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In the inaugural edition of this publication, we addressed various rules that set boundaries on what is permissible damages evidence. The focus in that publication was to survey the codified rules and common law principles underpinning the analysis and presentation of damages.

In this, the second edition, we expand on that analysis with recent changes to the rules, and the authors also summarise noteworthy cases from the various jurisdictions.

Upon reviewing these cases, one is struck by the somewhat consistent approach taken to addressing these issues, although one must remain cognisant of the differences that exist.

We are also fortunate to have expanded the roster of participating jurisdictions to include India.

I hope that you find this publication to be an interesting and informative resource and, as always, please feel free to contact me with any comments or suggestions.

Errol Soriano
Duff & Phelps
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October 2019
Part I

GENERAL PAPERS
Chapter 1

GLOBAL PRINCIPLES OF COMPENSATORY DAMAGES

Gary J Mennitt, May K Chiang and Selby P Brown

I GENERAL PRINCIPLES

Whether in civil law or common law jurisdictions, the general principle underlying compensatory damages is largely the same: such damages are awarded to put the innocent party in the position it would have been in had the harm not occurred. Black’s Law Dictionary, a frequently cited legal dictionary in the United States, defines compensatory damages as ‘[d]amages sufficient in amount to indemnify the injured person for the loss suffered’. This general principle finds a variety of applications across jurisdictions, factual applications and areas of law.

This chapter will provide some general background on compensatory damages around the world. While not meant to be an exhaustive survey, we endeavour to provide the reader with a basic understanding of the contexts in which compensatory damages are awarded, and how an injured party proves entitlement to the damage amount. Subsequent chapters of this volume will provide more detailed information concerning damage awards in various jurisdictions.

II RESTORING THE INJURED PARTY TO PRE-INJURY STATUS

i Breach of contract

Where a breach of contract is at issue, compensatory damages are designed to place the injured party in the position it would have enjoyed if the contract had not been breached. Such damages are often referred to as ‘expectation’ or ‘benefit of the bargain’ damages. In most jurisdictions, this means that the injured party may recover for direct losses owing to the breach of the contract. In a commercial contract setting, lost profits may also be recoverable as compensatory damages, but proving lost profits with the requisite degree of certainly can be difficult and jurisdictions differ with respect to the likelihood of an award of lost profits.

In Australia, a common law jurisdiction, commentators have carefully noted that ‘the same situation’ does not necessarily mean ‘as good a financial position’. A monetary substitute

1 Gary J Mennitt is a partner, and May K Chiang and Selby P Brown are associates at Dechert LLP.
for performance, then, may not be as lucrative as actual performance of the contract, given that the breach may have caused the injured party’s assets to lose their own value, and the fact that the injured party has a duty to mitigate damages.\(^4\)

In Brazil, a civil law jurisdiction, compensatory damages for breach of contract account for both actual loss and future lost profits.\(^5\) In Russia, another civil law jurisdiction, direct losses and lost profits are recoverable, but lost profits have been particularly difficult to prove.\(^6\) Furthermore, Russian courts are empowered to reduce the scope of damages if the injured party increased the amount of damages or failed to take reasonable measures to reduce it.\(^7\)

In the United Kingdom, compensatory damages for a breach of contract take the form of ‘expectation damages’: the injured party is awarded the net loss, which is calculated by quantifying the harms caused by the breach, and then deducting any benefits resulting from the breach.\(^8\) Such losses can include costs incurred from the breach and the profits that the claimant would have earned but for the breach.\(^9\) Where it is impractical to prove lost profits, the injured party is entitled to the rebuttable presumption that the venture would have broken even.\(^10\)

Though Spain is a civil law country, it recently adopted the common law approach to compensatory damages. Therefore, following a breach of contract, the claimant may recover the costs or expenses it incurred as a result of the breach, and may also be awarded lost profits.\(^11\)

In Singapore, courts look first to see whether the contract contains a provision for liquidated damages, which fixes the sum of money payable to the non-defaulting party in the event of a breach.\(^12\) If the contract does not have a liquidated damages clause, then the court may award ‘unliquidated damages’, which essentially function as compensatory damages – they put the party in the position it would have been if the contract had been performed fully.\(^13\)

\(^9\) ibid.
\(^10\) id. at 3.
\(^12\) Ramesh Selvaraj and Sean Tseng, ‘Contracts, Negotiation, and Enforcement in Singapore: Overview’, Practical Law Country Q&A (1 August 2018).
\(^13\) ibid.
Global Principles of Compensatory Damages

ii  Tort and personal injury

Similarly, in the personal injury context, compensatory damages seek to restore the injured party to his or her pre-injury condition. While many countries follow this general principle, jurisdictions differ in the types of losses they consider when awarding compensatory damages for tort. Canada and the United Kingdom provide instructive examples.

To restore a plaintiff to his or her pre-accident condition in Canada, courts look at both non-pecuniary losses such as pain and suffering, as well as the plaintiff’s pre-accident financial condition. Courts consider both the past financial loss and the prospective financial loss. If a future loss may result owing to the defendant’s wrongful conduct, courts will consider this future contingent loss against the probability of its occurrence; it may be added to the total compensatory damages award on a pro rata basis.

In the United Kingdom, the injured party is entitled to be returned to the position that it would have been in had the tort not been committed. If the claimant receives benefits under an insurance policy, those benefits are irrelevant to the damage award. Compensable losses may be monetary or non-monetary. Courts in the United Kingdom recognise a wide variety of monetary losses: injured parties have recovered for the reasonable cost of repair to damaged goods, loss of anticipated profits, and wasted staff time for having to respond to a significant disruption in business owing to the injury.

iii  Proving entitlement to compensatory damages

To receive an award of compensatory damages, the injured party must show that the injury in question actually caused the damages sought. The seemingly universal prerequisite of causation requires a direct link between the defendant’s conduct and the plaintiff’s injury. In some cases, the injured party will be required to rebut the wrongdoer’s claim that the injury was caused by a different force. It is also a common concept that an injured party’s attempts to obtain damages may be thwarted, at least in part, where the injured party did not take reasonable steps to ensure the damages were not greater than necessary. The concepts of causation and mitigation are discussed further below.

iv  Causation

Under Russian contract law, ‘the non-breaching party must prove the fact and amount of losses and that the losses were caused solely by the breach of the contract’, which is difficult to prove. If the damages were caused partly by the breach of contract and partly by something


ibid.


id. at 2.

id. at 1.

id. at 2, 5.
else, courts will reduce the damages that the breaching party must pay. 'If the party fails to prove the exact amount of losses, but proves the fact that the losses were incurred, the court must reasonably define the amount of losses by itself.'

The Brazilian Civil Code generally requires a causal link between the act or omission attributed to the party in default and the consequence suffered by the innocent party.

Law in the United States similarly generally requires a claimant to establish that the compensatory damages sought were suffered as a consequence of the claimed violation of tort law or a contract. American courts typically require a plaintiff to establish that the damages were proximately caused by the defendant's conduct. In other words, while the damages must not have happened but for the defendants' bad conduct, they cannot be so remote that they cannot be directly traced to the wrongful conduct, and they must not be the result of other intervening causes. On the other hand, there may be multiple proximate or 'but-for' causes of an injury, and the law of apportioning damages and seeking contribution or indemnity from others jointly or partially liable is generally a matter of state law. This is so in both contract and tort law.

English and Canadian law share substantial overlaps regarding causation. Canadian personal injury law requires the injured party to show both legal and factual causation. Legal causation requires proof that the 'type or class of injury [was] a foreseeable result of the accident, although the extent of the injury need not be foreseeable.' Factual causation requires a showing 'that the injury would not have occurred “but for” the accident or to show “that the accident materially contributed to the injury’. Unlike Russia, if the plaintiff can establish either but-for or material contribution, the plaintiff can recover regardless of whether something else also contributed to its damages. But where the injuries are legally caused by more than one person, the damages will be apportioned among the wrongdoers.

Under English contract law, the ‘but-for’ causation test likewise requires a plaintiff to prove factual causation. The primary goal is to put the plaintiff in the same position he or she was in pre-breach, but to avoid compensating the plaintiff for damages that he or she would have experienced regardless of the breach. 'Legal causation' is also required under English law. In English law, the concept holds that 'even though some losses were factually caused by the breach (that is, but for the breach they would not have occurred), they are nevertheless

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26 See, e.g., NY CPLR, Articles 14–16.
27 See, e.g., Hughes, 17 Fla Jur 2d Damages Sections 7–16; Section 15:6. Completeness, 43B Mass Prac, Trial Practice Sections 15:3–15:7 (3d ed.);
29 ibid.
30 ibid.
31 id. at 238.
treated legally as not having been caused by the breach’. 33 Considerations such as foreseeability and remoteness will likely play a role in English courts’ common-sense evaluations of whether the legal chain of causation has been interrupted. 34

v Mitigation

Another common principle regarding entitlement to damages is the concept of mitigation, a variation of which appears to exist in most jurisdictions at least in some areas of law. The Russian Civil Code ‘allows a judge to reduce the scope of damages if the aggrieved party, intentionally or not, increased the amount of damages or failed to take reasonable measures to reduce it’. 35 English courts similarly recognise the concept of mitigation, though if the defendant seeks to reduce his or her damages on the ground that the plaintiff failed to mitigate his or her damages, the defendant bears the burden of providing as much. 36 The same is true in South Africa. 37

Singapore law requires that, at least in the context of breach of contract, an innocent party act reasonably to mitigate his or her losses, though what exactly qualifies as reasonable is ‘often a difficult concept to pin down’. 38 In Brazil, though the concept of mitigation of damages has roots in common law, it has been gaining more recognition over the past few decades. 39

IV CONCLUSION

The general principles underlying compensatory damages do not vary greatly across modernised legal systems around the world. Actual awards of compensatory damages are therefore driven by the facts of each case and the nuances of the local jurisdiction’s governing law. As a best practice, one should partner with a practitioner knowledgeable of the local jurisdiction’s practices, rules and precedents to obtain the best result for clients.

33 id. at 12.
34 id. at 12–13.
I INTRODUCTION

In the modern age, almost all information is generated, edited and stored in a digital format. Digital evidence presents in a variety of ways including text-based records like spreadsheets, reports or notes, as well as multimedia like photographs, and audio or video recordings.

The nature of digital evidence can sometimes make it complex to access and interpret. Just like physical evidence, digital evidence can be easily subject to spoliation if not handled properly, with a strict chain of custody maintained.

Because every individual and organisation typically has such a large quantity of digital information in their custody, it can be a daunting task to find the relevant pieces. Digital forensic and electronic discovery professionals can assist with the collection, analysis, security, review, production and reporting on all types of digital evidence.

II PRESERVATION OF DIGITAL EVIDENCE

Forensic images

Any type of physical media capable of storing information can be forensically imaged. This includes computer hard drives, solid state drives, external USB devices, SD cards used in cameras, game systems, smartphones, among others.

All of digital forensic science is based on a class of computer algorithms known as 'hash algorithms'. Hash algorithms are designed to provide a digest (or 'hash') of any given input. Given an identical input, a hash algorithm will generate an identical output every time. If a hash algorithm generates the same output for two inputs, it mathematically proves those inputs are exactly the same.

Forensic images are an exact, bit-by-bit copy of a digital storage device that is written out to a file. To verify a forensic image, the hash of that output file is compared with the hash that was generated when the information was read from the original storage device. If these hash values match, it means the forensic image is an exact copy of the original disk and can be treated as such for the purposes of analysis.

Once a forensic image is generated, that image cannot be modified. If the image is modified, the next time the evidence is verified, the hash will not match. If a forensic image were to be restored to a digital storage device and placed in a computer, the content of that digital storage device would be indistinguishable from the original.

---

1 Joel Bowers is a managing director in the Cyber Risk practice of Kroll.
Digital forensic analysis is performed against a forensic image rather than the original device, ensuring that the evidence and the investigation are not compromised.

ii Targeted collections
While forensic images are truly the ‘best evidence’ when it comes to digital information, they can be time consuming to create, and are not always desirable to clients because of budget constraints or concerns about overcollection and data privacy.

In these cases, it is possible to perform a targeted collection that captures only specified files or folders on a computer system or account. A best practice for targeted collection is to encapsulate the target in an archive called a logical image.

Logical images are similar to forensic images in that they cannot be altered without causing a hash mismatch, and in that they preserve metadata. Logical images differ from forensic images in that they do not provide as much context for an investigation, and they do not allow deleted file recovery, because only the specified files are captured.

A major downside to targeted collections is that if for some reason relevant data is not identified as part of the initial target, the examiner will have to go back to the source and recollect. Recollecting the same sources always causes an increase to cost, and there is always an additional risk that the necessary information will no longer available from the source.

iii Collecting from the Cloud
The popularity of Cloud services is increasing daily as more and more individuals and organisations move towards decentralised infrastructure and software as a service solution for their information technology needs.

Each Cloud provider has a different method of transferring or exporting data back to their users. In some cases, a given Cloud provider’s export solution will be deficient for the purposes of an investigation or even non-existent. In those cases, specialised third-party software will need to be used to complete the collections.

Cloud collections are more similar in nature to logical images than they are traditional forensic images. In the Cloud, there is no unallocated space to image. Because there is no unallocated space, there is nowhere to look for deleted information outside of the Cloud provider’s normal retention policy.

The same approach to Cloud collections can also be applied to social media services. Public posts can be collected via digital forensic tools. Provided credentials, built in export tools or digital forensic tools can be used to collect entire accounts, including direct messages between individuals on the social media platform.

III ANALYSIS OF DIGITAL EVIDENCE
i Forensic analysis
Forensic analysis is a ‘deep dive’ into a system that is capable of storing data. Analysis methodology will vary according to the context of the case, but typically in civil litigations, forensic analysis focuses on the systems themselves and the usage of those systems rather than the documents contained on them.

Digital forensics is closely tied to information security incident response. These types of responses are necessary when an organisation is damaged by a cyber-attack and needs assistance getting the attacker out of their network, remediating the network from the attack, and even notifying their customers regarding any personally identifiable information that
was exfiltrated by the attacker. Digital forensic analysis can be used to determine the initial point of compromise and assist with directing the remediation and determining the extent of damage caused by the attack.

The most destructive forms of cyber-attacks are currently ransomware attacks that encrypt all the information on a victim’s network, essentially holding the information hostage until the ransom is paid, as well as business email compromise attacks. The most common attack vector for both of these is known as ‘phishing’.

Phishing is the act of sending an email that appears to be legitimate but actually contains a malicious link. If the user clicks on the link, it will either download malware to the victim’s computer, or it will send the user to a website designed to steal the user’s login credentials. Once login credentials are stolen, the attacker can use those to perform privilege escalation attacks, or to send messages to other users in the organisation and gain access to their accounts as well.

Deleted document recovery and extraction of user-generated information is also considered part of the forensic analysis process. Once the documents are exported, the review of the documents and other user-generated content is covered by electronic discovery services.

ii  Electronic discovery

Electronic discovery is the digital version of the traditional discovery process. During a discovery process, relevant documents are exchanged between parties involved in litigation to exchange relevant information prior to a trial.

While electronic discovery review can act as a ‘deep dive’ into individual documents and emails, the quantity of information available is sometimes daunting. Luckily, electronic discovery is one area where technology can at least partially assist in solving the problem it has created.

Once information is loaded into an electronic discovery platform, there are many analytical tools that can be leveraged to help get to relevant data faster. Typically, the available analytical features will include concept clustering, which groups documents with similar concepts so that entire irrelevant concepts can be excluded at once. Another extremely useful analytical tool is email threading, which ensures reviewers will only have to review the final, most complete email thread.

An example of an analytics-heavy electronic discovery workflow is predictive coding or assisted review. During assisted review, the system will learn from the actions of human reviewers for a pre-set number of training rounds. After the training rounds are complete, the system will suggest coding or categorisation for the remaining records and display the results to the review team. The review team will perform quality control checks against the documents categorised by analytics and perform additional training rounds if they are not satisfied with the system’s margin of error.

There are also advanced analytical features available today such as semantic analysis (the system will predict someone’s mood at the time an email was composed), and visualisation tools, so that reviewers can quickly see a visualisation of who within a data set was communicating with which other custodians, about which topics, how frequently and when.
Physical analysis

While analysing the digital information is important, it is also useful to physically inspect devices for clues about their usage, or to determine what happened to the information that used to be stored within them. Users will occasionally physically damage devices in an attempt to destroy the information contained within. Those efforts are not always entirely successful, and it is important to check the true state of the hardware.

In some rare cases, we have seen new storage devices installed into older computers in an attempt to pass those new storage devices off as the originals. This practice is detectable by querying the system vendor for the original equipment that was included with the computer system and comparing it against the parts currently installed in the computer. We have seen laptops with hard drives installed that were manufactured years after the system was built, with the users trying to pass them off as the original hardware.

Reporting and productions

The first form of output from a digital forensic investigation will be exports from tools that have analysed system artifacts, document listings and a general summary of initial findings. These items, along with a listing of what information is available on a given data source, can be shared with counsel and discussed to provide further direction to an investigation.

Forensic expert reports generally outline the most useful evidence found during an investigation, construct a narrative of what was done with the available evidence sources and draw conclusions relevant to the case based on the evidence found on devices. Occasionally it is necessary to provide copies of forensic images to the opposing side in a litigation so that they can have the report verified by an additional expert.

Electronic discovery reports typically are in the form of a document production. Document production specifications are discussed and exchanged early in a court proceeding. Typically, a production will be received from the opposing side and loaded into the electronic discovery platform for review by counsel.

TYPICAL AREAS OF INTEREST

User-generated information

The most obvious form of information available from digital devices and accounts is user-generated information such as email, documents, calendar entries and notes. This is the data that the user chooses to save to the digital storage device and is the actual reason for their usage of the device in the first place.

In addition to user-generated information, computers are typically used for secondary purposes and end up storing user-generated information in places that aren’t quite as obvious. For example, a user may decide to back up their smartphone to their computer in case something happens to that device, or they decide to upgrade to a new device. In those cases, an investigator may be able to locate or recover that smartphone backup and essentially be able to perform an investigation on the user’s smartphone as it was at the point in time when the backup was created.

In the past decade, cryptocurrency has become more mainstream and began to gain real value. It is possible that during an investigation, a cryptocurrency wallet, or even simply wallet addresses may be discovered. This both poses risks for the investigator (who may be accused of stealing the cryptocurrency, as they had access to the keys), as well as greatly assists the investigator, who is now able to conduct all kinds of online asset tracing.
ii System artifacts

In addition to information intentionally generated by users, there are also system artifacts that are a byproduct of the standard usage of the computer. Computers are constantly recording what they are used for in some manner. Whether information is available through a resource like a system log, every file on a system also has metadata that can be interpreted and pieced together to provide a narrative of a user’s actions on a computer.

Major events that occur on computers are typically logged. For example, every time a user logs into a computer, the system notes what time that occurred, which user it was, and even if there were any incorrect password attempts prior to the successful login.

In addition to events such as logins being recorded, most systems typically keep lists of which files were recently accessed. This is done so that the user has the convenience of referencing a list of their most recently accessed files, but also helps an investigator to tell the story of what the computer was used for.

Computers also maintain similar lists in other system artifacts for things such as internet history, and even accessory history, such as a record of which USB storage devices were connected to a computer, and when. By correlating the USB storage history with the file access history, it is sometimes possible to tell if a user copied any files from a system to an external USB storage device.

One of the major benefits of forensic imaging is that it creates an exact copy of a digital storage device, including any unused space. This is useful because until information on a storage device is overwritten with new information, that information can be recovered by computer forensic software. That means it is possible to both report some information about which files were deleted by a user and when, as well as to recover copies of those deleted files and export them for review.

V SUMMARY

Because almost all information is digital, computer forensics and electronic discovery are necessary parts of almost every investigation. Collecting information properly and defensibly is key. If the origin of data is questionable or tampering is suspected, important evidence could be rendered useless.

With so much data available, digital forensic and electronic discovery analytical tools are indispensable. It is absolutely necessary to cut through the noise as quickly as possible and locate any meaningful information.

Once the relevant facts are located, digital forensic experts can help put it together and construct a timeline or narrative of the important facts, outlining exactly what happened, and quickly getting the truth into a report for use by the courts.
Chapter 3

RULES GOVERNING EXPERT EVIDENCE ON DAMAGES

Erik Arnold

I INTRODUCTION

In a court of law, opinion evidence is generally considered inadmissible. Expert opinion evidence is a special exception to this rule and is introduced in court proceedings when specialised or technical knowledge is required to assist the trier of fact in ruling on matters beyond the common knowledge of the court.

In our adversarial litigation system, expert evidence has long been viewed by stakeholders with some apprehension. Experts occupy a grey area between fact evidence and judicial interpretation – the expert’s findings are not strictly factual, but based on opinions, and are therefore subject to the frailties of human nature. Nonetheless, expert evidence plays an important and necessary role in civil litigation. As the complexity of litigation has increased over the years, so too has the role of the expert, expanding to include a broad range of professionals such as accountants, business valuators, forensic investigators, economists, statisticians, scientists and medical professionals, to name a few.

