensation is that the claim has simply been shifted into the global calculation of compensation.

109. I do not think there is an entitlement, as a distinct figure, to compensation for vindication. The ACT Court of Appeal recently rejected vindicative damages as a distinct head of damages in *Lewis v Australian Capital Territory* [2019] ACTCA 16. The Court said at [63]:

> The appellant quoted no authority recognising vindication, or vindictive, damages as a separate head, and in particular outside the chapeau of exemplary damages. As mentioned above, the request for exemplary damages had been abandoned. That abandonment took with it any right to vindicative damages.
>
> The Court is not satisfied that there is any basis in Australian law upon which the claim for vindicative damages, as a separate head of damages, can be sustained.

110. I note an application for special leave to appeal the decision in *Lewis* has been lodged in the High Court.

111. I do accept that compensation under the *HRA* has not been previously awarded in the ACT and the bounds of compensation have not been previously set. It may therefore be argued that the absence of an entitlement to 'damages' for vindication does not impact upon an entitlement to compensation under the *HRA*. My view is that damages should be seen in the broad sense of the plaintiff's right to be compensated for a particular type of harm and that I should not make any distinction simply because the compensation is pursuant to the *HRA*.

112. Another more basic reason for not awarding an amount of money specifically for vindication is that it has not been claimed in the pleadings. The Amended Statement of Claim is specific, at [7], in stating that the only particular of compensation for the claim under s 23(2) is:

> The plaintiff has been deprived of his liberty during the term of his imprisonment for 18 years, 9 months and 12 days (6,860 days).

113. No application was made to amend the pleadings.

114. Notwithstanding *Lewis*, however, it must be recognised that the compensation to be awarded, remembering that it is compensation from a conviction that should never have occurred, will include an acknowledgment of the vindication of the plaintiff. This is consistent with the underlined words in the judgment of Gleeson J referred to above in the quotation from *Wotton*.

115. Turning now to the actual assessment of damages, Mr Miners, in his affidavit, refers in [16] to the plaintiff's solicitor informing him that "in a recent claim for damages for "unlawful detention" or "wrongful detention" the Supreme Court had "notionally assessed" damages at "a rate of….$1,219.51 per day"". The letter being referred to is dated 14 January 2019 and can be found in Exhibit E at page 208.

116. The Supreme Court case that is said to suggest use of a daily rate is *Lewis v Australian Capital Territory* [2018] ACTSC 19; 329 FLR 267, the primary decision in *Lewis,* referred to above. Refshauge J assessed notional damages of $1.00 in favour of a plaintiff who had been wrongfully imprisoned for 82 days. At [388] his Honour said that if his assessment of notional damages was in error he would have assessed damages for the 82 days of wrongful imprisonment in the sum of $100,000. This figure, divided by 82, produces a result of $1,219.51. This seems to be the source of the daily rate suggested by the plaintiff's solicitor.

117. I do not see *Lewis* [2018] as establishing a right to damages calculated on a daily rate. Firstly Refshauge J did not reach his $100,000 by way of a calculation of a daily rate. Secondly, while a daily rate might be arguable over a relatively short period such as 82 days, it would not necessarily be an appropriate basis for calculation when the length of imprisonment is 6,860 days. If the plaintiff's solicitor was suggesting a daily rate was applied in *Lewis* [2018], he was wrong.

118. The defendant has referred me to *Ruddock v Taylor* [2003] NSWCA 262; 58 NSWLR 269, in support of the proposition that a daily rate is inappropriate. Spigelman CJ, at [49] said:

> Damages for false imprisonment cannot be computed on the basis that there is some kind of applicable daily rate. A substantial proportion of the ultimate award must be given for what has been described as "the initial shock of being arrested" (Thompson v Commissioner of Police of the Metropolis [1998] QB 498 at 515). As the term of imprisonment extends the effect upon the person falsely imprisoned does progressively diminish.

119. While I agree that a daily rate should not be adopted, I note that the "lengthy" periods in custody in *Ruddock* were 161 days and 155 days so that the diminishing effect can hardly be stretched over a term of 6,860 days. It is also evident from the plaintiff's statement that different events occurring through his custody would have revived the shock and horror of being in custody.

120. Another approach, to some extent favoured by the defendant, is to award damages on an annual basis. The 2008 guidelines to the New Zealand scheme of ex gratia payments set a "starting figure of $100,000 for each year in custody" as compensation for "non-pecuniary losses" (Ministry of Justice (NZ), *Compensation for Wrongful Conviction and Imprisonment* (Backgrounder, May 2015) 6).

