

**Cameron J Charnley, ‘Compensatory damages and the role of ‘loss’ in actions for tort and breach of contract’ (2022) 51 *Australian Bar Review* 320**

This article discusses the role of ‘loss’ in claims for compensatory damages by comparing two appellate decisions involving the question of damages — *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 (‘*Lewis*’) on tort, and *Leeda Projects Pty Ltd v Zeng* (2020) 61 VR 384 (‘*Leeda Projects*’) on breach of contract – which engage with a plaintiff’s loss differently, particularly in circumstances where a plaintiff seeks compensation for a wrong which has made no material difference.

The case in *Lewis* involved a claim for damages for the tort of false imprisonment in circumstances where the prisoner (Lewis) was not ‘lawfully at large’ when he was falsely imprisoned. Lewis’ periodic detention order cancelled following his breach, and he was imprisoned to serve his term in full-time detention. He sought substantial damages for the loss of the right to liberty. The High Court upheld the award of nominal damages only, finding that if the decision to cancel his periodic detention had afforded Lewis procedural fairness and had he not been falsely imprisoned, he would have been lawfully imprisoned, and thus he suffered no real loss at all.

The case in *Leeda Projects*, the building owner sought from the builder substantial damages occasioned by a delay of over two years in completing building works. The Court of Appeal held that the lower court had erred in awarding damages for lost rent – the building was never intended to be either rented or resided in – but that an award of damages for loss of use of the property reflecting ownership costs (rates, service charges etc) during the delays was appropriate, irrespective of whether any direct financial loss was incurred. Although the building owner would have incurred those expenses anyway, she acquired no benefit during the period of delay. The breach caused the loss of that benefit.

The article proposes some guiding principles in assessing a plaintiff’s entitlement to substantial compensatory damages.

An award of substantial damages in tort requires more than mere infringement of a right; there must be a measurable loss. Otherwise, the distinction between nominal and substantial damages is meaningless.

Nominal damages may be appropriate not only for ‘fleeting or minuscule interferences’ but also in circumstances where the particular interference is without practical consequence – even if not ‘a trivial wrong’.

The relevant question is whether the plaintiff has in some measurable way suffered a ‘worsening’, a ‘setback’ or an ‘adverse consequence’. This might normally be identified through a counterfactual. Where, as in *Lewis*, the facts are so extraordinary as to effectively preclude the existence of compensable loss, it is critical to focus on the facts rather than broader policy concerns.

It is important to identify a counterfactual situation in which the contract was not breached, or the wrong did not occur, which is grounded in reality and connected to the facts. The article argues that this represents a common-sense approach to the assessment of damages.

This article argues that a decision to award compensatory damages for breach of contract should focus on the contracted-for loss instead of restitution, if only for the sake of clarity and consistency. This allows for a just award of compensatory damages where a breach has deprived the offended party of an expected benefit — regardless of the inevitable expense needed to obtain it.