This chapter provides a general framework for the role of the expert in civil litigation, with a particular focus on damages. We first examine the rules governing the conduct of experts. We then examine the content and form of the expert’s report. Finally, we discuss common misgivings that stakeholders have expressed with respect to how expert evidence is tendered in litigation and emerging practices concerning the use of expert evidence at trial.

II RULES GOVERNING THE ROLE OF EXPERTS

i Admissibility of expert evidence and the court’s role as gatekeeper

Expert evidence is allowed only with permission of the court and trial judges remain vigilant in their role as gatekeepers. The courts must weigh the credibility and probative value of the expert’s evidence on a case-by-case basis, routing out faulty or incorrect opinions and excluding entirely those experts who are wholly unqualified or seek to provide opinions outside their area of expertise.

While the case law in different jurisdictions varies slightly, expert evidence is generally considered admissible when the following conditions are met:

a the expert’s opinion is relevant to the specific facts at issue in the litigation;

b the expert’s opinion is required to assist the trier of fact in ruling on matters that require specialised technical knowledge; and

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The individual proffered as an expert is properly qualified. This requires that the expert have the relevant knowledge, skill, experience, training and education. The expert’s analysis should rely on sufficient facts and data and be premised on sound principles and methods.

Experts are commonly retained to opine on issues relating to the quantification of damages and the courts generally recognise the necessity for independent experts in nearly all cases where a claim for damages is made or where financial analysis is required.

**ii  The expert’s duty to the court**

The natural tension between experts and the parties that retain them is a seemingly unavoidable consequence of litigation. The expert is at first recruited (and paid) by advocates, and then asked to provide independent assistance to the courts. In large part to mitigate against the risk of ‘hired gun’ experts, recent amendments to the rules of civil procedure in many jurisdictions have sought two common objectives – placing clear limits on the allowable scope of an expert’s evidence and codifying the expert’s overriding duty to the court.

Independent experts are retained, above all else, to assist the court on matters within their expertise and this overrides any obligation to the parties that have retained them. While expectations for experts with respect to independence and objectivity are not new, the courts are shining a brighter light on this issue, developing formal codes of conduct that clearly define the expert’s role and restrict improper behaviour. In many jurisdictions, experts must now sign a declaration acknowledging that they have read and understand the rules, agree to be bound by an expert code of conduct and accept their overriding duty to assist the court. This declaration is often appended to the expert’s report.

**III  THE EXPERT’S REPORT**

The objective of the expert’s report is to effectively and credibly communicate the facts, assumptions and analysis underlying the expert’s opinion. Combined with the expert’s evidence at trial, including responses to cross-examination by opposing counsel, the report must assist the trier of fact in assessing the merits of the expert’s opinion.

While the rules of civil procedure in most jurisdictions provide a general framework for the content of an expert’s report, the courts have generally recognised that the specific requirements of an expert’s report will vary based on the nature of the analysis and circumstances of each case. The form of an expert’s report is also determined, in large part, by the expert’s accrediting body, and the practice standards and disclosure requirements governing its members.

In this section we examine the general form and content of the expert’s report. While this is by no means an exhaustive list, it highlights some of the critical elements of an effective expert damages report.

**i  The expert’s qualifications and experience**

There is a basic requirement for the report to outline the expert’s qualifications in the matter at hand so that the expert can be probed by opposing litigants, and the expert’s credibility ultimately assessed by the trier of fact. The report should give sufficient details of the expert’s qualifications and relevant professional experience. This requirement is often satisfied by appending the author’s curriculum vitae directly to the report. It may also be constructive to provide a list of relevant cases in which the expert has testified.
ii  Independence and objectivity

Concern over the independence and objectivity of experts, in fact and appearance, continues to be a major focus for stakeholders in litigation. Regardless of which party has retained the damages expert, the report should include a statement that the expert has acted independently and objectively, and that the expert’s compensation is not contingent on the views or opinions expressed therein. In most jurisdictions, the rules of civil procedure require that all experts explicitly acknowledge their overriding duty to assist the court regardless of who is paying their fees, a point emphasised in certain jurisdictions where the report is to be addressed directly to the court and not to retaining counsel.

iii  Instructions and assumptions

The expert’s report should disclose all of the assumptions underlying the damages analysis, distinguishing between those assumptions that are within the expert’s area of expertise (and based on the expert’s scope of work) and those that the expert was instructed to take. While the courts recognise that disagreements between experts may result from genuine differences in professional opinion, differences often arise simply from the instructions and assumptions provided by retaining counsel.

The report should disclose the procedures followed by the expert to determine the reasonableness and appropriateness of key assumptions. The expert would typically not be expected to apply the same rigour to given assumptions that fall outside of the expert’s area of expertise. These assumptions may include facts in dispute between the parties that will be proven (or disproven) at trial or inputs to the damages analysis provided by other parties. In any event, it is important for the expert to obtain clear instructions from the party requesting the report and, to the extent possible, to assist the trier of fact in differentiating between genuine differences of professional opinion and differences arising from instructions or given assumptions.

iv  Scope of review

The expert’s report should disclose all material information that was reviewed and relied upon in reaching its conclusion. The expert’s scope of review in a damages analysis may include, but is not necessarily limited to, agreements, contracts, financial statements, accounting records, inputs from other subject-matter experts and information available in the public domain, as well as correspondence and interviews with relevant parties. It is the expert’s responsibility to gather sufficient documentary evidence to ensure that the conclusions contained within the report are properly supported. When access to essential information is denied by retaining counsel or is otherwise unavailable, the expert should consider whether a qualification to the opinion is required owing to limitations imposed on the expert’s scope of review.

The rules of civil procedure in most jurisdictions do not provide much in the way of specific requirements for the expert’s scope of review. As a result, exposing deficiencies in the expert’s scope of work is often left to opposing counsel and the ultimate assessment is made by the trier of fact on a case-by-case basis. The thoroughness of the expert’s due diligence and scope of work speaks to credibility and is often cited by the courts as a factor in determining the weight placed on expert opinion evidence.
v Calculations and the damages model

The expert's report should provide sufficient information to allow the reader to understand how the expert arrived at the conclusion. A set of schedules is often appended to the expert's report setting out summaries of important financial documents and the calculations supporting the expert's findings.

Given the heightened complexity of modern business decision-making, the scope of accounting systems and the scale of financial record-keeping for most organisations has grown immensely in recent years. The damages expert is often faced with vast amounts of financial data. As the financial information underpinning the analysis grows in complexity, so too does the damages model, which is often required to accommodate many dynamic inputs and alternative scenarios. While an expert's schedules cannot be expected to reproduce every single calculation underlying a complex damages model, the report should sufficiently document the key mechanics, assumptions and data underlying the analysis to assuage any concern that the damages model acts as a 'black box'.

It may be constructive for the expert to produce an electronic version of the damages model. Together with the expert's report and schedules, this allows another qualified individual to verify the accuracy of the model and to reproduce the results using the same data, inputs and assumptions.

vi Working papers

The expert's files should be maintained in an organised manner and the scope of work performed by the expert should be documented. The extent of working paper documentation is largely left to the expert's discretion. As a rule of thumb, the expert's files should retain copies of:

a all relevant information relating to the dispute and the specific events giving rise to the claims, including documents and other information produced during the course of the litigation;

b any information reviewed, or analysis prepared to provide the damages expert with a background understanding of the subject matter and the broader economic or industry context, including industry research, analyst reports, macro-economic data, metrics for comparable public companies traded on public stock exchanges and other statistics available in the public domain; and

c all working papers, data and records underlying the damages calculation itself, including models, calculations, projections, statistics, accounting data, financial statements, forecasts, tax returns and management reports.

Counsel and experts communicate regularly and often by email. The courts have generally recognised that consultation between counsel and experts during the course of preparing a damages report is necessary, within reason, to ensure that all relevant issues are adequately addressed in the expert's report and to facilitate a more timely and affordable process.

Whether and to what extent solicitor–client privilege extends to communications with experts remains a live issue in many jurisdictions, particularly so when experts produce several working drafts of their report, some of which may be reviewed by counsel. The expert should clearly mark all work-product that is in the process of being completed as being in draft form and subject to change, specifying that the work-product is being issued strictly for the purpose of obtaining comment, instruction or confirmation of facts required to complete the report. While the courts in most jurisdictions increasingly acknowledge that the draft report
review process is an important and necessary step in the expert’s scope of work, it would be prudent for the expert to document significant changes to the analysis as the draft report evolves, including new facts, assumptions or findings that result in meaningful changes to the conclusion.

vii Limitations and qualifications
A damages analysis is only credible, and ultimately of probative value to the court, if the information underpinning the expert’s findings is accurate and complete. It is critical that users of the expert’s report understand the nature of the information that was relied upon and any inherent limitations in the scope of the expert’s work. As noted earlier, the expert should consider a qualification to their opinion if access to essential information is limited for any reason.

An expert report in a damages case typically includes an overriding assumption that the financial information provided to the expert is accurate and complete. The report should disclose whether or not the expert has audited, reviewed or otherwise undertaken any procedures to determine the veracity of the information relied upon in arriving at the conclusion.

The expert’s opinion is a function of the facts and information available at a particular point in time. The expert may reserve the right to modify the report or reconsider the conclusions therein should any new material information or facts be brought to light after the date of the report.

IV ALTERNATIVE APPROACHES TO EXPERT EVIDENCE
Concerns over the cost of litigation are not new. The use of expert evidence in civil litigation and the procedural complications that come along with it are seen by many as contributing, in part, to the rising cost and complexity of litigation. There is also no shortage of cases in nearly every jurisdiction where ‘advocacy by experts’ has led to a significant miscarriage of justice. For these reasons, the role of the damages expert in civil litigation and the manner in which expert opinions are entered into evidence are evolving. The rules of civil procedure in many jurisdictions are being revised and expanded to permit (or encourage) a number of unique alternatives to the traditional use of expert evidence at trial.

i The traditional approach to expert evidence
In the traditional model to expert evidence, each party to the litigation typically retains their own expert. The experts are asked to prepare their own analysis, commonly exchanging reports and a formal reply report prior to trial. At trial, the qualifications of each expert are first assessed by the courts. If admitted, the experts are then, in turn, examined by retaining counsel and cross-examined by opposing counsel. The experts generally do not communicate directly with one another and comments on the opposing expert’s assumptions, methods and findings are limited to the reply report.

ii Jointly appointed experts
The first alternative we will examine is the use of a single, jointly appointed expert. Rules of civil procedure in several jurisdictions now allow for the appointment of a single expert witness to opine on issues in dispute between the parties, including the quantification of
damages. The courts have been given increasing latitude to appoint joint experts, showing
a particular interest in doing so when the expert is asked to opine on comparatively less
controversial quantum issues. The expert may be instructed by the parties or by the court.

In certain circumstances, the use of a jointly appointed expert has been credited with
reducing the time and cost of litigation, while also mitigating, in fact or appearance, the
‘hired gun’ mentality of experts. The use of a jointly appointed expert tends to provide a
narrow path to resolution on relatively straightforward quantum issues. Settlements are also
fast-tracked, perhaps becoming more tenable for litigants when the ultimate outcome on
quantum issues is more predictable.

Critics argue that the simple existence of opposing views on a subject are not always
indicative of expert bias. Genuine differences of professional opinion may exist within the
expert’s field. The appointment of a single expert therefore presumes that the view of a
particular expert is correct among a field of others. It can be argued that the use of a single
expert therefore inhibits a party’s ability to sample the range of opinions necessary to advance
its case.

While the practice of jointly appointing one expert can reduce the cost to litigate
relatively simple cases, in more complex litigation the use of a single expert does not necessarily
eliminate the need for each party to retain their own subject-matter expertise. These ‘shadow’
experts often assist behind the scenes in reviewing the jointly appointed expert’s report and
in identifying avenues for cross-examination. In these cases, the joint retainer may in fact
contribute an additional cost burden.

The success of a jointly appointed expert depends, in large part, on having a clear set of
instructions that have been agreed to in advance by all parties. Where the court will instruct
the expert directly, the marching orders are normally clear. Where the litigants are responsible
for jointly instructing the expert, the process can fall apart quickly if proper ground rules are
not established from the outset. The ground rules should include clear instructions for timing
of key milestones and final deliverables, communication between litigants and the expert, the
process for discovery of relevant information and the draft report review process.

The expert should be given latitude to execute the fact-finding and due diligence process
in any manner he or she considers reasonable to satisfy his or her obligation to the court and
to execute on the scope of work required to support his or her opinion. The expert should
be given final say because it is, after all, his or her conclusion being sought and his or her
professional reputation on the line when that conclusion is ultimately reported to the court.

The success of a jointly appointed expert depends in large part on fair and open
communication between all parties. Any communication to the expert and all information
underpinning the expert’s scope of review should be shared among all parties. The need
for open communication becomes increasingly important in situations where there is
information asymmetry between the parties. For example, in cases where only one party
has readily available access to a business’ financial records and documentation, the expert
must take care to provide the less-informed party with an opportunity to review and provide
context for any information proffered by the other party. Failure to do so will ensure that the
expert is only given one side of the story.

The jointly appointed expert can be an efficient and cost-effective method for the court
to resolve relatively straightforward disputes, but the use of one requires careful planning and
it is important for all parties to respect the process.

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iii Concurrent evidence

Another alternative being explored in many jurisdictions is concurrent evidence. Concurrent evidence is at first similar to the traditional approach to introducing expert evidence at trial. Opposing experts are first asked to prepare and exchange their own reports. Questioning at trial then proceeds on familiar terms for each expert – direct examination, cross-examination and reply. In a twist to the traditional model, the experts are then asked to return to the witness box and are questioned together. The necessity for experts to share close quarters during this session gives us the colloquial term ‘hot tubbing’. The hot-tubbing session is typically moderated by the trial judge and questions can be asked by counsel, the court, or both. When it comes to the hot-tubbing session, there are no hard and fast rules.

The experts are often encouraged by the trial judge to reach agreement, where feasible, on issues in dispute. The discussion quickly reveals the critical points on which a party’s case will succeed or fail. If managed effectively, the discussion should clearly identify genuine differences of professional opinion, which are addressed by the experts in real time. The trial judge is given latitude to ask questions of the experts at any time to clarify the court’s understanding of key issues. In theory, agreement is reached quicker in a hot-tubbing session because the experts acknowledge that unreasonable assumptions or untenable positions will immediately be exposed by the accompanying expert. The concurrent evidence model puts experts together to address differences in real time, whereas the traditional model could see experts examined days or weeks apart.

The trial judge must play a more active role in the hot-tubbing session. The process is less structured than the traditional counsel-led examination model and the judge must take care to moderate the discussion appropriately to prevent the experts from being side-tracked by minor issues and to ensure that the discussion advances towards the genuine and meaningful areas of difference.

A recurring complaint from stakeholders is that the hot-tubbing format tends to favour those experts who are more confident or persuasive in their testimony and there is the risk that assertive personalities will ‘steam roll’ the discussion on critical issues. The trial judge can, to a large extent, overcome this deficiency by way of appropriate moderation of the discussion and probing of the experts.

Counsel is often hesitant to cede control of the proceedings. The real-time interaction between the experts and the direct involvement of the trial judge means the discussion is more fluid and considerably less controlled than counsel’s traditional question-and-answer examination format.

While there are some practical complications, the hot-tubbing approach is generally seen as an advantageous means of changing the mindset of experts and, under the right circumstances, a valuable tool for the courts to fast track the discussion of otherwise complex issues towards genuine areas of disagreement.

iv Expert witness conferences

We have discussed two alternative approaches to the traditional model of expert evidence – concurrent evidence and jointly appointed experts. A third approach – expert conferences – is viewed as a sort of hybrid of the two.

The concept of expert conferences is fairly simple. Experts retained by opposing litigants meet in advance of trial to exchange information, discuss their findings and identify the significant areas of disagreement. The overriding objective of the expert conference is to narrow the focus of trial to only the genuinely disputed issues.
If so instructed, the experts may draft a joint statement summarising the major areas of agreement and disagreement. This joint statement is then served to the court to assist in better understanding the areas of dispute between the experts, the basis for these differences and the significant ‘levers’ on which a party’s claim for damages will rise or fall. An effective joint statement will also set out the areas of disagreement that are inconsequential to the calculation of damages, allowing the court to set aside these issues and to minimise time spent at trial pursuing any red herrings.

The expert conference must be undertaken in good faith. While counsel may be apprehensive over relinquishing control, it would be improper for an expert to be given, or to accept, instructions not to reach agreement. Experts must approach the conference with a genuine interest in reaching consensus on issues of common professional understanding and identifying errors and omissions in each other’s work. Experts may need to abandon positions that do not stand up to the rigours of professional scrutiny or where the underlying analysis is not credible.

The joint statement should provide the court with a clear understanding of the major areas of disagreement and the basis for each expert’s opinion. The joint statement should delineate between differences of professional opinion that are within the experts’ areas of expertise and differences that result from instructions provided by counsel. Experts should seek further instruction where there are discrepancies in significant facts of the case. Counsel should not be directly involved in drafting the joint statement, although it is not uncommon for counsel for both parties to review a draft of the statement prior to its release.

Preparation is key. If an expert is ill-prepared, the opposing expert’s opinions are unlikely to be properly scrutinised and, rightly or wrongly, will dictate the direction of the joint statement. The expert conference should take place at a stage of the proceedings where the important facts of the case are known, typically after production of relevant documents and discovery of key fact witnesses for both parties. It is more effective to hold the expert conference after the experts have issued their reports, ensuring that the position of each expert is on the record prior to meeting.

There has been general support for expert conferences in most jurisdictions, which are commonly ordered by the court prior to, or in conjunction with, the pretrial conference. Expert conferences are now more commonly being used in damages cases to address widespread concerns over the time and cost of litigation. The courts in several jurisdictions have noted widespread support for the practice where expert conferences are already the usual practice. Expert conferences can be particularly effective in damages cases where seemingly vast differences between complex models for calculation damages can often be attributed to a relatively small number of critical assumptions or instructions. The joint statement is an effective method for bringing these differences to light.

V CONCLUSION

Expert evidence will continue to be a necessary and vital part of civil litigation. The courts recognise the importance of the independent expert’s report and testimony in nearly all cases requiring the quantification of damages, providing the expert clearly demonstrates an understanding of his or her overriding duty to assist the court above all else. While the courts are yet to find the panacea for all issues plaguing expert evidence, several alternative approaches have emerged that are a step in the right direction towards the delivery of fair, timely and cost-effective access to justice.
I INTRODUCTION

Financial damages analyses calculate the difference between the financial results that ‘would have’ occurred absent the actionable event, and what actually transpired. The assessment of the financial performance of an operating entity includes an examination of the entity’s historical operating results as recorded in its accounting records and reported on its financial statements.

For entities with stable operations, past financial results are often a good predictor of the ‘but-for’ results that the entity would have realised absent the event. In such circumstances, the analyst inherently assumes that the entity’s past, pre-event financial performance would have continued, absent the event. Some minor adjustments to the pre-event results may be required to reflect changes in circumstances, but often these changes are exiguous.

In other circumstances, pre-event financial results are a poor proxy for the but-for scenario. However, this does not mean that the past results are irrelevant. Projecting what would have occurred in the but-for scenario still requires an understanding of how the entity’s revenues and costs vary as production or sales volumes change, commonly referred to as cost-volume-profit analysis. Deconstructing past financial results often uncovers important relationships between revenues, costs and volumes, which is information that underpins the analyst’s but-for financial projection.

Analysis of accounting records also informs the analyst’s assessment of the entity’s actual financial performance and position after the event.

Those involved in assessing financial damages should be interested in the accounting concepts, rules and practices underpinning the preparation of accounting records and financial statements because understanding the accounting framework provides important insight into what the data shows and also speaks to its inherent limitations. From an evidentiary standpoint, accounting records and financial statements are contemporaneous business records that often provide detailed explanations of past transactions and financial events, information critical to proving the financial effect of the event. One cannot evaluate the nature and purpose of past transactions without first understanding the rules governing how the transactions are documented in the entity’s financial records.

The discipline of financial accounting concerns the rules and practices by which an entity’s transactions are quantified, evaluated and aggregated in its accounting records, with similar transactions being grouped into an ‘account’. Each account is assigned an account

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1 Errol Soriano is a managing director at Duff & Phelps.
2 What ‘would have’ occurred is called the ‘but-for scenario’. The actionable event is referred to as the ‘event’.
number, and these accounts reside within the entity’s general ledger. Accounts are organised within the general ledger by classification. For example, different fixed-asset accounts (automobiles, computers, furniture, etc.) are grouped together under ‘fixed assets’ in the general ledger.

An accounting system with a relatively high number of accounts allows one to categorise transactions into more homogenous groups. For example, instead of having just one general ledger account for all automobiles, an entity may have separate accounts for automobiles at the head office, the warehouse and the manufacturing plant.