121. In the United Kingdom successful applications for compensation under *the Criminal Justice Act* are referred to an assessor. Total compensation for a person who has been in prison for more than 10 years is limited to £1m (as at 2015). The assessor conducts the following exercise:

> Section 133A of the 1988 Act sets out the steps the assessor must follow when assessing compensation. In assessing the amount of compensation attributable to the applicant's suffering, she must have regard in particular to:
>
> - the seriousness of the offence concerned and the severity of the punishment suffered as a result of the conviction; and
> - the conduct of the investigation and prosecution of the offence.
>
> She has the discretion to make deductions from the amount of compensation that she would otherwise have awarded by reason of either or both of the following matters:
>
> - any conduct of the applicant appearing to the assessor to have directly or indirectly caused or contributed to the conviction concerned; and
> - any other convictions of the applicant and any punishment suffered as a result of them.
>
> (Sally Lipscombe and Jacqueline Beard, Miscarriages of Justice: Compensation Schemes (House of Commons Library, Standard Note SN/HA/2131, 6 March 2015) 8)

122. Another approach would be to adopt tort principles of damage and attempt to put the plaintiff in the position he would have been but for the conviction. The evidence however, or lack of it, does not permit such a calculation. For example I do not have any figures for expected earnings had the plaintiff returned to work in the Public Service.

123. It is also apparent that the parties have not adopted a common law damages approach. The defendant has referred to "general damages" but its figures are well in excess of what might be awarded for general damages in, for example, a personal injury case. In *Lee v McGrath* [2018] ACTSC 173, although the plaintiff ultimately lost on liability, I

assessed general damages at $500,000 for a young man about whom I said the following, at [109]:

> No matter how much worse his injuries could be, the fact remains that since the age of 15 the plaintiff's life has been completely overwhelmed by his injuries. The sense of humour that he maintains is the only element of a 'normal existence' that can be identified. He is significantly cognitively impaired, when not in bed his movement is restricted to a wheelchair (to which his legs are bound), he cannot even move freely about a bed, he needs to be moved by two persons, he is incontinent both of urine and faeces and his speech is hesitant and uncertain. There is very little prospect of improvement other than perhaps some assistance from physiotherapy and speech therapy. The plaintiff has lost a good deal of his life expectancy. His remaining 33 years will be plagued by the disability which he now suffers.

124. I was told that $500,000 would have been the highest award of general damages ever made in the ACT. On one observation of the facts in *Lee*, that plaintiff's situation was effectively a life sentence of impairment and disability.

125. There have been some ex gratia payments made in Australia following long terms of imprisonment. For example Ms Lindy Chamberlain received an ex gratia payment of $1.3m plus costs and the value of the family car. She had been in custody for about four years. In Western Australia Mr Andrew Mallard received $3.25m after 12 years imprisonment. I do not know if these amounts included an interest component.

126. The plaintiff pointed out that in Mr Mallard's case the act of grace payment was not accompanied by a release of liability on the part of the state government. Mr Mallard was therefore at liberty to press for further compensation if he thought it appropriate.

127. Payments like the above two examples however have not been assessed pursuant to any right to compensation so that their relevance is limited. They have also been made for different reasons, for example "to ease transition" or "to express regret" (Rachel Dioso-Villa, 'Out of Grace: Inequity in Post-exoneration Remedies for Wrongful Conviction' (2014) 37(1) *University of New South Wales Law Journal* 349, 358).

128. There are too many, and varied, cases in the United States of America, to assist in discerning helpful principles.

129. The National Registry of Exonerations, a joint initiative of the University of California Irvine Newkirk Center for Science and Society and the University of Michigan Law School published this summary for compensation for 2018:

> Fewer than half of exonerees received any compensation. Exonerees who did receive compensation account for slightly more than 60% of all the years lost, at an average rate of $220,000 per year in prison. (National Registry of Exonerations, *Exonerations in 2018* (Report, 9 April 2019) 8)

130. By way of example, Mr Martin Tankleff was freed after spending 17 years in prison for murdering his parents. He was released after his confession was found to have been fabricated and other exculpatory evidence was established. He sued New York State under § 8-B ('Claims for unjust conviction and imprisonment') of the *Court of Claims Act* (NY Consolidated Laws). He received a settlement of US$3.375m (*Tankleff v. State of New York* (NY Ct Cl, Claim No. 118655, UID 2013-045-038, 27 November 2013).

131. Another example relates to Mr Billy James Smith in Texas, where, in 2010, annual compensation was limited to US$80,000 per annum. Mr Smith spent 19 years in prison before being exonerated. Under the Texas scheme he received US$1,593,000 plus an annuity of US$9,000 (*In re Smith*, 333 S.W.3d 582 (Tex, 2011)). I note that under the

Texas legislation, in contrast to the *HRA*, applications for compensation are specifically directed to be made to the State comptroller or by a suit against the state (*Texas Civil Practice & Remedies Code of 2005*, Tex Code Ann ch 103).