Periodically, the balances in similar accounts are aggregated and reported as a line item in the entity’s financial statements. For example, the balances in all of the automobile accounts would be added together and reported as the line item ‘automobiles’ on the entity’s balance sheet. Financial statements can be prepared for any period, but are most commonly prepared on a monthly, quarterly and annual basis.

Financial statements speak to three attributes of the entity’s financial circumstances, being:

a  the financial position of the business at a point in time (on the balance sheet);

b  the financial results (profit or loss) from operations over a specified period (on the income statement); and

c  the change in the business’ cash position over a specified period (on the cash flow statement).

II  INTERNATIONAL FINANCIAL REPORTING STANDARDS

For sophisticated entities, financial accounting is governed by rules that provide a degree of standardisation in how similar transactions are recorded and presented on an entity’s financial statements. The International Financial Reporting Standards (IFRS) are a set of accounting standards developed to provide a standard global framework for public companies.3

The IFRS Foundation is a non-profit public interest organisation responsible for developing a global set of high-quality accounting standards. The Foundation's objectives include improving comparability of financial information by enhancing transparency and quality, strengthening accountability by reducing the information gap between investors and business operators, and contributing to economic efficiency by helping investors identify opportunities and risks in business ventures.

IFRS is a principles-based system4 with broad guidelines, allowing for the use of the accountant’s professional judgement in their application. Professional judgement is required because a single set of standards cannot anticipate every possible nuance or situation. However, increased subjectivity in accounting standards may lead to reduced comparability across entities.

3 The United States permits foreign and SEC registrants to use IFRS standards in their US filings but requires domestic public companies to use US generally accepted accounting principles (US GAAP), set by the Financial Accounting Standards Board.

4 US GAAP is a rule-based framework, with a more specific and detailed set of rules, as opposed to the broader principles in IFRS.
The most common measurement basis in financial statements is the historical cost of the item – the amount expended or received. For example, the historical cost of manufacturing equipment is the cost to acquire the machine; wages payable are recorded at the amount owing at the time the liability is incurred.

In some circumstances other bases are used, including the realisable value (e.g., to set to market the marketable securities that the entity continues to hold on the balance sheet date) and present value (e.g., to measure the current value of liabilities associated with future pension obligations).

III FUNDAMENTAL QUALITATIVE CHARACTERISTICS OF FINANCIAL REPORTING AND ACCOUNTING

i Faithful representation
It is a fundamental tenet of IFRS that financial information should represent the relevant economic phenomena in a manner that is complete, neutral and free from error.

A complete depiction of a phenomena includes all the information necessary for the user to understand the phenomena.

A neutral depiction means that the basis of reporting is free from bias in selection and presentation. This includes ensuring that phenomena are not discounted, or afforded undue emphasis.

Free from error means that there are no errors or omissions. It does not mean accuracy in all respects. For example, a bad debt expense is management’s estimate of the proportion of accounts receivable that are likely uncollectible at a given point in time. This estimate is a faithful depiction if the amount is clearly described as an estimate and that the estimate has limitations.

ii Relevance
Accounting standards are designed to provide relevant information to the users. Relevant information can make a difference in the users’ decisions, whether or not they take advantage of it.

Relevant information can have predictive value, confirmatory value or both. Data has predictive value if it is relevant to forecasting financial performance, and confirmatory data is used to confirm or amend previously held views and conclusions.

In a damages analysis, historical financial statements are relevant in both respects. The information is often predictive, and is thus used as a starting point to project future financial performance (absent the event). The data in financial statements can also be confirmatory to the extent that it speaks to the financial effect that the event has had on the financial performance or position of the entity.

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5 Assets are carried at the selling price and liabilities are carried at the undiscounted amount expected to be paid.

6 Assets and liabilities are carried at the discounted future cash inflows (outflows) generated (realised) under the normal course of business.
That said, an entity’s accounting and financial reporting systems are set up to fulfil statutory reporting requirements and provide management with key operational information; the systems are not often specifically designed to accommodate what can be the somewhat unique information requirements in an exercise to prove financial loss.

This limitation on the usefulness of accounting systems in the context of proving financial loss has been ameliorated in recent years as modern accounting systems store data in relational databases, and these systems are capable of aggregating transactional data in a customised format that is responsive to the somewhat unique needs of the damages expert.7

However, even with these technological advances the accounting and reporting systems are but one source of relevant information concerning the affairs of the business. For example, the state of the entity’s relationships with its customers, suppliers, lenders and employees, or management’s expectations for the future will not be evident in financial statements and the general ledger alone. Thus, the analyst must examine other relevant financial information, such as contracts, agreements, financial forecasts and industry information, among other things.

iii Understandability
The challenge in financial reporting is to distil a large volume of what are often complex transactions into a relatively brief, understandable format. The premise underlying IFRS is that the user has a reasonable knowledge of the business and that the user will review the financial statements diligently.

Given the natural tension between the competing objectives of relevance and understandability, financial statements cannot be all things to all users – certain users may need to seek additional information from other sources (including the accounting records underpinning the financial statements), and the assistance of financial and accounting experts.

For example, if the analysis involves valuing the shares of the business, the analyst will examine the data reported in the financial statements, but this information is often at too high a level to complete the picture. For example, management salaries are an expense amount reported in aggregate on the financial statements that is often examined in greater detail to determine which costs are required to operate the business as opposed to amounts incurred for tax planning or other purposes. The financial statements commonly report total salaries expense as a line item on the income statement, but not who was paid what during the year. For that level of detail, the analyst must refer to the source accounting records, including payroll records and general ledger account detail.

iv Materiality
Information is material for financial reporting purposes if its omission or misstatement on the financial statements could influence the user’s evaluations or decisions. The determination of what constitutes a material item is largely a matter of professional judgement. For example, a US$100,000 misstatement in a small business may be material, but may not be for a large multinational entity.

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7 A relational database comprises multiple data sets organised by tables with different tables storing different categories of information, each linked to the other tables with one or more common data fields. Functionality within the system allows data to be extracted and aggregated from different tables, which facilitates data searchability, analysis, organisation and reporting.
In a damages analysis, the threshold of materiality is often much lower than the level governing the preparation of the entity’s financial statements. As such, the analyst will often examine the underlying accounting records, which have more detailed and disaggregated information (that is not material to present on the financial statements).

v Comparability
Comparability refers to the consistency of an entity’s results across time periods and is enhanced when similar events and transactions are treated consistently in the entity’s accounting records. Comparability also refers to the ability to benchmark results among different reporting entities.

There is a natural tension between relevance and comparability; more rigid accounting rules may result in a one-size-fits-all approach in reporting what can be a somewhat heterogenous set of transactions. Broader guidelines that leave more to the accountant’s judgement may provide the flexibility needed to better capture the essence of the transactions (enhancing relevance), but these judgements are subjective, possibly leading to variances in accounting treatments and reducing comparability.

vi Timeliness and cost
Timeliness and costs are constraints to financial reporting. In regard to timeliness, information is only relevant to the extent it is available to the decision makers before they have made their decision. The longer one takes to prepare the financial statements, the less relevant that information is to the decision maker, even if the interim time is spent gathering more precise data. Similarly, the cost of producing additional analysis may outweigh the value and materiality to the user.

IV ELEMENTS OF THE FINANCIAL STATEMENTS
The five elements of financial statements are assets, liabilities, equity, revenues and expenses. An item that meets the definition of an element should be recognised if:

\[ a \] it is probable that any future economic benefit associated with the item will flow to or from the entity; and

\[ b \] the item has a cost or value that can be measured with reliability.\(^8\)

The financial statements also include notes, which provide further information on amounts reported in the financial statements and other issues affecting the business.

In some circumstances, where an item is not recognised in the financial statements, note disclosure is included. The amount of the potential benefit or cost need not be certain to be reported.

\(^8\) The Conceptual Framework for Financial Reporting, IFRS.
i  The balance sheet
The financial position of an entity at a specific point in time is reported on its balance sheet, which separately lists the entity’s assets\(^9\) and liabilities\(^{10}\), the net of which is the entity’s equity position.

ii  Assets
Assets are reported (on the balance sheet) when the cost can be reliably measured, and it is probable that future economic benefit will flow to the entity.

Economic benefits include items that furnish capacity to produce goods or services (e.g., equipment), items that can be exchanged for other assets held by another entity (e.g., inventory) and items that can be used to settle a liability or can be distributed to the owners of the entity (e.g., cash and marketable securities).

Many long-term assets are depreciated across their useful lives, under a systematic process where an expense is recorded and the asset’s carrying amount is reduced each period by that same expense amount.

The entity need not own the item to expect to receive future economic benefit. For example, a leased item may be classified as an asset because the entity will realise long-term future economic benefits from the lease, even though the entity does not own the underlying leased item.

Assets can be classified as tangible or intangible.\(^{11}\) For example, manufacturing equipment is a tangible asset, as its economic benefits derive from its physical properties. In contrast, a patent is an intangible asset because the value of the asset comes not from the physical legal document evidencing the patent, but rather from the legal rights of the patent.

Assets are periodically tested for impairment, and the value is written down if the future benefits are lower than the carrying value. While such analyses can be useful information in the context of a damages analysis, it is important to appreciate that the carrying value of assets on financial statements are set in the context of financial reporting, not in the context of litigation, and often more detailed analyses is required to prove financial loss.

iii  Liabilities
Liabilities are the present obligations of the entity. In this context, the obligation is a duty or responsibility to act or perform in a specific way. For example, accounts payable arise when the entity has received goods or services and has undertaken to pay for those goods and services at some point after delivery. Some obligations are legally enforceable by contract (e.g., loans) or statute (e.g., taxes payable). In other cases, an obligation may arise from voluntary business decisions. For example, if an entity decides to rectify a complaint even though not legally required to do so, the total future cost of rectification may meet the liability test.

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9  A resource controlled by the entity as a result of past events from which future economic benefits are expected.

10  Present obligation from past events, the settlement of which is expected to be an outflow of resources.

11  Intangible assets are non-physical assets where the benefit to the business comes from the rights and/or privileges inuring to the owner. Tangible assets have a physical substance.
Liabilities are recognised when the cost of the liability can be reliably quantified. Where this is not the case (e.g., when the outcome of a pending lawsuit is uncertain), the entity may still be required to provide information concerning the obligation in the notes to the financial statements.

iv  Equity

Equity is the difference between the reported values of the entity’s assets and liabilities. It is the residual interest attributable to the owner of the entity. This ‘value’ to the shareholders reflects valuation rules applied in the context of financial reporting; in most cases the fair market value of the shareholder’s equity will be different.

Equity can be broadly organised into two categories: (1) amounts contributed by the owners of the entity; and (2) retained earnings, being the cumulative net income that the entity has earned in the current and past reporting periods that has not yet been distributed to the owners.

v  The income statement

The entity’s financial performance (i.e., profit) is measured as the difference between its income and the expenses it incurs to earn the income. The net result is the entity’s net income (or loss) for the period and this is reported on the entity’s income statement.

vi  Income

Income is the economic benefits flowing to the entity in the form of cash or enhancements to its assets, or reductions to its liabilities. Income includes benefits derived from normal operations (the sale of goods or the rendering of services) and amounts from unusual or non-recurring activities such as the gain on the sale of manufacturing equipment (where proceeds exceed the carrying cost of the item). For the purposes of financial reporting, it is often the case that income from core activities and unusual and non-recurring income amounts are segregated on the income statement so that the user can more easily evaluate the results from the entity’s core operations.

vii  Expenses

Expenses are the outflows of economic benefits from the business that the entity undertakes in the expectation that the outflow will provide resources, such as goods, services or efficiencies to the business in furtherance of its objective of earning income.

The matching principle is an axiom of financial reporting, stating that expenses are to be reported in the fiscal period in which the economic effect from the expenditure is realised.

In many circumstances matching the expenditure and economic effect from the expenditure is simple. For example, wages are paid in return for services rendered by employees, and for most of the year the cost and economic benefit are realised in the same fiscal year. However, consider the circumstance at year-end (say, 31 December); employees have provided services in the last two weeks of December and are paid for these services in January of the following year. If one were to record the expense when the wages were paid (in January of the following year), there would be a mismatch between the year in which the economic benefit was received and the year in which the expense was recorded in the financial statements.
Accrual accounting is a process used to effect the matching principle, under which expenditure is accrued, to reallocate the expense from the period of the payment to the period in which the economic effect from the expenditure was realised. In the example above, the wages expense is reallocated from January to the previous December.

Another common example of accrual accounting involves the accounting treatment for capital assets, such as manufacturing equipment. While the expenditure to acquire the asset occurs in one fiscal year, the economic benefit from the expenditure (provided by the continued use of the equipment over time) is realised over several subsequent years. In this circumstance it would be inaccurate to reflect the entire expenditure to acquire the equipment as an expense in the year of acquisition. Instead, the costs are spread over the economic life of the item, through depreciation expense.

In essence, portions of the capital asset are transferred from an asset (on the balance sheet) to an expense (on the income statements) as the economic life of the asset is consumed over time.

Another category of expenses pertains to unusual and non-recurring non-operating expenses. These amounts often relate to reduced asset values arising when the reported value of an asset has diminished during the year, either because of market forces (e.g., in the case of marketable securities) or as a result of a loss on sale of an asset (i.e., where the proceeds from the sale are less than the carrying value of the item in the entity’s accounting records).

It is often the case that expenses from core activities are segregated from the unusual and non-recurring amounts so that the user of the financial information can more easily evaluate the results from the entity’s core operations.

viii  Cash flow versus net income and the statement of cash flow

Net income, the difference between the entity’s income and expenses, is a measure of the profitability of the business. Profit is a useful measure of the long-term viability of the entity. However, cash flow is also vital to the business – an entity can be profitable and yet its ability to operate can still be threatened by a shortage of cash.

This disconnect between accounting profits and cash flow arises, in large part, from the matching principle and accrual method of accounting.

If all of the entity’s income and expenses are received and paid in cash, then its net income equals its cash flow. For most entities this is not the case. Consider that income is realised when the benefit has been earned, even if the cash is only received later. For example, a law firm may issue an invoice on day one, and recognise the income on that date, but will only realise the cash inflow on a later date (when the client pays the invoice).

The same holds true for expenditures. Consider the previous example of manufacturing equipment. It is acquired on day one and, because it is expected to contribute economic benefits over several years, it is recorded as an asset (typically at the cost to acquire the item). For simplicity, assume that the entity paid cash to acquire the asset. All the cash outflow is realised on day one even though no expense (which reduces net income dollar for dollar) has yet been recorded. Subsequently, the asset value is then reduced in increments to reflect that portion of the economic life of the asset that is consumed in operations each period, and the incremental consumption in any given period is reported as depreciation expense (which reduces net income) – but there is no cash outlay from this event.

The statement of cash flow reports the business’ sources and uses of cash over a specified period. Sources and uses of cash arise from the operating results of the business (net income adjusted to reflect changes in non-cash balances during the period); financing activities
(increases in bank financing, repayments of bank financing, or changes in the amount of equity invested in the business); and investment activities (cash expenditures on items such as new investments in plant and equipment).

In terms of assessing financial loss, one examines the income statement, but in many cases the most accurate basis to measure the loss is based on cash flow, and the analyst will adjust the reported profitability to reflect the timing differences between net income and cash flow and then measure the entity’s financial loss based on the diminution in cash flow post-event.

V SUMMARY

In the context of quantifying financial loss, financial statements provide important information. However, in most cases, the aggregated data in the financial statements is at too high a level to establish the specific dollar value of a financial loss arising from an event. To isolate the financial effect of an event, the analyst must look behind the financial statements, to the entity’s underlying accounting and business records.
Chapter 5

OVERVIEW OF THE FINANCIAL DAMAGES MODEL FOR INCOME LOSS

Errol Soriano¹

I FRAMEWORK

Quantifying financial loss involves a hypothetical exercise of placing the injured party in the position they would have occupied but for the wrongdoing. In the case of breach of contract, this involves placing the injured party in the position they would have been in had the contract been fulfilled; in the case of tort, the exercise involves placing the party in the position they would have occupied had the tort not occurred.

In most circumstances, the financial loss is based, at least in part, on the diminution in the injured party’s revenues from the wrongdoing. However, it is also common that the injured party has experienced increased costs as a result of the wrongdoing and this is typically quantified as a separate head of damages.

The plaintiff bears the burden of proving its loss, and damages are intended to be compensatory, not punitive. “There are two essential principles in valuing that claim: first, that the plaintiffs have the burden of proving their loss; second, that the defendants being wrongdoers, damages should be liberally assessed but that the object is to compensate the plaintiffs and not punish the defendants.”²

At its highest level, the damages framework calculates the financial loss as the difference between the incremental revenue that the injured party would have realised net of the incremental costs that would have been incurred to realise that incremental revenue.

The analysts’ work is governed by common principles and practices of financial analysis together with common law that addresses such issues as the date of assessment, mitigation, remoteness and foreseeability.

However, it is almost always the case that the analyst’s professional judgement will play an important role in the assessment. The purpose of this chapter is to set out key components and considerations governing the analyst’s work.

II HINDSIGHT

When determining the course of action that the plaintiff would have undertaken in the ‘but-for’ world, the use of hindsight is not generally permitted. For example, when considering whether the plaintiff would have manufactured and sold the product itself, only the information available to the plaintiff at the time should be considered.

¹ Errol Soriano is a managing director at Duff & Phelps.
² For example, in the context of patent infringement, see Lord Wilberforce in General Tyre & Rubber Co. v. Firestone Tyre and Rubber Co. [1975], [1976] RPC197 (UK HL), which cites Pneumatic Tyre and Puncture Proof Pneumatic Tyre (1899), 16 RPC 2019 (CA).
Having established the injured party’s course of action in the but-for world, hindsight is then permitted to determine the monetary value of this but-for scenario. For example, in the case of a patent infringement, the royalty rate that would have been charged is based on a hypothetical negotiation, the assumed terms of which are based only on the information available to the parties at the time the rate was set – without the use of hindsight. However, the product sales revenues (on which the royalties are payable) may be determined with the benefit of hindsight (based on, for example, actual volumes sold during the loss period).

III INCREMENTAL REVENUE

At the core of most damages analyses is the projection of the revenue that the entity would have realised but for the alleged wrongdoing. We say this because the expenses that would be incurred to earn that incremental revenue can usually be determined based on the analyst’s assessment of the cause-and-effect relationship between revenues and expenses, commonly referred to as a cost-volume-profit analysis.

Lost revenues can arise from decreased sales volumes, price suppression, or both.

By its nature, projecting lost revenues can be a somewhat subjective exercise because one is hypothesising about the financial performance of the business absent the event.

Past financial performance can be a useful proxy to project the financial performance during the loss period, particularly in circumstances where the industry the entity operates in is stable. But, in most circumstances, the analyst will also have to consider the impact of circumstances existing during the loss period. The analyst will consider industry and economic factors and how they have changed over time, together with the plaintiff’s circumstances, including, but not limited to, the plaintiff’s efforts at mitigating its losses.

An often-quoted case on mitigation is British Westinghouse Electric and Manufacturing Co. Ltd v. Underground Electric Railway Co. of London Ltd, in which the court stated: 3

> The fundamental basis for the assessment of economic damages is that compensation for pecuniary loss naturally flows from the breach: but this first principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss . . . and bars him from claiming any part of the damage which is due to his neglect to take such steps.

What constitutes reasonable attempts at mitigation is fact specific and while the determination is often based on argument presented by counsel, the financial analyst can play an important role in assessing what constitutes reasonable courses of action from a business risk and cost perspective – important considerations for the court to evaluate in its deliberations.

IV INCREMENTAL EXPENSES

Revenues and expenses exist in a cause-and-effect relationship. Having first assessed the effect that the wrongdoing has had on revenues, the analyst can then turn his or her attention to the expenses that would be incurred to realise those lost revenues. The analyst will typically undertake what is termed a cost-volume-profit analysis that seeks to identify the underlying relationship between revenues, costs and production volumes. Simply stated, the analyst

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3 [1912] AC 673 (HLO).
Examines how costs change at various levels of revenue and production. Having established the relationship between these variables, it is usually straightforward to project the incremental costs that would have been incurred to realise the lost revenues (i.e., absent the alleged wrongdoing).

Costs are commonly categorised by their behaviour and common categories include variable costs, fixed costs, semi-variable costs and step costs.

i Variable costs
Costs are categorised as variable costs if they vary in proportion to changes in revenue or production volume. Common examples of variable costs include sales commissions paid as a percentage of revenue and materials used to produce a product.

Identifying and segregating these costs from other types of costs is important because it provides insight into the profitability of incremental units of production or sales. The difference between revenues and variable costs is termed contribution margin.

ii Fixed costs
Fixed costs are incurred in set periodic amounts that do not fluctuate with changes in production volume or revenues. Stated another way, a fixed cost is incurred at a set amount regardless of whether the company earns US$1 of revenue or US$1 million of revenue. Common examples of fixed costs include rent, insurance and C-suite expenditures.

In most circumstances, where the plaintiff’s business continues to operate during the loss period despite the alleged wrongdoing, fixed costs are excluded from the analysis of financial loss because these costs would have been incurred regardless of the wrongdoing. In other words, these are not incremental costs incurred to earn the lost incremental revenue.

iii Semi-variable costs
Semi-variable costs are a hybrid between fixed costs and variable costs in that a component of the cost is a fixed periodic amount, but other parts of the expenditure are variable with changes in revenues or production. Returning to the above example of the sales commission that was viewed to be a variable cost, it may be the case that a portion of the sales commission is a fixed periodic amount with a second component being based on sales volumes, in which case the expense would be considered semi-variable. Another common example involves utilities where a certain base amount of expenditure is required to keep the lights on, but additional energy may be expended to produce incremental units of the product.

The analyst will examine the nature of these semi-variable costs, and in particular how they behave at different levels of sales or production volume (as the case may be). Having already projected the incremental revenue, the analyst will project the change in the semi-variable cost amount required to earn the incremental revenue, and this amount is deducted from incremental revenues in the financial loss analysis.

iv Step costs
Step costs remain constant for a certain range of production volume or revenues but then change to a new plateau for revenue or production volume outside that range. For example, in a manufacturing facility, wages paid to production line workers on one production line would be a fixed amount, but if subsequent increases in production necessitate a second production line, the total wage cost will step up to reflect the additional costs paid to employ the second line of workers.
The analyst examines the entity’s sales or production capacity and, based on his or her projection of the but-for revenues, projects the incremental step costs that would be incurred (to the extent existing capacity is determined to be insufficient to meet the projected but-for volumes or revenues).

V THE PRESENT VALUE OF FUTURE LOSSES

Future losses refer to the financial loss, arising from the wrongdoing, that will occur after the date of the trial. These losses are projected to the end of the loss period and then discounted back to the trial date using the appropriate ‘discount rate’.

One should not read too much into the term ‘discounted’ – discounting future amounts is based on mathematical formulas, rather than a simple percentage reduction in the future dollar amounts. The formulas are well known and based in large part on the assumed rates of return employed therein.

It is axiomatic that a dollar received today is worth more than a dollar received a year from now because the dollar received today can be invested, earn income and grow to a larger amount by that future date. Furthermore, the risk of realisation of receiving a dollar today is nil whereas there may be some risk of realisation for amounts to be received on future dates.

The concept of present value equates a stream of future payments to a lump sum, which, if handed to the recipient today, would grow at a specified rate of return to exactly equal to future sum on the future date it becomes due. In effect, future loss amounts are ‘discounted’ to their present value.

Based largely on this premise, awards for future financial loss are discounted to their present value on the date of the award. As noted in the case of McCarter Burr Co Ltd v. Harris:

> If the choice had been given of accepting half of the sum in ready cash or going on and taking all the uncertain chances of the popularity of a patent medicine continuing, of going on with the business expenses in the way of persistent and costly advertising and of seeking and filling orders and paying salaries to its officers, I feel sure that it, the plaintiff, would have hesitated long before refusing it and would in its consideration of the offer, not have felt as much certainty about its future business as its officers seemed at trial to entertain.

From a damages perspective, the rates of return employed in determining the discount rate should reflect the risk that future loss amounts may not have been realised absent the actionable event. In effect, the discount rate reflects the risk-adjusted after-tax rate of return that an investor would require to be indifferent between receiving the present value of the future loss (i.e., the loss amount) or the right to receive the future loss amounts as they would have come due absent the alleged wrongdoing.

The analyst plays a large role in assessing these risks of realisation; the analysis is based in large part on the analyst’s assessment of the risks and opportunities in the industry in which the entity operates, the entity’s historical financial performance and prospects, as well as those of its peers to the extent that such information is publicly available.

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4 (1922), 70 DLR 420 [1922] 3 WWR 929, 18 Alta LR 609 (SC APP Div).
As noted in the case of Murano v. Bank of Montréal:

[1] In assessing the reliability of projected future profits, a record of past earnings will obviously increase the certainty of such a prediction. However, a lack of evidence of past earnings does not automatically preclude a new business from recovering for lost profits. Rather, a new business must be allowed to prove lost profits to a reasonable level of certainty by expert testimony, by evidence of actual profits of similar businesses, by evidence of proven managerial experience and expertise, and by evidence of subsequent earnings if such evidence is available. Nevertheless, damages should not be awarded for lost profits which are entirely speculative and uncertain.

The analyst’s risk assessment will evaluate the reliability of the financial projections prepared by the analyst or the company, as the case may be. Relevant considerations may include, but are not limited to, the following:

a. the extent to which the projections were prepared by persons with knowledge of the industry;

b. the extent to which the plaintiff’s financial projections were corroborated by the defendant’s own information;

c. the extent to which the analyst has softened the impact of the projections. The analyst should have good reason before adjusting the financial projections but, if done, the fact remains that by forecasting financial results less than those indicated in the financial projections prepared at the time, the risk that the injured party would not realise the amount forecast in the analyst’s report is reduced;

d. availability of corroborating third-party, arm’s-length data, such as industry growth projections prepared by an industry association that corroborates the assumptions and analysis included in the financial projections; and

e. the scope and rigour of the analyst’s analysis to test the reasonableness of the assumptions employed in the financial projections.

VI ASSUMPTIONS

Given that the analyst is tasked with determining the financial effect of the ‘but-for’ scenario, he or she will necessarily employ assumptions in his or her analysis. In broad terms, assumptions can be segregated into those that pertain to law, those that pertain to facts, and those that are required to frame the analyst’s damages model.

Assumptions pertaining to matters of law are outside the expertise of the analyst and, in most cases, such assumptions are provided by counsel. For example, the analyst may be instructed to assume that the terms of a signed contract are binding.

Some assumptions regarding assumed facts will address events. For example, the analyst may be asked to assume that a binding verbal representation was given during a meeting between the litigants. In most cases these assumptions will be taken as given by the analyst because it would be inappropriate for the analyst to provide commentary and opinion on findings of fact and legal interpretation, which, by their nature, are the purview of the court.

That said, in other circumstances the analyst will be able to assess the reasonableness of these assumptions by, for example, evaluating contemporaneous documents such as

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5 1995, 41 CPC (3d) 143 (Ont Gen Div).
emails, agreements and meeting memorandum. For example, the analyst may have been
asked to assume a certain volume of lost sales but may be able to establish the veracity of the
assumption based on the terms specified in the correspondence between the parties.

The third category of assumptions are those required as parameters for the loss analysis,
and in many cases these are developed by the analyst, possibly with some input from counsel.
Examples of these types of parameter assumptions include, for example, the period of loss.

VII ACCOUNTING FOR PROFITS

This remedy is most commonly available in two types of cases:

a in a breach of fiduciary duty case where a competitor has had illegal access to the
entity’s trade secrets, customers or other proprietary systems; and

b in a case involving the infringement of intellectual property rights.

The objective in an accounting for profits is to require the defendant to disgorge all profits
made as a result of the infringement.

i Breach of fiduciary duty

In many jurisdictions it is common that remedies for breach of fiduciary duty are discretionary,
and depend all on all the facts before the court. The remedies are designed to address not
only fairness between the parties, but also the public concern about the integrity of fiduciary
relationships.

Many of these cases revolve around an employee that leaves the business to compete,
unfairly, by utilising confidential corporate information or resources to gain a competitive
advantage in the marketplace, or by soliciting corporate customers in violation of non-compete
agreements or other statutory or contractual obligations.

Although the case law varies by jurisdiction, from a financial perspective the case of
de Florio v. Con Structural Steel Ltd sets out a common arithmetic process to quantify the
ill-gotten profits, as follows.

First, it is necessary to establish the length of the period during which the fiduciaries
are obligated not to solicit former clients. Second, the plaintiff has the option to seek either
the profits it has lost, or the profits the defendants have gained during the non-solicitation
period. Third, the list of former customers successfully solicited during the non-solicitation
period must be established. Fourth, the value of the solicited contract must be calculated.
Fifth, it is generally appropriate to apply a discount to the calculation of the lost profits. The
discount will account not only for the competitive nature of the business in question but
will also account for the fact that the plaintiff would not have been guaranteed to receive the
disputed contract if the defendant had not been present as a competitor in the marketplace
(to the extent this is the case).

The defendant’s cost structure will be different from that of the plaintiff, and therefore
the profit that the defendant made from the wrongful act will be different from the financial
loss suffered by the defendants, and the difference it is often material.

For example, the cost of inputs necessary to provide the services or produce the products
may vary depending on the relationships with it the suppliers. Also, larger operations have
efficiencies (economies of scale, etc.) that can reduce costs of production.

If the process permits, it behoves the plaintiff to assess both available remedies (damages
and the accounting for profit) to determine which calculation yields a larger value. However,
in some circumstances the plaintiff may be obliged to choose between an accounting of profits and a damages analysis at an early stage in the proceedings, in which case the analyst may provide judgement based on what can admittedly be only a preliminary understanding of the operations of the two businesses.

ii Patent, trademark and copyright infringement

Accounting for profits is also available in the context of patent, copyright and trademark infringement cases. While it is common for statutory provisions to provide authority for an accounting for profits, this remedy is also available as an equitable remedy in many jurisdictions. For example, see Siddell.6

In an accounting for profits, the inventor is only entitled to that portion of the infringer’s profit that is causally attributable to the invention. There has been recent analysis regarding what is meant by the term ‘profit’ in this context.

Historically, the meaning of profit simply meant the difference between revenues and costs. ‘Profit is the difference between expenditures made to produce and sell the infringing articles and the receipts therefrom.’7

However, more recently the framework has shifted to a differential approach. In Monsanto Canada Inc v. Schmeiser, the Supreme Court of Canada held that the preferred means of calculating profits is the differential profit approach, described as ‘a comparison is to be made between the defendant’s profit attributable to the invention and his profit had he used the best non-infringing option’.8

The practical significance of the difference between the two approaches is shown in Schmeiser. The defendant infringed Monsanto’s patent by growing genetically modified canola (which rendered it resistant to herbicide). However, the defendant claimed that it had gained no financial benefit from the use of the invention; there was no evidence to show that the defendant took advantage of the herbicide resistance by spraying the herbicide and, because the defendant sold the canola seeds for crushing rather than as seed, the sale price was no higher than it would have been had he planted unpatented seed. The trial judge measured the losses as the difference between the revenues from those crops and the costs incurred to grow the crops (i.e., the historical methodology). Upon appeal, the Supreme Court of Canada used a differential approach and found that the defendant’s profits ‘were precisely what they would have been had they planted and harvested ordinary canola . . . The appellant’s profits arose solely from qualities of their crops that cannot be attributed to the invention’.9

VIII SUMMARY

At its highest level, the quantitative framework underpinning an accounting for profits or damages analysis is well established. The challenge in a particular case is for the analyst to populate the framework with parameter estimates and assumptions that are well-reasoned given the facts of the case, and supported by empirical or corroborating third-party evidence.

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6 Siddell v. Vickers (1892), 9 RPC 152 (CA).
7 P Preston in Teledyne, infra note 166 at 110, quoting Levin Bros v. Davis Mfg Co 72 F 2d163 (8th Cir, 1934) at 165.
9 ibid.
Chapter 6

THE FINANCIAL DAMAGES MODEL FOR LOSS OF VALUE

Neil de Gray

I  INTRODUCTION

Damages are generally calculated as either (1) a loss of income or (2) a loss of capital. When damages are determined on account of a loss of capital, it is often necessary to perform a valuation of an asset or business.

This chapter is intended to provide an overview of business valuation principles, concepts and methodologies, and to explain how they apply to the calculation of damages. Although the valuation of any particular asset or business will depend on case-specific factors, the general principles outlined herein can be broadly applied. That said, there is no valuation formula or rule and the determination of value is inherently subjective. It is generally advisable that parties engage a qualified business valuation professional where a formal business valuation is required.

II  DEFINITION OF FAIR MARKET VALUE

The first step in any valuation process is to clearly understand what exactly is being valued. A valuator may be tasked with valuing a business in its entirety, including both its equity and debt components (enterprise value), specific equity or debt interests in a business, or specific assets of a business. Establishing what is to be valued is a critical first step in the valuation process.

The valuator must also establish the definition of value to be adopted. In general, business valuations typically focus on the determination of ‘fair market value’; however, other definitions of value may be relevant in certain case or fact situations.2

The definition of fair market value varies to some extent by jurisdiction. In the United States, fair market value is defined as: ‘The price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts’.3 In Canada, the generally accepted definition of fair market value is: ‘The highest price available in an open and unrestricted market between informed and prudent parties, acting at arm’s length and

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1 Neil de Gray is a director at Duff & Phelps.
2 For example, in Canada, ‘fair value’ is generally adopted as the definition of value to be used in cases involving shareholder oppression, shareholder dissent and in family law. Fair value is commonly defined as fair market value without the consideration of a minority discount or premium for control.
3 United States v. Cartwright.
under no compulsion to act, expressed in terms of cash’. Although the definition of ‘fair market value’ varies to some extent by jurisdiction, the general underlying components of the definition remain consistent.

i Highest price available
Conceptually, a buyer and a vendor will only transact at a price and upon terms to which they both agree based on their own motivations and self-interest. The transaction price is the price at which the vendor’s interest, which is to maximise the selling price, and the buyer’s interest, which is to minimise the purchase price, are in equilibrium. Fair market value determined in a notional context reflects the highest price available.

ii Willing buyer and willing seller: no compulsion to act
The fair market value definition assumes that the parties are willing participants in the transaction and neither party is forced to transact. In reality, a business owner may be compelled to sell their ownership interest for a variety of reasons including personal health or financial difficulty.

iii Knowledge of relevant facts
The fair market value definition assumes that both the vendor and the purchaser are informed with respect to all material facts important to the value determination and will act prudently. All information that would or should have been available at the valuation date is assumed to have been available in the notional market value determination. It is generally accepted that hindsight information, information that could only be expected to have been known after the valuation date, is not considered in the fair market value determination.

iv Acting at arm’s length
The definition of fair market value assumes that the buyer and seller are arm’s-length parties and will negotiate in accordance with their self-interest.

v Open and unrestricted market
Fair market value assumes an open and unrestricted market that includes all potential acquirers. All potential purchasers with the will and resources to transact are included in the valuator’s considerations. Any restrictions that may influence the marketability of a business are assumed to be temporarily lifted for the purpose of determining value in a notional context. To the extent restrictions exist, the valuator may consider the impact of the restrictions by applying a reasonable discount to the value that has otherwise been determined.

vi Expressed in terms of cash or cash equivalents
Fair market value is expressed on a cash equivalent basis and assumes the transfer of the rights and risks associated with the business at the valuation date. This is often in contrast to open market transactions, which are frequently consummated based on non-cash consideration, such as the transfer of shares, or involve payments over a period of time (an earn-out).
III  OPEN MARKET PRICE VERSUS NOTIONAL FAIR MARKET VALUE

Price and value are two distinct concepts that are often confused in consideration of a valuation.

The price of a business or asset is based on the negotiations of a buyer and seller in an open market transaction and reflects the actual terms of a sale.

Value is generally determined in the context of a notional market, where the enterprise subject to valuation has not actually been exposed to the market for sale. The notional market is intended to replicate what may be expected to occur in a rational, fully informed and liquid marketplace without exposing the business interest for sale.

Notional fair market value is generally determined on an intrinsic (stand-alone) basis without the consideration of the potential synergies or economic benefits that may accrue to a subset of the potential purchasers of a business. Certain purchasers may be willing to pay a price that is different from intrinsic value because of their specific circumstances and the specific benefits they may receive from an acquisition. These purchasers are commonly referred to as special interest purchasers.

Quantifying the premium that a special interest purchaser may be willing to pay for synergies is often difficult in a notional market context as the information necessary for the valuator to accurately assess synergies is generally unavailable. As a result, the price arrived at in an open market transaction may be different from the value conclusion reached in a notional market valuation at the same valuation date.

Notional fair market value may also differ from price because of the following:

a Information asymmetry. Open market transactions are negotiated between parties with varying degrees of knowledge and as a result the transaction price may be different from the ‘highest price available’ as determined in a notional market context.

b Compelled parties. A vendor may be compelled to sell their business as a result of personal health, financial or other reasons. Forced open market transactions may result in a price that is lower than notional fair market value.

c Non-cash consideration. Open market transactions often involve non-cash consideration or other forms of compensation including earn-outs and employment contracts that impact the price paid.

d Imprudent decisions and human emotion. A purchaser or vendor may negotiate an open market transaction based on human emotion that does not reflect the ‘highest price available’.

IV  VALUATION PRINCIPLES

The following seven valuation principles are widely accepted as general foundations of business valuation.

i  Principle one: value is determined at a specific point in time

Value is determined at a specific point in time based on information that was known or knowable at that point in time. The value of a business interest is based on the market’s perception at a specific point in time of the business’ future prospects and in particular the future cash flow that the business is likely to generate.

The prospects for a business change from day to day as new information becomes available. Both external and internal factors continually impact the value of a business and, as such, value is determined at a specific point in time.
Consistent with this principle, hindsight information is generally excluded from consideration when determining value. In negotiating an open market transaction, the vendor and purchaser do not have the benefit of future information. The same principles are applied to valuation in a notional context, where value is to be based only on information that was known or knowable at the time of the valuation.

ii Principle two: value is a function of the future benefits to accrue from ownership
Value is principally a function of the prospective future cash flows of a business. Potential acquirers evaluate a business based on expectations of the cash flow that will accrue to them following the acquisition. As the saying goes, ‘cash is king’.

Value is therefore based on expected future performance as measured by the discretionary future cash flows to be received from the investment in the business. Value is a function of the prospective cash flows and the risk of achieving the future cash flows in the amount and timing anticipated. In assessing prospective cash flows, historical financial performance can be informative to the extent it is representative of future performance; however, a valuator must consider evolving industry and economic trends.

iii Principle three: the market dictates the rate of return
Conceptually, the value of a business is equal to the present value of the business’ anticipated future cash flows. The rate of return used to determine the present value of the future cash flows is derived from market rates of return. At any given time, investors must weigh an investment of capital in a business or asset against other potential investments available in the marketplace.

Market rates of return are based on general market forces, which include:

a general economic conditions, including short- and long-term borrowing rates.
Borrowing rates impact the acquisition and divestiture activities of investors and the rates of return required by purchasers on their invested capital;

b the market’s perception of a certain industry and the risk profile of the industry. This includes the market’s perception of the risks, opportunities, competitive landscape, regulatory environment and growth prospects of an industry;

c the types of purchasers in the market, their investment objectives and motivations; and

d company-specific risk factors unique to the business being valued.

The market-driven rate of return reflects the rate of return necessary to motivate investors to deploy capital in the business given the associated risk and opportunities of achieving the projected cash flows. At any point in time, a market-driven equilibrium exists whereby the rate of return offered by a particular investment vehicle reflects the market’s perception of the investment risk of that vehicle. Investors seek to maximise their return while minimising their risk.

In determining business value, the prospective cash flows of a business and the rate of return applied to those cash flows are interdependent. The higher the risk of realising the cash flows, the higher the required rate of return.

iv Principle four: value is influenced by liquidity
In general, the greater the liquidity of an investment, the greater the value of that investment. Liquidity is a measure of the ability to convert an investment into cash. A liquid investment
is one that can be quickly converted into cash. Greater liquidity reduces the risk of an investment by providing the potential purchaser with a greater ability to access their capital and exit their investment.

The liquidity of an investment in a private business is often restricted by certain provisions contained in shareholders’ agreements or corporate articles. It is not uncommon for shareholders’ agreements to limit the ability of shareholders to transfer their shares. In such circumstances the valuator may assess the impact of such provisions on value and, if appropriate, reduce the value by applying an appropriate ‘liquidity’ discount.

v Principle five: value of a minority interest versus a controlling interest

The value of a minority interest is generally less than the value of a controlling interest considered on a pro rata basis.

A controlling shareholder is generally defined as a shareholder that through their ownership interest can elect the majority of the board of directors and in turn govern the business operations. The fair market value of a controlling interest is generally determined on a pro rata basis by applying the ownership interest percentage of the controlling shareholder to the ‘en bloc’ fair market value.

A minority shareholder does not have the same ability to influence the business decisions and operations of the business or dictate the amount or timing of dividends or the terms and conditions and timing of the eventual sale of the business. As such, the value of a minority interest may be less than the pro rata portion of fair market value.

A minority discount is often applied when arriving at a value conclusion for the minority interest to account for the minority interest’s inability to influence and control the operations of the business. The quantum of the minority discount is fact and case specific and based on the valuator’s consideration of the ownership structure, relationship between the owners, agreements between the owners, statutory provisions on business governance and shareholder rights, as well as other relevant information.

vi Principle six: value is influenced by the underlying net tangible assets

Tangible assets consist of a business’ physical assets and include working capital, inventory, property, plant and equipment. In general, all else held constant, a higher tangible asset base reduces the risk profile of a business and supports a higher business value.