132. Ultimately I have found no persuasive path to the manner of assessment in common law damages, in other ex gratia payments in Australia or in the schemes operating in the United Kingdom, New Zealand and the United States of America.

133. Without more, almost nineteen years is a very long time to be in prison. To this must be added the experience of prison as described by the plaintiff in his statement and inferred from the prison records in Exhibit E. The experience also includes the injustice of being in prison as a result of a very flawed first trial. The plaintiff entered prison in his middle age. He has emerged on the cusp of old age.

134. Unlike in *Ruddock* I do not think the shock necessarily diminishes with time although as acknowledged by the plaintiff, at [171] of his statement:

> After about the first two years or so at the Alexander McConachie Centre, prison life started to improve a bit. Up to then it was just as bad as New South Wales prisons.

135. The plaintiff's statement is self-explanatory. Nevertheless I think some of its contents need to be listed to illustrate the rigours and challenges of long-term imprisonment.

136. Before doing so however I note that the plaintiff in his statement sets out his background, highlighting the high levels of education of his family and himself and, in essence, outlining a privileged upbringing. To the extent that these facts go beyond a description of his background, and are intended to suggest that prison would have been a greater hardship than for a person of lesser education and privilege, I reject that suggestion.

137. In my view almost 19 years of prison for any person wrongly convicted would be burdensome. This is of course subject to me taking into account the personal experiences endured by the plaintiff, both of a physical and emotional nature, and also includes the course of the many legal proceedings before his ultimate release.

138. Returning to the plaintiff's statement, these matters emphasise the plaintiff's life in prison:

    (a) The plaintiff was frequently moved between prisons. This occurred on 90 occasions (Exhibit E, page 129). The moves would have prevented him from establishing any form of settled routine.

    (b) Because of his classification as a "non-association" prisoner, the plaintiff was in effective isolation for about eight years.

    (c) When not isolated the plaintiff was required to live in a prison section occupied by "the most violent and dangerous prisoners".

    (d) The plaintiff's remonstrations against poor treatment were often ignored and sometimes saw him punished. His frustration levels reached the stage where he smeared his own faeces on the walls of his cell, as the only way to make a protest.

    (e) In January 2006 the plaintiff was assaulted by another prisoner. As a result he still has some impairment in the vision in one of his eyes.

(f) The plaintiff was subjected to prison politics in which fellow prisoners took offence to minor perceived insults and extracted revenge in a disproportionate manner.

(g) From time to time the plaintiff came into contact with particularly violent prisoners who threatened him. He also had contact with paedophiles, one of whom made sexual advances towards him.

(h) The plaintiff summed up events around him by stating, at [121] "I could not believe the extent of the brutality and barbarity which existed through the whole of the prison system".

(i) The plaintiff attempted suicide in December 2000. This seems to have followed the deterioration of his mental health after the rejection of his appeal, in May 2000, by the High Court.

(j) Following his suicide attempt, while in the prison clinic, the plaintiff was taunted by a prison officer, an action which was ignored by the prison nurse.

(k) On one occasion the plaintiff witnessed the murder of another prisoner. He was subpoenaed to give evidence at the inquest but was terrified of providing a statement of what he had seen.

(l) The plaintiff was deprived of contact with his family, in particular his sisters, with whom he was particularly close.

139. It is also necessary to take into account the plaintiff's loss of his working life and economic capacity, the insult to his reputation, and also, as already mentioned, the need to compensate him for the wrongfulness of his imprisonment.

140. All of the factors I have mentioned above form the ingredients of compensation, namely the counterbalance or requital for the years the plaintiff spent in prison.

141. I was taken to the several judgments and legal processes that filled many of the years during which the plaintiff was in prison. I do not think I need to detail them but do agree with the plaintiff that the 'ups and downs' and delays associated with the proceedings would have added to the plaintiff's frustrations and significantly affected his time in prison. I note for example that at one stage his solicitor stopped acting for him so that 40 cartons of material were delivered to him at prison. Access to them was difficult and he eventually gave up the then current proceedings.

142. As has become clear there is no formula or established pathway to the assessment of compensation. It is evident from the figures put forward by the parties, and also having regard to the size of the act of grace offer made by the Treasurer, that compensation must be substantial. Taking into account all of the factors I have listed above, I think the appropriate compensation is $5,000,000. Without necessarily agreeing that an annual rate is applicable, my figure equates to about $267,000 a year.

143. In relation to interest the plaintiff's original claim was for pre-judgment interest at the fluctuating rates set by the court. The defendant said that interest should be calculated in accordance with *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657. This would be interest at 2%. In his final submission on damages the plaintiff effectively adopted the *Gogic* formula.