A higher tangible asset base generally reduces the risk associated with the business because it:

a. provides a natural barrier to entry. The large capital investment required to enter capital intensive industries often serves as a natural barrier to entry for potential new competitors and limits the risk of competition;

b. increases a business’ collateral and provides greater access to debt financing. Lenders are generally more comfortable extending credit to businesses with strong collateral. Increasing the relative proportion of debt in the company’s overall capital structure can lower the company’s overall cost of capital (because the cost of debt financing is generally less than the cost of equity financing); and

c. reduces downside risk. If all else fails and the business is not successful, a potential acquirer has lower downside risk in an investment in a business with a high net tangible asset base as the assets of the business can be sold, thereby limiting the total loss of the failed enterprise.
vii Principle seven: commercial and non-commercial value are distinct
Successful companies have, to a greater degree than less successful companies, intangible qualities that result in the business earning comparatively larger cash flows and returns. The incremental value created by these intangible qualities is commonly referred to as goodwill.

Goodwill is an intangible asset that reflects a business’ established brand, reputation, customer loyalty and other intangible factors that cannot be separately identified or quantified. Goodwill consists of both those assets that can be transferred to a potential purchaser and are commonly referred to as commercial goodwill, and those that cannot be transferred and are commonly referred to as personal or non-commercial goodwill.

The commercial value of a business is derived from the business’ assets and operations and includes commercial goodwill. The non-commercial component of value is a function of the personal abilities or relationships of an individual and do not accrue to a potential acquirer. A potential acquirer will generally not pay for personal goodwill as it is non-transferable.

V FUNDAMENTALS OF BUSINESS VALUATION
i Enterprise value versus equity value
Enterprise value and equity value are two value terms that are often misunderstood. The value of a business interest consists of two components: (1) the value of the business’ equity; and (2) the value of the business’ outstanding debts. Together these two components comprise the enterprise value of the business, which represents the value of the business in its entirety including its equity and debt components. Enterprise value is not affected by how a business is financed.

In contrast, the equity value of a business represents the value of a business’ equity (i.e., the value of the shares) and is equal to the enterprise value less the value of the business’ net debt. The equity value is affected by how a business is financed.

The enterprise value of a business comprises the value of interest-bearing debt and equivalents, plus the value of the business’ net operating assets (cash, inventory, receivables less payable and fixed assets), plus the value of identifiable intangible assets (brand names, trademarks) and non-identifiable intangible assets (commercial goodwill). Equity value excludes the value of interest-bearing debt and equivalents and represents the shareholder’s or owner’s claim to the business’ assets.

VI VALUATION APPROACHES AND METHODOLOGIES
i General value approaches
There are three generally accepted approaches to valuing an asset or business.

Income or cash-flow approach
The value of the asset or business is determined based on the expected future cash flows to be generated by the asset or business. The prospective future cash flows are discounted or capitalised at an appropriate rate of return reflective of the risks inherent in realising the cash flows.
Cost approach
The value of the asset is determined based on the historical cost of the asset or the cost to replace the asset. The cost approach is typically reserved for the valuation of specific assets rather than in the determination of the value of an active business as a whole.

Market approach
The value of the asset or business is determined based on the application of comparable market valuation metrics. The underlying premise is that the metrics associated with a comparable asset or business reflect the inherent risks of that asset or business and are applicable to the business subject to valuation.

ii Liquidation approach versus going concern approach
The first step in assessing the value of a business is to assess the viability of the business. The valuator must assess whether the business is expected to realise a reasonable rate of return on the value of the net assets employed in the venture. This analysis will inform the valuator’s decisions of whether to employ a going-concern approach or a liquidation approach.

Going concern approach
The value of the business is determined based on the underlying assumption that the business will continue to operate and generate positive prospective future cash flows.

Liquidation approach
Represents the estimated net proceeds that would remain following the disposition of the business’ underlying assets and settlement of its liabilities.

Selection of valuation approach
A business that is considered to be economically viable is generally valued on a going-concern basis implying that the business will continue to operate into the future. A going-concern valuation approach focuses on the future economic benefits (the prospective cash flows) that will accrue to the ownership group.

A business that generates recurring negative cash flows, or where the business is not expected to realise a reasonable rate of return on its invested capital, will typically be valued on a liquidation basis. A liquidation approach assumes that the business’ assets will be sold, its debts repaid, and any proceeds will be distributed to the equity holders. The premise underlying a liquidation scenario is that the maximum value to the shareholders will be realised not by continuing to operate the business, but rather by converting the net assets of the business back to cash so that the shareholders can redeploy this capital into another (more promising) business venture. When value is to be determined pursuant to a liquidation approach, an asset-based valuation methodology is generally used. Liquidation analysis may be either on an orderly basis, meaning the business is assumed to have a reasonable timeline to wind down its operations and maximise value, or forced, where an expedited timeline is assumed.
iii Valuation methodologies

Asset-based valuation methodology

Pursuant to an asset-based valuation methodology, the value of a business interest is determined based on the value of the business' underlying assets and liabilities. Asset-based valuation methodologies are most commonly employed when valuing holding companies (companies whose primary function is to hold investments in other businesses) or when the valuator determines that an operating company is not viable (and a liquidation valuation approach is therefore employed as the primary valuation technique).

The most commonly employed asset-based valuation methodology is the adjusted net book value methodology. Pursuant to the adjusted net book value methodology, the valuator adjusts the reported book value of the subject business’ assets and liabilities to reflect fair market value at the valuation date.

It is important to understand that the book values reported on a company's balance sheet often reflect historical cost amounts or may not reflect the true economic value of an asset or liability. For example, reported asset values on a balance sheet often reflect the initial purchase price of an asset that may or may not be indicative of fair market value at the valuation date.

In general, the adjusted net book value methodology involves adjusting the reported shareholders' equity as reported on a company's financial statements by adding or deducting the amount by which the value of the net assets exceeds or is less than the value reported for accounting purposes and adjusting for related tax differences.

The adjusted net book value methodology can be applied in both a going-concern and a liquidation value scenario. Under a liquidation approach, value is calculated as the difference between the net realisable value of the business' assets and the amounts needed to satisfy the business' liabilities. In these calculations, the net realisable value of a particular asset is the cash retained by the business from the sale of each asset after paying any sales commissions, moving costs, taxes and other costs incurred to dispose of the asset and effect the winding up of the business.

Cash flow and earnings-based valuation methodologies

Cash flow-based valuation methodologies are commonly employed when the underlying business interest is determined to be a viable operating enterprise. The two most common cash flow-based valuation methodologies are the capitalised cash flow (or earnings) methodology and the discounted cash flow methodology.

Cash flow or earnings-based valuation methodologies require:

- an informed assessment of the prospective future cash flows of the business being valued;
- an assessment of the risk of achieving the projected future cash flows both in quantum and on the anticipated timeline. The risk assessment informs the valuator's estimate of the appropriate risk adjusted rate of return (or valuation multiple) to apply when estimating the business’ enterprise value;
- an analysis and assessment of the fair market value of the business’ interest-bearing debt and equivalents at the valuation date. Interest bearing debts and equivalents are deducted from enterprise value to determine the equity value of the business; and
- an analysis of the business’ net assets. The calculated enterprise value assumes that the business has adequate operating assets (i.e., working capital, fixed assets) to generate the projected cash flows. Where the business does not have adequate assets, an adjustment
is required to account for a shortfall. Similarly, when the business holds excess assets that are not required for the ongoing operations of the business, the fair market value of these redundant assets are added to arrive at the equity value of the business.

The capitalised cash flow/earnings methodology

The capitalised cash flow (or earnings) methodology involves dividing an estimate of a business’ normalised maintainable after-tax discretionary cash flow by an appropriate capitalisation rate that reflects the risks and rewards of the business. The capitalised cash flow methodology is based on the assumption that a business’ future cash flows will be relatively stable from year to year or increase at a stable rate of growth. As a result, this methodology is typically adopted for mature businesses with relatively stable earnings that can be reasonably estimated into perpetuity or when a reasonable forecast of cash flows is not available.

Pursuant to the capitalised cash flow methodology, the valuator first estimates the company’s annual maintainable discretionary cash flow. Discretionary cash flow is the quantum of cash flow earned by the business that can be distributed to the shareholders of the business each year without impairing the business’ ongoing operations.

Estimating a reasonable maintainable cash flow level requires professional judgement and analysis of the business and its prospects, including the prevailing and prospective economic and industry conditions. Maintainable cash flow is often expressed as earnings before interest, taxes, depreciation and amortisation or EBITDA.

To estimate a company’s maintainable cash flow a valuator typically considers:

a the historical operating results of the company. Historical operating results provide an objective benchmark upon which future operating levels may be estimated. However, it is important that the historical results are reviewed in the context of prevailing market conditions; and

b contemporaneously prepared forecasts, business plans and budgets. A well-formulated budget provides insight into management’s expectations and may reveal business trends or factors that should be considered in assessing maintainable earnings. Business plans, budgets and forecasts are often prepared by management as part of their annual planning.

The analysis of a business’ historical and prospective cash flows should also consider the need for any adjustments to normalise the business’ performance. Normalisation adjustments are required to account for non-recurring, unusual and non-discretionary amounts and may include adjustments to:

a eliminate the impact of non-recurring or unusual historical revenue or expense amounts including, for example, start-up costs, one-time litigation costs, moving expenses and restructuring charges;

b reflect adjustments to related-party compensation (salaries and bonus) paid to owners and managers to the extent the reported compensation expense does not reflect a fair market value for the services rendered;

c adjust other non-arm’s-length transactions to reflect a fair market rate. For example, it may be necessary to adjust rent payments if such payments are paid to a related party and are below market rates; and

d eliminate income or expenses related to redundant assets as it is assumed that these assets are not required for the ongoing operation of the business. The fair market value of redundant assets is separately added to value.
Based on the foregoing, the valuator estimates a range of maintainable cash flow. From this maintainable cash flow, the valuator deducts corporate income taxes, sustaining capital expenditure requirements\(^4\) and incremental working capital requirements to arrive at an estimate of the company’s after-tax maintainable discretionary cash flow.

<table>
<thead>
<tr>
<th>Components of discretionary cash flow</th>
</tr>
</thead>
<tbody>
<tr>
<td>Earnings as reported on the financial statements</td>
</tr>
<tr>
<td>+/- Non-cash adjustments (depreciation, amortisation, etc.)</td>
</tr>
<tr>
<td>+/- Normalisation adjustments (non-recurring and related party)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Maintainable earnings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less: Corporate income taxes</td>
</tr>
<tr>
<td>Less: Working capital requirements</td>
</tr>
<tr>
<td>Less: Capital expenditure requirements</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>After-tax discretionary cash flows</th>
</tr>
</thead>
</table>

The second step of the capitalised cash flow methodology is to estimate the present value of the future cash flow by dividing the estimated maintainable cash flow by an appropriate risk adjusted capitalisation rate. The capitalisation rate reflects the valuator’s assessment of the risk of the business realising the maintainable cash flow.

The selection of a capitalisation rate is subjective and is based on the professional judgement, experience and the knowledge of the valuation professional. The valuator may consider:

- \(a\) prevailing market rates of return, including the prevailing risk-free rate (often measured with reference to government bond rates) and equity risk premiums (measure with reference to public equity market returns);
- \(b\) industry risk factors and prevailing market rates of return for industry participants;
- \(c\) company specific risk factors, including an analysis of the principal strengths and weaknesses and the opportunities and threats facing the company at the valuation date. The valuator will consider the company’s customer relationships, client concentration, stability and predictability of earnings etc.;
- \(d\) an appropriate capital structure of the subject company having consideration for the debt capacity of the subject company, its existing lending arrangements and the capital structure of comparable companies; and
- \(e\) the prevailing and prospective corporate income tax rate.

The capitalised cash flow of the subject company is calculated by dividing the estimated maintainable discretionary cash flow by the selected capitalisation rate. To the capitalised cash flow, the present value of the existing tax pools is added to arrive at enterprise value. To determine equity value, the fair market value of redundant assets, if any, is added and interest-bearing debt and debt equivalents outstanding at the valuation date are deducted.

The following table illustrates the capitalised cash flow methodology.

\(^4\) Sustaining capital expenditure requirements are the annual capital cost required to sustain the operations of the business. It represents the annual required investment in a company’s capital assets.
The Financial Damages Model for Loss of Value

Capitalised cash flow illustration

<table>
<thead>
<tr>
<th></th>
<th>Low</th>
<th>High</th>
</tr>
</thead>
<tbody>
<tr>
<td>Selected maintainable EBITDA</td>
<td>US$90,000</td>
<td>US$100,000</td>
</tr>
<tr>
<td>Less: corporate income taxes</td>
<td>(23,850)</td>
<td>(26,500)</td>
</tr>
<tr>
<td>After-tax cash flows</td>
<td>US$66,150</td>
<td>US$73,500</td>
</tr>
<tr>
<td>Less: incremental working capital requirements</td>
<td>(5,000)</td>
<td>(5,000)</td>
</tr>
<tr>
<td>Less: sustaining capital expenditure (net of the tax shield)</td>
<td>(10,000)</td>
<td>(10,000)</td>
</tr>
<tr>
<td>Maintainable after-tax cash flows</td>
<td>US$51,150</td>
<td>US$58,500</td>
</tr>
<tr>
<td>Divide by: capitalisation rate</td>
<td>11.0%</td>
<td>12.0%</td>
</tr>
<tr>
<td>Capitalised cash flow</td>
<td>US$465,000</td>
<td>US$487,500</td>
</tr>
<tr>
<td>Add: present value of UCC tax shield</td>
<td>10,000</td>
<td>10,000</td>
</tr>
<tr>
<td>Enterprise value</td>
<td>US$475,000</td>
<td>US$497,500</td>
</tr>
<tr>
<td>Add: redundant assets</td>
<td>500</td>
<td>500</td>
</tr>
<tr>
<td>Less: interest bearing debts and equivalents</td>
<td>5,500</td>
<td>5,500</td>
</tr>
<tr>
<td>Equity value/fair market value</td>
<td>US$470,000</td>
<td>US$492,500</td>
</tr>
</tbody>
</table>

Discounted cash flow methodology

Whereas the capitalised cash flow approach is based on a single annual estimate of maintainable cash flows, the discounted cash flow (DCF) valuation methodology involves forecasting the year-by-year cash flows of the subject company for a specified number of years. The present value of each of these future amounts is then calculated based on the valuator’s estimate of the appropriate risk-adjusted required rate of return (discussed previously).

In addition to the forecast period cash flows, most businesses will continue to earn cash flows after the forecast period. The value of these post-forecast period cash flows is referred to as the terminal value. The valuator estimates terminal value based on an estimate of the business’ annual maintainable cash flow in the post-forecast period capitalised at an appropriate rate of return. The calculation of the residual value is in essence a capitalised cash flow approach bolted on to the DCF analysis.

The net present value of the cash flows during the forecast period and the terminal period are added to determine the enterprise value of the business. To determine the equity value, interest-bearing debts are deducted and redundant or deficient assets are added or subtracted.

A DCF methodology is typically appropriate where the business has relatively sophisticated business-planning protocols, where the business is expected to experience variable production over several years and for assets with limited economic lives (e.g., mines).

The following chart illustrates the DCF methodology.

Discounted cash flow illustration

<table>
<thead>
<tr>
<th></th>
<th>Forecast period</th>
<th>Year 1</th>
<th>Year 2</th>
<th>Year 3</th>
<th>Terminal period</th>
</tr>
</thead>
<tbody>
<tr>
<td>EBITDA</td>
<td></td>
<td>US$5,000</td>
<td>US$10,000</td>
<td>US$20,000</td>
<td>US$20,400</td>
</tr>
<tr>
<td>Less: corporate income taxes</td>
<td></td>
<td>(1,250)</td>
<td>(2,500)</td>
<td>(5,000)</td>
<td>(5,100)</td>
</tr>
<tr>
<td>Less: working capital requirements</td>
<td></td>
<td>(500)</td>
<td>(500)</td>
<td>(1,000)</td>
<td>(1,000)</td>
</tr>
<tr>
<td>Less: sustaining capital reinvestment</td>
<td></td>
<td>(1,000)</td>
<td>(1,000)</td>
<td>(1,000)</td>
<td>(1,000)</td>
</tr>
<tr>
<td>After-tax discretionary cash flow</td>
<td></td>
<td>US$2,250</td>
<td>US$6,000</td>
<td>US$13,000</td>
<td>US$14,260</td>
</tr>
<tr>
<td>Capitalisation rate</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>8.0%</td>
</tr>
</tbody>
</table>
The Financial Damages Model for Loss of Value

<table>
<thead>
<tr>
<th>Discounted cash flow illustration</th>
<th>Forecast period</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Year 1</td>
</tr>
<tr>
<td>Terminal value</td>
<td></td>
</tr>
<tr>
<td>Discount rate</td>
<td>10.0%</td>
</tr>
<tr>
<td>Discount period (number of years)</td>
<td>0.5</td>
</tr>
<tr>
<td>Discount factor</td>
<td>0.953</td>
</tr>
<tr>
<td>Net present value of cash flows</td>
<td>US$2,145</td>
</tr>
<tr>
<td>Sum of the present value of the cash flows during the forecast period</td>
<td>US$17,590</td>
</tr>
<tr>
<td>Present value of the terminal period cash flows</td>
<td>150,308</td>
</tr>
<tr>
<td>Enterprise value</td>
<td>US$167,898</td>
</tr>
<tr>
<td>Less: interest bearing debt and equivalents</td>
<td>(10,000)</td>
</tr>
<tr>
<td>Add: redundant assets</td>
<td>5,000</td>
</tr>
<tr>
<td>Equity value/fair market value</td>
<td>US$162,898</td>
</tr>
</tbody>
</table>

**Market-based valuation methodologies**

The market-based valuation approach relies on public equity market data and precedent transaction data of companies determined to be somewhat comparable to the subject company being valued. This valuation methodology involves analysing the valuation multiples, financial ratios and operating results of these comparable companies and transactions and applying those multiples to the subject company. The underlying premise of the market-based approach is that companies in similar industries face similar risks and as a result should have similar return profiles.

The two principal market-based valuation approaches are (1) the comparable public company approach, and (2) the precedent transaction approach.

**Comparable company approach**

A comparable company approach involves researching and calculating the valuation metrics and financial ratios of publicly traded companies that are deemed to be somewhat comparable to the subject company. In these cases, the valuator may consider ‘value benchmarks’ in his or her analysis.

Examples of valuation benchmarks include:

- enterprise value to EBITDA multiple – calculated as enterprise value divided by EBITDA;
- enterprise value to revenue multiple – calculated as enterprise value divided by revenue;
- price-to-book-value ratio – calculated as the public market capitalisation of the company divided by the reported net book value of the company; and
- price-to-earnings ratio – calculated as the public market share price divided by the earnings per share.

There are many other valuation ratios that are commonly calculated. Some ratios are more relevant to one industry than another. Given the inherent difficulties in identifying reasonably comparable companies, the comparable company approach is most often used as a secondary valuation approach, to assess the reasonableness of the notional valuation conclusion based on a cash flow or asset-based methodology.
Precedent transactions approach

Precedent transaction analysis involves researching and reviewing actual transactions involving companies that are comparable to the subject company. Utilising publicly disclosed information about actual transactions including the selling price, historical performance and terms and conditions of sale, it is possible to determine comparable valuation metrics that can then be applied to the subject company to determine a value conclusion. Similar multiples as those illustrated above can be determined for these precedent transactions.

Rules of thumb

In certain industries, market rules of thumb may exist that can be used to determine business value. Rules of thumb are generally applied as a secondary test of the reasonableness of a value conclusion arrived at through a cash flow or other valuation methodology. Rules of thumb have their foundations in market transactions involving companies in a specific industry and are based on industry-specific activity ratios or formulas that have been derived over time. When using a rule-of-thumb approach, it is important that the valuator considers what exactly the rule of thumb is calculating and whether the rule of thumb is applicable to the business interest being valued.

VII CONCLUSION

Business valuation is an inherently subjective exercise. In preparing a business valuation, valuation professionals apply their professional judgement, experience and knowledge of business valuation fundamentals to the specific facts to arrive at an informed and reasoned value conclusion. Whether for the purpose of calculating damages from a capital loss or otherwise, it is generally advised that a business valuation professional be consulted when a business valuation is required.
Part II

JURISDICTIONS
I OVERVIEW

In Australia, monetary relief is available under common law, equity and statute. Determining whether a plaintiff is entitled to a damages award and the quantum of that award will require consideration of those three sources of law, the type of claim being made and the remedial purpose of the award.

i Common law

At common law, damages generally serve a compensatory purpose for the defendant’s tort or breach of contract. The monetary remedy normally aims to place the plaintiff in the position he, she or it would have been in had the breach of duty not been committed.

ii Equity

Both equitable compensation and an account of profits are generally available for breaches of equitable obligations. Equitable compensation can be distinguished from damages by the characteristics unique to it, including its discretionary nature. An account of profits focuses on the gains made by the defendant via breach of the relevant equitable obligation rather than on the plaintiff’s loss.

iii Statute

Statute will often also provide a monetary remedy. The extent to which common law or equitable principles apply to such a claim is a question of statutory construction. The questions of construction that the court will need to consider will be whether and to what extent the statutory provisions modify the operation of general law principles. As such, the measure of relief will be dependent on the particular statutory provision.

iv Non-compensatory damages

Punitive, gain-based and liquidated damages also may be available in exceptional circumstances where compensatory damages are deemed to be an inappropriate response to the breach.

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1 Simon Morris is a partner and Thomas Riddell is a lawyer at Piper Alderman. The authors acknowledge the contributions of Dr David Winterton and Amir Chowdhury to the previous edition of this chapter.
v Punitive and exemplary damages
Punitive damages are occasionally awarded for certain wrongs recognised by common law to punish the wrongdoer and deter the commission of future wrongs, but the traditional view is that they are not available for breaches of equitable obligations.2

vi Restitutionary damages
The availability of a gain-based award in response to a common law wrong has occasionally been recognised, most often in cases where the defendant tortiously interfered with the plaintiff’s right to goods3 or land.4 The term ‘restitutionary damages’ is sometimes used as a label to describe all such awards for common law wrongdoing, but it has also been suggested that it is necessary to distinguish between two measures of gain in this context: one based on the immediate transfer of value to the defendant that is entailed by the wrong and one based on the consequential profits that accrue to the defendant as a result of the wrong, which is sometimes labelled ‘disgorgement’.5 While both measures of gain have also exceptionally been awarded for breach of contract in England, Australian courts have been reluctant to allow for gain-based recovery for contractual breach.6

vii Liquidated damages
At common law, liquidated damages are available where parties contract for a fixed amount of damages to be payable for a breach of contract in circumstances where the predetermined amount is a genuine pre-estimate of the loss likely to flow from the breach rather than a sum intended to punish or deter the breach. Equity may also deem a sum payable on the happening of an event other than breach (‘the primary stipulation’) as ‘penal’ and hence irrecoverable where it is ‘out of all proportion’ to the interests protected by the primary stipulation,7 or where it ‘is properly characterised as having no purpose other than to punish’.8

II QUANTIFICATION OF FINANCIAL LOSS
i Introduction
The aim of awarding damages, at least in commercial cases, is generally to put the plaintiff in the financial position he, she or it would have been in had the relevant breach of duty not occurred.9 But in upholding this principle, various subsidiary matters arise, including how

3 See Bunnings Group Ltd v. CHEP Australia Ltd [2011] NSWCA 342; (2011) 82 NSWLR 420 at [172]–[175], [177]–[178], considering damages assessment for conversion or detinue.
8 ibid. [165] (Gageler J).
9 Livingstone v. Ranyards Coal Co (1880) 5 App Cas 25, 39 (Lord Blackburn).
the plaintiff’s counterfactual financial position is to be quantified and which consequences resulting from the breach are included in this assessment. A number of these subsidiary matters are now addressed.

ii  Evidence

A plaintiff claiming damages is expected to adduce evidence that is available and typically adduced in that type of claim. Where a plaintiff does not adduce such evidence, he or she cannot complain of the non-award of damages or of a lesser quantum of damages than would have been obtained if the evidence had been adduced.10

iii  Date of assessment

Typically, damages arising from a breach of contract are assessed at the date of the breach, but courts will depart from this general rule ‘whenever it is necessary to do so in the interests of justice’.11 Damages arising from a tort are also typically assessed at the date on which the cause of action arose. However, in personal injury cases and death cases, damages are normally assessed at the date of judgment.12

Mitigation

It is important for a plaintiff to identify the applicable date of assessment for its cause of action as it will affect the date from which the court expects a plaintiff to act reasonably and attempt to minimise loss caused by the defendant’s wrongdoing.13 If the plaintiff failed to act reasonably, he or she will not be awarded damages for losses that could reasonably have been avoided.14 Plaintiffs who take reasonable steps to mitigate loss are entitled to be compensated for the costs of taking such reasonable steps, even where the costs of taking such action overall increases the loss suffered.15

iv  Financial projections

Future loss

Damages must compensate the plaintiff on a once-and-for-all basis. As such, the lump sum award must encompass not only the loss already suffered by the plaintiff but also any causally attributable losses that the plaintiff is likely to suffer in future. A plaintiff will be entitled to an award of damages to compensate future loss if he or she can establish, on the balance of probabilities, that the defendant’s wrongdoing caused loss of a non-negligible opportunity that the plaintiff would have taken advantage of.

v  Assumptions

In quantifying the plaintiff’s loss, a court may be entitled to make certain assumptions about the value of what has been lost or about what would have happened had the breach not occurred. For example, the value of goods tortiously damaged or not delivered in breach of

10 Luna Park (NSW) Ltd v. Tramways Advertising Pty Ltd (1938) 61 CLR 286.
contract is generally measured by reference to the market price, at least where an available market exists, and it may be that, when a plaintiff claims damages following an acceptance of the defendant's contractual repudiation, it is assumed that the plaintiff would have been able to perform its own remaining obligations under the contract.\textsuperscript{16} It is a matter of debate as to whether these various assumptions are necessarily rebuttable or are sometimes irrebuttable.

\textbf{vi Discount rates}

Above, we described circumstances where a plaintiff can claim for loss of opportunity and future losses. If the plaintiff is awarded damages to compensate for loss that has yet to occur, the plaintiff is essentially receiving an advance payment of that loss. An adjustment must be made to account for the accelerated receipt in the form of discounting the damages to present value.\textsuperscript{17}

In commercial cases, market rates of interest will be considered an appropriate discount rate,\textsuperscript{18} but in personal injury and death cases, state jurisdictions have their own statutory provisions prescribing a fixed discount rate. In the Northern Territory, New South Wales, Queensland, South Australia and Victoria the discount rate is 5 per cent.\textsuperscript{19} In Western Australia the discount rate is 6 per cent.\textsuperscript{20}

\textbf{vii Currency conversion}

Damages awarded in foreign currency will generally be converted into Australian dollars using the spot foreign exchange rate at the date of judgment.\textsuperscript{21}

\textbf{viii Interest on damages}

Courts in most Australian jurisdictions\textsuperscript{22} have a statutory discretion to award interest on damages.\textsuperscript{23} Common to those jurisdictions are three principles that courts must have regard to when exercising their power to award interest on damages.

First, the power is discretionary, and depending on legislation, the court must consider whether or not to award interest, for what period the interest calculation is to run, the rate of interest and on what portion of damages that interest will be applied. Second, the object of the power to award interest is to compensate plaintiffs for being kept out of damages and so

\textsuperscript{17} \textit{Sellars v. Adelaide Petroleum NL} (1994) CLR 332.
\textsuperscript{18} \textit{Pennant Hills Restaurants Pty Ltd v. Barrell Insurances Pty Ltd; sub nom Barrell Insurances Pty Ltd v. Pennant Hills Restaurants Pty Ltd} (1981) 145 CLR 625.
\textsuperscript{19} Personal Injuries (Liabilities and Damages) Act 2003 (NT) Section 22; Civil Liability Act 2002 (NSW) Section 14; Civil Proceedings Act 2011 (Qld) Section 61; Civil Liability Act 1936 (SA) Sections 3 and 5; Civil Liability Act 2001 (Tas) Section 28A; Wrongs Act 1958 (Vic) Section 28I.
\textsuperscript{20} Law Reform (Miscellaneous Provisions) Act 1941 (WA) Section 5.
\textsuperscript{22} But not in Tasmania.
\textsuperscript{23} Judiciary Act 1903 (Cth) Section 77MA(2)(a); Federal Court of Australia Act 1976 (Cth) Section 51A(2) (a); Federal Circuit Court of Australia Act 1999 (Cth) Section 76(4)(a); Court Procedures Rules 2006 (ACT) r1616(6)(a); Supreme Court Act 1979 (NT) Section 74(2)(a); Civil Procedure Act 2005 (NSW) Section 100; Civil Proceedings Act 2011 (Qld) Section 58; Supreme Court Act 1936 (SA) Section 30C(4) (a); District Court Act 1991 (SA) s39(4)(a); Magistrates Court Act 1991 (SA) Section 34(4)(a); Supreme Court Act 1986 (Vic) Section 60(2)(a); Supreme Court Act 1935 (WA) Section 32(2)(a).
the prima facie time for when interest starts to accrue is the point in time when the breach is said to have occurred. 24 Third, the statutory provisions regarding interest do not apply to cases of dishonoured bills of exchange. 25

ix Costs
Costs generally follow the event, meaning that the successful party is entitled to recover costs from the other side unless there is a good reason to justify a contrary order. 26 Reasons that might deprive a successful party from recovering its costs include where the damages awarded are ‘nominal’, 27 where the successful party misbehaved in relation to either the subject of the conduct of the proceedings or where the successful party rejected a settlement offer or offer of compromise, and failed to obtain an order or judgment on the claim no more favourable to such offer. 28

x Tax
Awards of damages may be subject to taxation if categorised as income, indemnity or capital gain. Losses that would have been taxable, but for the wrong, and which then form the basis for an award of damages, will not necessarily still be considered taxable. An example of such losses are those forming the basis for an award of damages in certain personal injury cases. 29

III EXPERT EVIDENCE

i Introduction
A plaintiff seeking an award of damages must establish and assess losses suffered with as much certainty as the circumstances permit. Expert evidence can assist in persuading the court whether on balance the threshold of certainty has been met. Expert evidence adduced to assist the court in calculating damages are subject to the same rules of expert evidence in general.

ii The role of expert evidence in the calculation of damages
Expert evidence is particularly useful where scientific, technical or other specialised knowledge might assist the court in understanding evidence or facts at issue.

The common law position is that expert evidence cannot usurp the role of a judge in his or her function in calculating damages. If experts were allowed to answer the ‘ultimate issue’, and the answer is accepted by the court, then ‘the chances of success on an appeal on fact are

25 Judiciary Act 1903 (Cth) Section 77MA(2)(c); Federal Court of Australia Act 1976 (Cth) Section 51A(2) (c); Federal Circuit Court of Australia Act 1999 (Cth) Section 76(4)(c); Court Procedures Rules 2006 (ACT) r1616(6)(c); Supreme Court Act 1979 (NT) Section 74(2)(c); Civil Procedure Act 2005 (NSW) Section 100(3)(d); Civil Proceedings Act 2011 (Qld) Section 58(4)(b); Supreme Court Act 1935 (WA) Section 32(2)(c).
27 Alltrans Express Ltd v. CVA Holdings Ltd [1984] 1 All ER 685.
slight indeed, since there is direct and acceptable evidence on the very point at issue’. This ‘ultimate issue’ rule does not prevent questions being put to the expert witness that causes him or her to consider a hypothetical scenario where he or she is asked to assume the facts stated in evidence to be true.

The common law’s ‘ultimate issue’ rule has been abolished by statute. Although expert evidence cannot be deemed inadmissible solely because it goes to an ‘ultimate issue’, the rule still has utility as a caution for judges to ‘exercise particular scrutiny when experts move close to the ultimate issue, lest they arrogate expertise outside their field or express views unsupported by disclosed and contestable assumptions’.

iii The court’s role in excluding and managing expert evidence

Courts are able to consider and manage expert evidence that goes to proving the quantum of damages in accordance with the same principles applicable to the assessment of expert evidence generally. The Evidence Act contains provisions addressing the admissibility of expert opinion. Although not all expert evidence is opinion, the rules relating to the admissibility of non-opinion expert evidence are generally analogous to that of expert opinion.

Generally, evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed. This exclusionary opinion rule does not apply if the person expressing the opinion has specialised knowledge based on the person’s training, study or experience, and that opinion is wholly or substantially based on that knowledge.

Heydon JA’s judgment in Makita provides a summary of the principles relating to the admissibility of expert opinion:

In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of ‘specialised knowledge’; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be ‘wholly or substantially based on the witness’s expert knowledge’; so far as the opinion is based on facts ‘observed’ by the expert, they must be identified and admissibly proved by the expert; and so far as the opinion is based on ‘assumed’ or ‘accepted’ facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached; that is, the expert’s evidence must explain how the field of ‘specialised knowledge’ in which the witness is expert by reason of ‘training, study or experience’, and on which the opinion is ‘wholly or substantially based’, applies to the facts assumed or observed so as to produce the opinion propounded.

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30 Joseph Crosfield and Sons Ltd v. Techno-Chemical Laboratories Ltd (1913) 29 TLR 378, 379.
31 R v. Smith (1915) 11 Cr App R 229, 238.
32 Evidence Act 1995 (Cth), Section 80; each jurisdiction in Australia has its own Evidence Act, but they have been made uniform throughout almost all Australian jurisdictions.
34 Evidence Act 1995 (Cth).
35 id., Section 76.
36 id., Section 79.
37 Makita (Australia) Pty Ltd v. Sprowles (2001) 52 NSWLR 705, [85].
If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert’s specialised knowledge. If the court cannot be sure of that, the evidence is strictly speaking not admissible, and, so far as it is admissible, of diminished weight.

Where an expert’s opinion is admissible, courts are still unlikely to be persuaded by the evidence or to accept the expert’s conclusions in circumstances where the expert relied upon flawed assumptions. In *Norris v. Blake*, the New South Wales Court of Appeal considered the differing opinions expressed by a number of experts that related to the respondent’s likely life expectancy in a personal injury claim. The economic loss ultimately awarded was dependent on the respondent’s life expectancy. The court held that a relevant factor was the assumption held by many of the experts that the respondent would be in a persistent vegetative state. The court went on to conclude that the primary judge was entitled to discount those opinions because of his Honour’s finding that the respondent was not in fact in a persistent vegetative state.

iv Independence of experts

In most jurisdictions within Australia an expert can be retained by either one or multiple parties to the proceedings, but the expert must remember that his or her paramount duty is to the court and not the parties retaining them. Experts are duty bound to assist the court impartially and so must maintain a level of independence.

This duty to the court means that an expert cannot be ‘an advocate for the cause’ of the party retaining them. However, it does not mean that experts are required to refrain from giving evidence where they are a party to proceedings, have a material interest in proceedings, or are employed by a party to proceedings. Relationships of this kind do not necessarily infer that an expert cannot give impartial and objective evidence, nor that they will act as advocates for the party retaining them. Rather, these are factors relevant to the assessment of the weight to be given to the expert’s evidence at trial.

v Challenging experts’ credentials

A party can challenge an expert’s credentials by asserting that the expert does not possess ‘special knowledge, skill, experience or training about a matter’.

If the expert is found to not possess the relevant special knowledge, skill, experience or training about a matter, his or her evidence will be inadmissible.

In establishing whether or not the expert possesses the relevant special knowledge, skill, expertise or training, first the relevant field of expertise must be identified and then the judge must consider the skill of the witness purporting to be an expert.

Each opinion or piece of evidence adduced must then wholly or substantially fall within the identified field of the witnesses’ expertise. A chartered accountant, although able to express opinions about accounting standards, cannot necessarily give evidence relating

39 Expert witness code of conduct Sch 7 UCPR; Federal Court of Australia Expert Evidence Practice Note (GPN-EXPT), Annexure A.
41 *Rush v. Nationwide News Pty Ltd* (No 5) [2018] FCA 1622, [37]–[38].
to the conduct of a company director. Another example where opinion is not wholly substantially based on the witness’ specialised knowledge is where a chartered accountant is retained to write a report in which he or she restates the books of a publicly traded company, where that company is alleged to have misrepresented its financial position. Assuming that the accountant has no other expertise, he or she cannot then also be retained to calculate the true market value of the company’s shares had the company not misrepresented its financial position (i.e., the accountant cannot calculate the loss suffered by an investor who bought the company’s shares). In that case, the latter opinion, although relating to and following on from the calculations based on accounting expertise, falls substantially outside the accountant’s field of expertise.

vi Novel science and methods
Experts engaged to quantify damages in securities actions use a method of quantitative linear regression involving event studies. Event studies aim to quantify effects on share price caused by information (or rather misinformation) released to the market. This method of quantification arose out of US securities fraud litigation. Event studies assume a semi-strong efficient capital market hypothesis and require experts to select a relevant market or industry share index and obtain data for the movement in that index over a relevant period and compare it to the share price of the subject company to establish statistically significant linear trend by way of regression analysis. Then, by comparing the actual share price immediately after the disclosure of information and a predicted price using the aforementioned trend, an expert concludes that the difference in those prices is the dollar value attributable to the disclosure of the information.

IV RECENT CASE LAW

i Re HIH Insurance Ltd (in liq) [2016] NSWSC 482 (HIH Insurance [2016]) and Re HIH Insurance Ltd (in liq) [2017] NSWSC 380 (HIH Insurance [2017])

Prior to the Supreme Court of New South Wales decisions in HIH Insurance [2016] and HIH Insurance [2017], the elements for establishing causation in cases concerning loss arising from misleading and deceptive conduct claims involving securities remained unclear. Competing lines of argument were often put before courts about the extent to which reliance had to be established: was direct reliance on misleading and deceptive statements required, or was indirect reliance sufficient? The latter view relies on a concept of market-based causation to establish causation irrespective of whether plaintiffs had relied directly on misleading and deceptive statements. It contends that a causal link is established where the price of securities is affected by the misleading or deceptive information.

The facts of the case
HIH Insurance [2016] and HIH Insurance [2017] related to multiple claims by investors who acquired shares in HIH Insurance Limited (HIH) at an artificially inflated market price. HIH was a public company listed on the ASX. It was placed into liquidation in 2001 and

42 Australian Cement Holdings Pty Ltd v. Adelaide Brighton Ltd [2001] NSCW 645, [6].
admitted that its FY1999 financial statements, FY2000 interim financial statements and FY2000 final statements contained representations that were misleading and deceptive.\textsuperscript{44} These representations ‘conveyed to the market an overoptimistic impression of HIH’s financial position and prospects’.\textsuperscript{45} The statutory causes of action required investors to show that they had suffered loss ‘by’ the contravening conduct, in this case the misleading and deceptive financial statements.\textsuperscript{46}

**The decision**

Justice Brereton of the Supreme Court of New South Wales was tasked with determining whether shareholders who had not personally relied upon the misleading and deceptive statements could establish causation under the relevant statutes.\textsuperscript{47} The wording of these statutes was pivotal in considering whether indirect causation could be established.

Justice Brereton interpreted the word ‘by’ to express ‘the notion of causation without defining or elucidating it’.\textsuperscript{48} He followed Chief Justice Mason’s leading judgment in *March v. Stramare*,\textsuperscript{49} which stated that for a sufficient causal link to be established, it must be shown that the contravening conduct ‘caused or materially contributed to’ the loss.\textsuperscript{50}

Thus, Brereton J found that it was not necessary to prove each investor’s individual reliance on the misleading or deceptive financial statement and that a causal link could instead be established by showing that HIH made misleading or deceptive representations in relation to its financial statements, the market was deceived into a misapprehension that HIH was trading more profitably than it really was and had greater net assets than it really had, HIH shares traded at an inflated market price and investors paid that inflated market price to acquire shares, thereby suffering loss.\textsuperscript{51} This causal link is referred to as indirect market-based causation.

Following on from the *HIH Insurance* \textsuperscript{[2016]} decision, Brereton J considered the issue of quantum in *HIH Insurance* \textsuperscript{[2017]}. Generally, the measure of damages in these types of cases is ‘the difference between the price [the plaintiff] paid and the price they would have paid had the contravening conduct not occurred but all other factors had remained constant’.\textsuperscript{52} A complicating factor in calculating the quantum of loss was that shareholders had purchased shares while their market price was inflated by misrepresentations, but then subsequently sold some of those shares within the inflated period. Various approaches were suggested to Brereton J for consideration, including a ‘last-in-first-out’ (LIFO) approach, a ‘first-in-first-out’ (FIFO) approach and a proportionate approach. A proportionate approach requires treating the shares sold during the inflationary period as being proportionately drawn from the shares owned prior to the inflationary period and the shares acquired during the inflationary period. Brereton J held the LIFO method to be the favoured approach because it requires the shareholder to account for any inflationary benefit received on a share sale.

\begin{itemize}
\item 44 *HIH Insurance* \textsuperscript{[2016]} NSWSC 482, [3].
\item 45 id., at [38].
\item 46 Trade Practices Act 1974 (Cth) Section 82(1); Corporations Act 1989 (Cth) Section 1005.
\item 47 See Trade Practices Act 1974 (Cth) Section 52; see Corporations Act 1989 (Cth) Sub-sections 995 and 999. Note that these particular provisions have since been repealed and replaced.
\item 48 *HIH Insurance* \textsuperscript{[2016]} NSWSC 482.
\item 49 (1991) 171 CLR 506, 514.
\item 50 *HIH Insurance* \textsuperscript{[2016]} NSWSC 482, [37].
\item 51 id., at [75].
\item 52 id., at [74].
\end{itemize}
Indirect market-based causation and ‘fraud-on-the-market’ approaches

The principle recognised by Brereton J is similar but not identical to the well-established ‘fraud-on-the-market’ doctrine recognised by the United States Supreme Court in Basic v. Levinson.53 The key difference between the two doctrines is that, under the approach recognised in HIH Insurance [2016], there is no need to establish reliance. In contrast, the American doctrine provides plaintiffs with a presumption of reliance on the integrity of the market price of securities affected by the misrepresentation, which it is open to the defendant to rebut with sufficient evidence.

ii  AHRKalimpa Pty Ltd v. Schmidt (No. 3) [2019] VSC 197 (AHRKalimpa)

In Australia, the status of equity as a body of law distinct from common law is the subject of an enduring debate.54 Some jurists contend that the two have fused, so that the principles applicable to one may alter those applicable to the other.55 Others assert this to be a fallacy, arguing that equity follows its own ‘coherent body of principles’.56 In the recent AHRKalimpa decision, the Victorian Supreme Court considered whether common law principles of causation reasoning apply in the determination and quantification of equitable compensation.