144. I have a discretion with respect to interest (*Court Procedure Rules 2006* (ACT) r 1619). The argument in favour of the defendant's approach is that the damages, to a large extent, are akin to general damages for pain and suffering. There is thus an accumulation of the base amount as the years progress, at least until 22 August 2014. Taking into account the plaintiff's ultimate agreement with this approach I intend to adopt it, noting that the interest rate of 2% will double to 4% from August 2014 (when the lump sum crystallised upon the plaintiff's release from prison) to the present time.

145. I have however also decided to commence the accumulation of interest from July 2004, when the *HRA* came into force. This is done not as a finding of principle, but in the exercise of my discretion because the notional accumulation of the award in the hands of the defendant did not begin before July 2004.Therefore I will assess interest at 2% over 10 years and then at 4% (on the total so far) for 5.1 years (both periods being subject to rounding off). On this basis the interest is $2,020,000 ((5m x 2% x 10) + (5m x 4% x 5.1)).

**Section 18(7)**

146. The plaintiff states in his Submissions in Reply at [24] that if he is successful under s 23, "it will not be necessary for the Court to resolve the issues of construction that are presented by s 18(7) of the HR Act".

147. I have found that the plaintiff has succeeded under s 23 and consequently am of the view that there is no need to determine his case under s 18(7).

148. In deference to the parties' submissions however, I will deal briefly with s 18(7). I begin by repeating my view that the current case is specifically addressed by s 23. It accords with the scope and intent of that section.

149. I do not think that s 18(7) has either the same objective or breadth. My reading of s 18(7) is that it is intended to address wrongful arrest and detention situations, normally treated as a common law tort.

150. The distinction between the 'cover' provided by ss 18 and 23 was identified by Penfold J in *Strano v Australian Capital Territory* [2016] ACTSC 4; 11 ACTLR 134 (when commenting on the decision of Gray J in *Morro and Ors v Australian Capital Territory* [2009] ACTSC 118; 234 FLR 71), at [33]:

> Second, the assumption that ss 18(7) and 23 of the *Human Rights Act* must operate in the same way simply because they both provide for a right to compensation (at [24]–[28]) does not seem to have any substantial basis, especially given the different kinds of detail provided in the two sections.

151. Incidentally, Penfold J, at [34] then says:

> Third, his Honour's statement that the two provisions "appear on their faces to provide for remedies in the circumstances that they predicate" (at [32]) is in my view no more convincing than the alternative proposition that the two provisions "appear on their faces" to require that ACT law provides for compensation for the breach of the specified rights. Indeed s 23 explicitly refers to a right to be compensated "according to law" (an addition, and a distinction between s 18(7) and s 23, which could easily reflect the existence of a recognised cause of action for false imprisonment and the absence of a recognised cause of action for what might loosely be described as unjust conviction).

152. Accepting her Honour was dealing with s 18, the words above in parenthesis might be read as supporting my view that s 23, of itself, gives rise to a statutory cause of action.

153. Returning to the scope of s 18(7), there is no suggestion that the plaintiff's original arrest was unlawful.

154. Although it is possible to argue that the conviction was unlawful because s 18(2) says no person may be deprived of liberty "except on the grounds and in accordance with the procedures established by law", the contrary argument is that the trial ran according to law.

155. His detention was a product of his conviction. It was the only lawful course open consequent upon that conviction. Penfold J, in *Eastman v Chief Executive of the Department of Justice and Community Safety* [2012] ACTSC 189; 274 FLR 255 sets out a useful history establishing the lawfulness of the plaintiff's detention.

156. The flaws in the trial may have led to a susceptible conviction. If the flaws later discovered had been available in the appeal process, no doubt the appeal would have been successful and the conviction viewed as unsafe or unsatisfactory. The conviction would have been set aside, or quashed, but it would not have been declared unlawful. Repeating the Full Court in *Eastman (No 2)* at [247]:

> Had the flaws in Mr Barnes' evidence, and the forensic evidence associated with it, been available as a ground of appeal, it would have been treated by a court of criminal appeal as giving rise to a substantial miscarriage of justice that required the conviction to be quashed.

157. Penfold J ultimately disagreed with Gray J (in *Morro*), finding that she did not agree "that s 18(7) creates a statutory cause of action separate from the tort of false imprisonment".

158. I do not need to decide on this dispute. This is because I do not think the threshold for the possible application of s 18(7) has been met: in other words, as already stated, the facts of this case simply do not fall within s 18(7).

## Orders

159. I make the following orders:

(i) Judgment for the plaintiff in the sum of $7,020,000.

(ii) The defendant is to pay the plaintiff's costs of the proceedings.

(iii) I will hear the parties if any alternate costs order is sought.

I certify that the preceding one hundred and fifty nine [159] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Elkaim.

Associate:

Date: 14 October 2019

**Amendment**

17 October 2019 Paragraph [2(c)] – delete the word "Wayne".