Facts of the case

AHRKalimpa concerned a joint venture to export cattle to Israel. One of the directors of AHRKalimpa, Mr Schmidt, hatched a scheme to redirect the export business opportunity to a separate company controlled by him. Subsequently, Schmidt stole AHRKalimpa’s confidential information and diverted the export business to his new venture.

In a separate decision, the court found Schmidt had breached his fiduciary duties. The court then separately considered the quantum of equitable damages to be paid by way of compensation.

The court was required to decide whether the award ought to place the plaintiffs in the position they would have been in but for the breach of fiduciary duties, or whether consideration of the plaintiffs’ inability to conduct the business without the involvement of Mr Schmidt meant that compensation should be limited to the value of a loss of opportunity arising from the defendant’s breaches. Essentially, the court was tasked with determining whether or not equitable compensation is determined by reference to the common law principles of remoteness and foreseeability of loss.

The decision

In resolving the issue of causation, Justice Elliot distinguished the analysis of causation at common law from the applicable test for equitable compensation. While at common law a plaintiff must satisfy the tests for foreseeability and remoteness of loss, his Honour observed that a plaintiff seeking equitable compensation is only required to establish that a defendant’s breach has ‘caused’ the loss. In other words, the plaintiff need only establish that the loss was caused “by”, “by reason of”, or “as a result of” the wrongful conduct.57 Once a causal link is found, equity does not require an examination of foreseeability or remoteness. His Honour referred to the reasoning in Ancient Order of Foresters in Victoria Friendly Society Ltd v. Lifeplan Australia Friendly Society Ltd, that because equity is concerned with vindicating an equitable obligation that has been breached, the ‘but for’ test of causation is sufficient irrespective of other contributing causes.58

So, all that the plaintiffs had to establish was that the defendants’ conduct in misappropriating the businesses and stealing confidential information caused them to suffer a loss. The defendants’ counterfactual scenario that the plaintiffs would be unable to continue the livestock export business without the assistance of Mr Schmidt was irrelevant to the causal inquiry because the equitable test for causation only requires a ‘but for’ link to be satisfied.

Causation in equitable compensation

Elliot J’s decision in AHRKalimpa confirms that the assessment of quantum in cases seeking equitable compensation does not entertain considerations of what would or ought to have happened but for a breach of fiduciary duties. Rather than adopting a ‘fused’ approach that assimilates common law principles and equity when determining causation,59 equity applies a distinct approach that is only concerned with protecting plaintiffs against breaches of equitable duties.

iii Bauer Media Pty Ltd v. Wilson (No. 2)

While the above cases discuss the role common law and equitable principles play in determining the availability and quantification of damages, it is important to consider the extent to which statute modifies these principles.

In Australia, defamation legislation applies a cap to the maximum amount that can be awarded for general damages. General damages comprise lump sum awards for both pure compensatory loss and aggravated damages. They are limited to a prescribed amount that can only be exceeded ‘if, and only if, the court is satisfied that the circumstances of the publication of the defamatory matter to which the proceedings relate are such as to warrant an award of aggravated damages’.60 However, an award for damages must still have


58 Ancient Order of Foresters in Victoria Friendly Society Ltd v. Lifeplan Australia Friendly Society (280) 360 ALR 1, 25 [88].


60 See Defamation Act 2005 (VIC) Section 35. This provision is replicated in the defamation acts of all other states.
an appropriate and rational relationship to the harm suffered by a plaintiff.\textsuperscript{61} In other words, the cap may be exceeded when a defendant’s improper or unjustified conduct, or conduct in bad faith, justifies an award for aggravated damages. However, an award must still be proportionate to the harm suffered. The recent high-profile case of Bauer Media Pty Ltd \textit{v.} Wilson (No. 2)\textsuperscript{62} considered the effect this cap has on damages for non-economic loss in defamation proceedings.

**Facts of the case**

In 2015, Bauer Media published several magazine and online articles alleging that Ms Wilson, a prominent Australian actor, was a serial liar. Ms Wilson commenced proceedings in the Supreme Court of Victoria alleging that the articles were defamatory and had caused her to suffer loss, which she identified to include disrepute, humiliation and loss of future work.

At trial, Ms Wilson was successful in receiving an award of A$650,000 for general damages, which included aggravated damages, and A$3,917,472 for special damages.\textsuperscript{63} On appeal, Bauer Media contested the quantum of damages. One of Bauer Media’s grounds of appeal was that the trial judge had erred in exceeding the statutory cap for general damages.

**The decision**

Bauer Media argued that the proper construction of the statutory cap required the trial judge to award aggravated damages separately from pure compensatory damages, and that only aggravated damages may exceed the statutory cap.\textsuperscript{64} The substance of this submission was that where a court assesses pure compensatory damages to exceed the statutory cap, and considers aggravated damages to be warranted, a plaintiff will only receive pure compensatory damages in the capped amount, and then receive a separate award for aggravated damages that may exceed the cap.

The Court of Appeal rejected this argument, finding that neither the language of the legislation nor the intention of Parliament mandated, expressly or implicitly, a separate award for aggravated damages. Doing so would place courts in the ‘impossible situation’ of ascertaining the unquantifiable, being what should be awarded specifically to console a plaintiff’s hurt feelings and compensate for their reputational damage.\textsuperscript{65} The court considered that a literal reading of the legislation provided that where a court awards aggravated damages, it is entitled to exceed the statutory cap in respect of both pure compensatory and aggravated damages.\textsuperscript{66}

It was further put by Bauer Media that some of the trial judge’s findings in relation to conduct warranting aggravated damages should be set aside.\textsuperscript{67} Specifically, Bauer Media submitted that the trial judge erred in finding that it was not justified in defending the proceedings and it was improper for a defence of triviality to be run, that it had failed to apologise to the plaintiff, and that it had disclosed confidential information in publishing the defamatory material.

\textsuperscript{61} id., at Section 34.
\textsuperscript{62} \[2018\] VSCA 154.
\textsuperscript{63} See Wilson \textit{v.} Bauer Media Pty Ltd [2017] VSC 521.
\textsuperscript{64} Bauer Media Pty Ltd \textit{v.} Wilson (No. 2) [2018] VSCA 154, [180]–[181].
\textsuperscript{65} id., at [226].
\textsuperscript{66} id., at [259].
\textsuperscript{67} id., at [140]–[149].
In setting aside these findings, the Court of Appeal reassessed damages for non-economic loss to be in the amount of A$600,000. The decision confirms that awards for general damages are made as a lump sum, and where aggravated damages are warranted, an award can exceed the statutory cap in respect of the whole of an award for general damages.

This approach was adopted in another high-profile defamation case, Rush v. Nationwide News Pty Ltd,\(^{68}\) which, at the time of writing, is currently on appeal to the Full Court of the Federal Court of Australia.\(^{69}\)

iii Mann v. Paterson Constructions Pty Ltd

What the appropriate measure of damages is, where a claimant provides work or services pursuant to a contract, and that contract is breached or repudiated by the other party before payment is made, will be the subject of an appeal before the High Court of Australia in the coming year.

Currently, claimants have the ability to elect between contractual damages or a claim for restitution based on quantum meruit for a ‘fair market value’ of the work or services provided. These two forms of relief are based on different principles and will often yield different results. An entitlement to contractual damages will arise upon a breach of contract. What the innocent party may recover will be informed by the contract price, being the amount bargained for between the parties. Conversely, a claim for quantum meruit will arise where equity deems a repudiating party to have unjustly enriched itself by virtue of failing to make payment for work or services provided by another party, and that it would be unconscionable for that party to retain the benefit of the work or services.\(^{70}\) As set out in Sopov v. Kane (No. 2), claims of quantum meruit rest upon the legal fiction that the contract is void ab initio upon repudiation, so that any clause stipulating the amount of payment to be made no longer exists.\(^{71}\) In its place, a claimant’s entitlement to payment will be determined by what the ‘fair market value’ of the work or services conferred to the other party is. This amount may well exceed the contractual value of the work or services.

**Facts of the case**

The applicants, Mr and Mrs Mann, entered into a written contract for the construction of two double-storey terraced houses with the respondent, Paterson Constructions Pty Ltd. After the first terrace house had been completed and handed to the Manns, but before completion of the second terrace house, a dispute arose over, among other things, moneys claimed for variations to building work. The Manns purported to terminate the contract and exclude Paterson Constructions from the site. In response, Paterson Constructions commenced proceedings in the Victorian Civil and Administrative Tribunal (VCAT), alleging that the conduct of the Manns constituted repudiation and purported to accept that repudiation.\(^{72}\) VCAT found that the Manns had wrongfully repudiated the contract and that, pursuant to Sopov, Paterson Constructions was entitled to recover payment for the works on a quantum

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68 [2019] FCA 496.
70 The origins of restitution for unjust enrichment, and the requirement for there to be some form of unconscionability, is set out in Australian Financial Services and Leasing Pty Ltd v. Hills Industries Ltd [2014] HCA 14.
72 See Paterson Constructions Pty Ltd v. Mann [2016] VCAT 2100.
merit basis. That quantum meruit entitlement was calculated by reference to evidence from a quantity surveyor in the amount of A$1,606,313, whereas the amount that could have been recovered by contractual damages was A$971,000.

The appellant court decisions

The Manns appealed the decision of the VCAT before the Supreme Court of Victoria.73 Their primary grounds of appeal, that the VCAT had either misunderstood or misapplied the principles applicable to assessing the value of a quantum meruit claim, and that the proper test was to assess a value on the basis of what was ‘fair and reasonable’ and this required consideration of the contract price, were dismissed. Justice Cavanough held that the Court was bound by the decision of Sopov, which set out that where an owner’s wrongful repudiation of a building contract is accepted by the builder, the contract is deemed void ab initio, and that where the builder elects to claim in quantum meruit, that claim is assessed independently of the contract by reference to the value of the benefit conferred on the owner.

The Manns appealed to the Victorian Court of Appeal.74 Relevantly, they contended that the trial judge erred in holding that the VCAT had correctly understood and applied the legal principles applying to the assessment of a quantum meruit claim by holding that a building contract is void ab initio upon the acceptance by a builder of an owner’s repudiation and by failing to take into account the contract price. This ground was dismissed on the basis that the Court was bound by the decision in Sopov and that any departure from this decision could only be made by the High Court of Australia.

Significance of the decision

The High Court of Australia has granted special leave for the Manns to appeal the decision of the Victorian Court of Appeal.75 The appeal will consider (1) whether a party accepting repudiation of a contract is entitled to be paid upon a quantum meruit as an alternative to contractual damages, and (2) if a quantum meruit claim is available, should the contract price provide a ceiling to the quantum that may be recovered.

There are three likely approaches that the High Court will take:

a that a claimant is limited to a claim in contractual damages;

b that a claimant may choose between contractual damages and quantum meruit, and that the latter may exceed the former; and

c that while a claimant may choose between the two, the contract price will operate as a ceiling to the amount claimable by way of quantum meruit.76

73 See Mann v. Paterson Constructions Pty Ltd [2018] VSC 119.
74 See Mann v. Paterson Constructions Pty Ltd [2018] VSCA 231.
75 See Mann v. Paterson Constructions Pty Ltd [2018] HCATrans 261.
76 For an in-depth discussion of these approaches, see John Eldridge and Timothy Pilkington, ‘Before the High Court – Discharged Contracts and Quantum Meruit: Mann v. Paterson Constructions Pty Ltd’ (2019) 41 Sydney Law Review 255.
I OVERVIEW

The Brazilian legal system, mainly based on codes and legislation, provides for two main categories of civil liability: (1) fault-based liability, based on the culpability theory, in which there must be evidence of the damages suffered, of the occurrence of a faulty act or omission (negligence, imprudence or malpractice) or wilful misconduct, and of the link of causation between the harmful conduct and the damage; and (2) strict liability, based on the risk theory and applied irrespective of the analysis of the offender’s fault or intention, in which there must be evidence of the act or omission (i.e., evidence of its occurrence, and not of the fault or intention motivating it), the damage allegedly suffered by the party and the link of causation between the conduct and the damage. While fault-based liability is the general rule, pursuant to the Brazilian Civil Code, strict liability applies to cases specified in the law (e.g., consumer rights under Law No. 8,078/1990, environmental matters under Law No. 6,938/81) or when the offender’s activity, by its nature, implies inherent risks to third parties (e.g., a carrier of hazardous or flammable substances).

The injured party is entitled to a broad scope of claims for damages, divided into two categories: moral damages, related to anguish, pain and suffering, and damage to property, which comprehends not only the compensatory or actual damages (e.g., an immediate, concrete, proven injury or loss, such as the damage arising out of a wilful misconduct that caused a devaluation of trademark) and loss of profit (i.e., the foreseeable earnings, proven with reasonable certainty, that the injured party would have received in the ordinary course of events if the harmful conduct had not occurred).

In claims for moral damages, the court will assess the indemnification to be granted to the injured party based on the circumstances of the case and on the indemnification standards adopted by the case law in similar cases. In general, the indemnification must consider the financial capability of the parties and must be reasonable and proportional in relation to the repercussion of the injury to avoid the undue enrichment of the injured party. The indemnification for moral damages is generally assessed in court without the need for expert examination.

In claims for damages to property (compensatory or actual damages and loss of profit), the injured party has the burden to prove not only the existence of the conduct, but also the tangibility of the loss and its concrete extension. An expert examination is generally conducted during the litigation to evidence the damage and its figures – although confirming

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the occurrence of a harmful act or omission, there will be no indemnification if the expert examination confirms that such act or omission has caused no concrete damage with financial consequences to the injured party.

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

The quantification of the financial loss has proven to be a considerably burdensome procedural phase for the injured party when it comes to claims for compensatory damages and loss of profit, especially in complex cases. In these cases, a comprehensive, accurate expert examination is crucial for the injured party, as it will only be entitled to receive an indemnification if it is able to evidence not only the occurrence of a harmful conduct, but also the actual, concrete damage with financial consequences arising out of such conduct. Should the injured party be able to evidence only the former but not the latter, there will be no indemnification to be paid by the offender to the injured party as compensatory damages or loss of profit.

ii Evidence

Damage to property (for which a claimant may be entitled to compensatory damages and loss of profit) is generally evidenced by means of expert examinations conducted in the field of knowledge of the matter under scrutiny in each lawsuit. For instance, an engineering examination is needed in cases discussing construction defects on buildings; accountant and economic examination is needed in cases discussing financial loss and loss of profit; medical examination will take place in cases discussing medical malpractice; a chemical composition examination will be demanded in cases discussing defects in the chemical composition of the product; and trademark examination is needed in cases discussing counterfeit.

As addressed below in more detail, the expert examination will be conducted by an expert appointed by the court directly, and the parties will be granted the possibility of appointing their experts to assist the court expert in the production of the technical evidence.

The expert examination will assess the exact amount of the damage suffered by the injured party, comprehending both the damage arising immediately and directly out of the harmful conduct (actual or compensatory damage) and the earnings that the injured party failed to receive as a result of such conduct (loss of profit). There is no limitation in value for the amount of indemnification in Brazil, as it must correspond to the exact amount of the damage suffered by the injured party, compensating it as if the harmful act had never occurred.

There is no law in Brazil authorising punitive damages in addition to compensatory damages or loss of profit, as the amount to be indemnified must correspond to the actual losses suffered by the party. Nevertheless, doctrine has developed a threefold function for the condemnation to pay moral damages, which should concomitantly (1) compensate the victim for the wrongful act that injured its morals and psyche; (2) punish the offender; and (3) prevent the wrongful act from happening again. To some extent, although it is still far from the US standards on punitive damages, this interpretation by the Brazilian doctrine ends up functioning as a sort of ‘punitive damages’ encompassed by the moral damage category.
iii Date of assessment
The compensatory damages and loss of profit will be assessed considering the date in which the harmful conduct has occurred. The expert appointed by the court will be granted access to all relevant information and documents of the case to prepare an expert report, which will take into account the date of the harmful act, the amount of the indemnification sufficient to fully compensate and hold the injured party harmless, and the interest and inflation that will accrue on the amount of indemnification.

The injured party may take several years to file a claim against the offender in view of the applicable statute of limitation period (e.g., three years for torts), resulting in a scenario where the assessment of the damage will occur much later in time in relation to the date on which the harmful conduct actually took place. In such cases, it is important for the injured party to preserve the evidence it has at its disposal to be used in the future to substantiate a claim for damages. To protect the injured party's interests in the meantime, it may file a precautionary measure against the offender to produce pieces of evidence in advance to prevent it from deteriorating.

iv Financial projections
In Brazil, the damage to property that the injured party is entitled to claim compensation for includes (1) the immediate, concrete, actual loss caused by the harmful act or omission (actual or compensatory damages), and (2) loss of profit or revenue, defined as the earnings that the injured party would reasonably and probably have received if the harmful act or omission had not occurred – in this case, the injured party must objectively evidence the high probability of receiving the earnings as a result of the ordinary course of events, as it would be expected without the harmful conduct committed by the offender.

Depending on the underlying matter and on the commercial activities of the parties, the indemnification for loss of profit (e.g., loss of operating revenue) can reach much more substantial figures than those assessed to compensate the actual damage immediately arising from the same harmful conduct.

Under Brazilian law, only direct damage – those suffered by the injured party and that have a direct, immediate and close chain of causation with the harmful conduct – are subject to indemnification. Indirect damage is not indemnifiable, as only the party directly affected would have standing to sue. For instance, court precedents usually hold that the mere devaluation of shares or decrease in dividends arising out of the fraudulent conduct of senior managers causes only indirect damage to shareholders, as the directly harmed party would be the company itself; therefore, in this case, the company, and not the shareholders acting by themselves, would be the entity with standing to claim such loss.

v Assumptions
The assessment of compensatory damages and loss of profit will ordinarily take into account the pieces of evidence produced by the parties, the underlying facts and economic outcome of the harmful conduct.

The methodology of assessment in each case, however, may differ in view of the underlying matter, type of contract and circumstance of the harmful act or contractual breach. In most of the cases, the methodology will be related to economic, accountant, environmental, engineering and medical assessments.

For example, company A hires company B to perform the construction of a certain facility to produce an important product of its portfolio. In view of company B’s complete
default towards the contract, company A will be entitled to claim for (1) reimbursement of the expenses it incurred to hire a third company to perform the construction, and (2) the loss of profit it suffered because of a delay in producing the goods. In this hypothetical case, the assessment of the damage will take into account the actual amount that company A has spent and paid to third parties to remediate company B’s default (accountant examination) and the foreseeable, reasonable gains that company A would have obtained if it had started producing the goods within the expected time (economic and accountant examination).

**vi  Discount rates**

As a general rule, there is no limitation in value for the amount of indemnification for compensatory damages and loss of profit, as it must correspond to the exact amount of losses suffered by the injured party, compensating it as if the harmful act had never occurred (Brazilian Civil Code, Article 945). When assessing the losses, the expert may take into account certain circumstances of the case, such as parties’ concurrent default, plaintiffs’ negligence, economic environment aggravating the loss, etc., which must be evidenced by the parties during the lawsuit.

**vii  Currency conversion**

The amount of indemnification resulting from moral damage or damage to property (compensatory damages and loss of profit) will be assessed by the court in Brazilian reais. The case law recognises contracts stipulating amounts to be paid in currency other than reais as valid, provided that the payment is made in Brazil upon the conversion of the amount into reais according to the exchange rate of the date of payment.\(^2\) In the case of claims for damages based on foreign amounts set forth in such contracts, the same rule will apply and the payment of the indemnification will be made in reais. In the case of decisions rendered by foreign courts, the amount fixed in foreign currency may also be enforced in Brazil upon conversion into reais, if the decision is previously recognised by the Superior Court of Justice.\(^3\)

**viii  Interest on damages**

If the claim is based on a contractual breach, the amount of the indemnification assessed by the court-appointed expert will accrue interest counted from the date on which the defendant was served with process, as well as inflation from the date of the decision confirming the amount of the indemnification or from the date of the contractual breach, depending on the underlying discussion. On the other hand, if the claim is based on a civil wrong arising from an act or omission independently of a contract (tort), the indemnification amount will accrue interest counted from the date of the harmful conduct, and will be subject to inflation from the date of the decision confirming the amount of the indemnification.

\(^2\) AgInt nos EDel no AREsp 1049346/GO, Superior Court of Justice.

\(^3\) SEC 11969/EX, Superior Court of Justice.
The Brazilian Civil Code, Article 406, sets forth that, when the parties have not agreed on the default interest, it will be calculated considering the same index accruing over defaulted taxes payable to the National Treasury.

There is a discussion on whether the index to be considered for the purpose of Article 406 would be the Special Settlement and Custody System (SELIC), which already comprehends interest and inflation and is decided by the Monetary Policy Committee, or 1 per cent per month, which may be coupled with inflation. The Superior Court of Justice has ruled that, unless the decision expressly decides otherwise, the SELIC index will be considered for the purpose of Article 406 of the Brazilian Civil Code. However, the courts in Brazil have ordinarily ruled that the interest should be set at the threshold of 1 per cent per month plus inflation – in these cases, because there was an express court decision on the matter, the 1 per cent interest rate would prevail over the SELIC index for that specific case.

ix Costs
The fees and expenses involved in the production of expert examination aiming to assessing damage to property (to claim compensatory damages and loss of profit) may vary depending on the scope and complexity of the assessment. As a general rule, each party will pay the fees of the assistant expert they have appointed, whereas the fees of the court-appointed expert will be paid by the party that has requested the expert investigation, or else shared when the expert investigation is ordered ex officio by the court or requested by both parties (Brazilian Code of Civil Procedure, Article 95). The defeated party will be ordered to reimburse such costs to the winning party.

x Tax
Amounts paid to the injured party as moral damages or damages to property are generally not subject to income tax, as they do not represent a gain, but merely compensate the losses suffered by the injured party. However, a specific analysis may be needed to confirm the incidence of any other tax over the amount of the indemnification, in view of the circumstances of each case and of the companies and individuals involved.

III EXPERT EVIDENCE
i Introduction
The Brazilian Code of Civil Procedures (Federal Law No. 13,105/2015) sets forth general provisions on evidentiary phase in civil lawsuits. Each party has the burden to prove its own allegations and claims through any sort of evidence available, such as documents, expert examination, witnesses and depositions (Code of Civil Procedures, Articles 369 and 373).

When it comes to expert evidence, the court may confirm the need of producing the expert examination depending on the facts, claims and circumstances of each case. The expert examination may be denied if (1) the confirmation of the fact does not depend on specific technical knowledge, (2) it is unnecessary in view of other pieces of evidence already produced, especially documents, and (3) the production of expert examination is impracticable.

4 Brazilian Civil Code, Article 406: When there have been no contractual provisions on default interest, or if no rate has been stipulated for default interest, or when default interest arises from legal determination, it shall be set at the rate then accruing on past-due tax obligations payable to the National Treasury.
Unlike other jurisdictions, the Brazilian legislation does not provide for a broad discovery allowing the party to oblige its opponent to disclose a vast number of documents and information as evidence in the litigation. Normally, the parties must rely on their own pieces of evidence, use them to substantiate the claims raised in the lawsuit and then submit such evidence to scrutiny by the counterparty and by the court (adversarial principle). However, if a certain document is necessary for the expert examination, the court may order the party to disclose it in court. To substantiate this request for disclosure, the party must satisfy certain legal requirements, such as: to evidence that it does not have access to all relevant documents needed to prove its injury, to evidence with a high level of certainty that the documents exist, are in possession of the counterparty or third party, as well as the purpose of the document and their relevance for the matter under scrutiny.

ii The role of expert evidence in calculation of damages

When it comes to lawsuits involving damages, the evidentiary phase is a necessary step for a decision on the merits. As the Brazilian Civil Code links the duty to indemnify to the proof of fault or wrongful misconduct, as well as to the extension of the damages, the plaintiff shall produce all pieces of evidence needed to confirm the concrete occurrence of the damage and its actual extension to obtain a favourable decision on the merits.

It is technically possible for the plaintiff to allege that an illegal act performed by the defendant has caused losses (i.e., evidencing, at least with minimal grounds, that the losses it is claiming indemnification for actually occurred and caused concrete damage), but stating that the extent or amount of such losses will be assessed during the expert examination phase or after the res judicata through a liquidation phase. In other words, the plaintiff must evidence that such losses have occurred concretely and have caused or are causing damage, but the work of experts appointed by the court is needed to confirm the exact extent of the losses.

iii The court's role excluding and managing expert evidence

Considering the factual background of the dispute, and given the fact that the evidence is directed to the judge's scrutiny, the judge is empowered to delineate the elements of the case and to determine, independently of the parties' request, which pieces of evidence should be produced to enable the rendering of a decision on the merits (Code of Civil Procedures, Article 370). In other words, as the judge is the final addressee of the evidence and has the duty to review it to issue a decision, he or she must order the evidentiary phase. The judge also has discretion to analyse the pieces of evidence attached to the case files to confirm whether additional pieces of evidence are necessary for a more accurate decision on the merits.

The pieces of evidence to be produced in suits for damages would depend on a case-by-case review, as the factual background of the dispute is relevant for the definition of the award and indemnification values.

There is no restriction on the types of evidence to be produced in a civil lawsuit. Although the Code of Civil Procedures contains indication of certain types of evidence that may be produced (i.e., documents, expert examination, witnesses and depositions) the list is considered merely indicative, allowing the parties to request the production of other pieces of evidence, provided that they are not illegal or against the moral standards.

There are specific provisions to be followed in the evidentiary phase. For instance, the parties are obliged to present with the complaint and with the defence all documents related
to their allegations and claims. New documents may be attached to the case files in response to other party’s allegation or in case the party is able to evidence that a document was not available or did not exist by the time of the filing of the complaint or defence.

As a general rule, each party is equally obliged to prove its own allegations and claims raised in the complaint and in the defence. In exceptional cases, the court may impose on the counterparty the burden to produce certain pieces of evidence important for the matter under scrutiny, dynamically allocating the burden of proof among the parties. For instance, in view of the peculiarities of the lawsuit, this inversion on the burden of proof may occur when the party originally obliged to produce the evidence in court cannot do so, or one of the parties has more ready access to the evidence. Such decision shall be properly justified and the inversion cannot take place in cases where the imposition results in an obligation impossible to be complied with (Code of Civil Procedures, Article 373, Sections 1 and 2). This dynamic distribution of the burden of proof may also be agreed by the parties, before or during the lawsuit, as the Code of Civil Procedures allows the parties to allocate the burden of proof by themselves, except in cases of inalienable rights or when the exercise of a right by one of the parties may become extremely difficult.

iv Independence of experts

If the court confirms the need to produce an expert examination, considering the facts, claims and circumstances of the case, it will appoint an expert with technical knowledge and expertise on the matter to conduct the examination. At the same time, the court will summon the parties to appoint their own experts to assist in the works and to submit queries to the expert to guide the technical examination.

Like the judge himself or herself, the court-appointed expert must be an independent and impartial character in the lawsuit, solely intended to guide the judge in the analysis of the technical aspects of the underlying matter. Thus, the court-appointed expert will have the same duty of impartiality and independence and will be subject to the same rules of impediment, bias and disqualification that apply to judges (Code of Civil Procedures, Article 465, Section 1, I). The expert assistants appointed by the parties, on the other hand, are not subject to the duty of impartiality – they will represent the parties and their counsels, from a technical point of view, in supervising and assisting the production of evidence.

The expert is generally appointed by the judge from a list of names of people enrolled in the courts’ registries. The Code of Civil Procedures, however, allows the parties the possibility of agreeing on names (on a single name or on a list of names) of experts to be possibly appointed by the court. This possibility is especially important in high-profile, complex cases, where parties would be able to suggest renowned names with profound expertise and background in the field of knowledge needed to an accurate solution of the matters under scrutiny. However, the judge is not bound to the parties’ joint submission of name. Even if the judge agrees and confirms one of the names jointly submitted by the parties, this expert will be appointed by the court and, therefore, will be subject to the duty of impartiality.

v Challenging experts’ credentials

The parties are allowed to challenge the expert’s credentials within 15 business days counted from court appointment.

In this sense, the parties will be able to sustain not only that the court-appointed expert does not have the necessary technical expertise to perform the technical examination, considering the field of knowledge demanded by the facts, claims and circumstances of the
case, but also submit requests and present pieces of evidence to disqualify the expert owing to impediment and bias. The court will decide on the parties’ challenges to the court-appointed expert (Code of Civil Procedures, Articles 465, Section 1, I, and 468, I and II).

vi Novel science and methods
The parties are allowed to produce any type of piece of evidence to prove their claims and allegations, as long as the intended evidence is not illegal or against moral standards. The same applies to novel science and methods: the party may request their use to prove its claims and allegations. The court will decide whether the method may be used, considering the underlying facts and the circumstances of the case.

vii Oral and written submissions
The court-appointed expert will submit a written report containing at least (1) a summary of the technical aspects of the case, (2) the analysis conducted with the help of the parties’ expert assistants, (3) the indication of the method used in the examination, (4) the responses to the parties’ queries, and (5) the conclusion on the technical matters under discussion. The parties and their expert assistants will be able to scrutinise the court-appointed expert’s report, agreeing or disagreeing with it, totally or partially, or to request clarification or additional analysis, submitting additional queries to complement certain incomplete or inaccurate aspects of the examination.

The party may also request the court to summon the court-appointed expert to attend a hearing to clarify some aspects of the technical examination. In this case, the parties must submit questions intended to be answered by the expert in this hearing.

In cases of low complexity, instead of ordering the production of a thorough expert examination, the court may just question (orally) a professional with expertise on the matter to obtain information and clarification needed for the merits of the case (Code of Civil Procedures, Article 464, Sections 4 and 5).

IV RECENT CASE LAW

i Case 1
The facts of the case
A company was hired to produce a substantial number of electronic devices specifically designed to be used in the projects of another company. The relationship was not formalised by a written agreement, but by an oral agreement. After the plaintiff had produced thousands of units of the device, the defendant decided to change its design, resulting in the loss of all units produced until then.5

The decision
The Superior Court of Justice confirmed that, regardless of the relationship being based on an oral agreement, the imposition of the duty to indemnify arises out of the violation of good faith and breach of legitimate expectations created on the parties (i.e., ‘confidence theory’).

5 Superior Court of Justice, Special Appeal 1.309.972/SP, 4th Chamber, Reporting Justice Luis Felipe Salomão, decided on 27 April 2017.
The decision granted the injured party indemnification for loss of profits and actual damage, owing to evidence of investments performed by the party to comply with the expectation of sale deriving from the oral agreement.

The significance of the decision
The decision expressly confirms that the existence of a written agreement is not essential for the duty to indemnify, as it is possible to assess such duty based on the breach of legitimate expectations that one of the parties has regarding a certain relationship.

ii  Case 2
The facts of the case
This case involves infringement of trademark protection, as the defendant would be using in its products a name very similar to one already registered by the plaintiff, misleading the consumers. The case also discusses whether, owing to the nature of the rights under scrutiny and the associated violations, it would be possible to reach an indemnified amount even without evidence specifically quantifying the losses.6

The decision
The Superior Court of Justice decided that the violation of trademark rights was sufficient to sentence the offender to indemnify, as it was assumed that such violation would cause losses to the injured party. The main justification of the decision is that evidence of substantial damage deriving from the infringement of trademark rights is extremely difficult to procure, owing to the nature of trademark rights. Thus, losses shall be assumed as proven based solely on evidence of infringement of trademark rights.

The significance of the decision
This decision admits that, in exceptional, unique situations such as trademark infringements, where the evidence of the loss may be extremely burdensome or virtually impossible to achieve, an indemnification for substantial damages may be fixed even without specific evidence on the quantification of the loss. This rationale may guide other cases where the violation of rights is undisputed but quantification is virtually impossible.

iii  Case 3
The facts of the case
In this case, the parties discussed infringement of trademark protection, as the hair cosmetic manufactured by the defendant would display a very similar trade dress to the traditional alimentary product manufactured by the plaintiff.7

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6  Superior Court of Justice, Special Appeal 1.661.176/MG, 3rd Chamber, Reporting Justice Nancy Andrighi, decided on 6 April 2017.
The decision
The State Court of Appeals of São Paulo ruled that, although the products have different purposes and do not compete in the same market, and even though Brazilian law is silent on the matter, the trade dress (e.g., box format, colours, graphic styles) of a certain product should be subject to trademark protection. When it comes to the amount of the indemnification, the decision acknowledges that it is virtually impossible to quantify the depreciation of the plaintiff’s product in the market and the associated undue enrichment obtained by the defendant – the decision granted an indemnification corresponding to 20 per cent of the sales revenue of the product under discussion.

The significance of the decision
This decision exceptionally mitigates the legal requirements for the duty to indemnify, fixing an amount based on a percentage over the revenue, even without clear proof of the quantification of the loss. The same rationale may apply to other cases where evidence on the quantification of losses may be extremely difficult or virtually impossible owing to the nature of the rights and relationship.

Case 4
The facts of the case
In this case, the plaintiff requested that an internet search engine company exclude from its public search certain anonymous pages with defamatory statements about the plaintiff.

The decision
The State Court of Appeals of São Paulo ordered the internet search engine company to reveal the identity of the offender and to block access to the offender’s web page. It also ordered the search engine company to pay indemnification for moral damages, owing to its lack of compliance with the court order to block access to the defamatory web page during the course of the lawsuit.

The significance of the decision
The reluctance of the defendant in complying with a court order may give grounds to the duty to indemnify, even in cases where the actual damage was initially caused by a third party, but to a certain extent was perpetuated by the defendant.
Chapter 9

CANADA

Junior Sirivar and Andrew Kalamut

I OVERVIEW

In Canada, damages are awarded to successful parties for their pecuniary and non-pecuniary losses. Non-pecuniary losses generally include pain and suffering or mental distress. A pecuniary loss generally includes losses that can be measured in a monetary sum, arising from loss of property, loss of services, personal injuries, loss of reputation or money, and damage to economic interest. This chapter will primarily focus on Canadian compensatory damages for pecuniary losses that are caused by breaches in Canadian contract or tort law.

The fundamental principle underlying Canadian private law remedies is *restitutio in integrum*, meaning 'restoration to original condition'. Private law damages arising from tort or contractual breaches are meant to be compensatory in nature. The award aims to restore a successful plaintiff to the position it occupied before the legal wrong occurred. Further, compensatory damages do not seek to punish the defendant. There is also an emphasis in Canadian law that damages awards should always be consistent, fair and rational. These principles have informed many, if not all, of the aspects comprising the law of damages in Canada.

Non-compensatory damages, while available in Canada, apply only in certain circumstances where the facts of the case and the defendant's conduct require it. For example, exemplary, nominal, punitive and restitutionary damages fall under the umbrella

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2 2015582 Ontario Ltd (Performance Plus Golf Academy) v. 375445 Ontario Limited (Hydeaway Golf Club), 2017 ONCA 980 at Paragraph 58 (CanLII) [Performance Plus]; citing Milina v. Bartsch (1985), 49 BCLR (2d) 33 at p. 78, 1985 CanLII 179 (BC SC), McLachlin J. (as she then was); Barber v. Vrozos, 2010 ONCA 570 at Paragraph 86 (CanLII); Rougemont Capital Inc v. Computer Associates International Inc, 2016 ONCA 847 (CanLII), at Paragraph 44 (CanLII) [Rougemont].


4 *Performance Plus*, note 2 at Paragraph 58.


6 *Performance Plus*, note 2 at Paragraph 60.
of non-compensatory damages. If equitable principles are found to apply, then monetary relief may be available by way of equitable damages that compensate for losses where a legal common law award would be insufficient.⁷

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

Generally, Canadian courts quantify financial loss and assess damages by valuing what the plaintiff’s position would have been ‘but for’ the defendant’s wrong.⁸ A successful plaintiff is awarded monetary damages to replace its loss; and, if applicable, its lost opportunity, income, or profit that it would have otherwise earned.⁹

ii Evidence

In some cases, it is not always clear what the value of the plaintiff’s loss is. Once liability is established, a plaintiff has the onus of proving its damages with cogent facts and expert evidence where necessary.

Canadian law recognises that the evidence available in a particular case may not precisely quantify the damages award. In these cases, although the plaintiff still bears the onus to prove the facts upon which damages are estimated, the difficulty in quantifying damages does not bar the court from assessing and, if appropriate, awarding damages. A liable defendant is never excused from paying damages because of evidentiary flaws, so long as there is some evidence upon which a court can draw facts to appropriately quantify the loss.¹⁰

In cases involving breach of contract, the contract may provide the best evidence of the plaintiff’s financial loss. Where a contract has not provided for the value of the agreement as a whole or certain terms, the court will determine value by the market price of the goods or services offered.¹¹

iii Date of assessment

The date of assessment for damages is context specific and depends on the wrong that has been perpetrated. The following is an overview of the general principles that guide how the date of assessment is determined in certain instances.

Absent special circumstances, the appropriate date to assess damages for breach of contract or a tort is at the date of the breach.¹² Although there are exceptions to this where fairness requires it, the presumption is not easily displaced.¹³ Canadian law focuses on the early crystallisation for dates of assessment, for the following reasons.

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⁸ Waddams, note 3 at Chapter 1.30.
⁹ id. at Chapter 1.10.
¹⁰ Borrelli v. Chan, 2018 ONSC 1429 at Paragraph 942 (CanLII) [Borrelli], aff’d SFC Litigation Trust v Chan, 2019 ONCA 525.
¹¹ Waddams, note 3 at Chapter 1.660
¹² Rougemount, note 2 at Paragraphs 45, 47 and 50; Waddams, note 3 at Chapter 2.270; Asamera Oil Corp Ltd v. Sea Oil & General Corp, [1979] 1 SCR 663 at pp. 664–65, 1978 CanLII 16 (SCC) [Asamera Oil].
¹³ Rougemount, note 2 at Paragraph 50;
An early crystallisation of the plaintiff’s damages promotes efficient behaviour: the litigants become as free as possible to conduct their affairs as they see fit. Early crystallisation also avoids speculation: the plaintiff is precluded from speculating at the defendant’s expense by reaping the benefits of an increase in the value of the goods in question without bearing any risk of loss.\footnote{Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp, [2004] 246 DLR (4th) 595 at Paragraph 125, 2004 CanLII 36051 (ONCA) [Kinbauri].}

The date of assessment is most commonly disputed when the property that the plaintiff was deprived of has changed in value between the date of the breach and the date of the judgment. This commonly occurs in the context of speculative property, such as shares or other ownership interests in corporations or real estate. If the value of the property in issue has declined during the period leading to trial, the plaintiff is advantaged by the damages being assessed at the date of the breach. For example, consider that a plaintiff enters into an agreement to purchase property for C$1,000, and the defendant then breaches the contract. At the trial, the property is worth only C$500. If damages are awarded as assessed on the date of the breach, the plaintiff will receive double the present value of the property. Such an outcome is often criticised as violating the fundamental principle of damages that the plaintiff is not to be put in a better position.\footnote{Waddams, note 3 at Chapter 1.660.} On the other hand, if the value of the property increases between the date of the wrong and the date of the judgment, the defendant benefits.

If the fluctuation in value would violate principles of equity or would work an unfairness on either party, Canadian courts may exercise their discretion and alter the date of assessment. Canadian courts have done so where no market exists to replace undelivered shares at the date of breach\footnote{Kinbauri, note 14 at Paragraph 126.} or in relation to speculative property, including shares, whose value is subject to sudden and constant fluctuations of unpredictable amplitude.\footnote{Asamera Oil, note 12 at pp. 664–65.}

iv Financial projections

Financial projections are often used to assist the court in quantifying the correct damages award for a prospective loss. For example, financial projections are often used in the context of quantifying future losses from income or profit from a business. Although financial projections may be used to assist in quantifying a plaintiff’s loss, Canadian courts recognise that calculating damages is not a precise science.\footnote{Agribrands Purina Canada Inc v. Kasamekau, 2011 ONCA 460 at Paragraphs 56,68 (CanLII).} The court has wide discretion to draw its own inferences from the facts to determine what a reasonable projection of the future loss is.

Expert evidence is typically required to prepare a financial projection. The methodology used to provide the financial projection is of critical importance. Soundly calculated projections will be given more weight by the court.\footnote{id. at Paragraphs 44–70; Expert evidence is discussed in full, below.}

Although it is ultimately up to the expert and the party’s counsel to determine what methodology is to be used, it should aim to be as realistic as possible.\footnote{For a full discussion regarding expert methodology, see Farley J Cohen & Prem M Lobo, ‘Business value as a measure of loss in litigation contexts: reflecting business ‘reality’ over hypothetical ‘fantasy’ (2011) Adv J [Cohen & Lobo].} For example, where a contract has alternative modes of performance, the financial projection should ensure that it adopts the Canadian presumption that the defendant would have performed the contract in
Canada

the manner that is least burdensome to it. Second, the financial projection should be based on objective facts known at the time of the loss, rather than hypotheticals or information that was obtained with the benefit of hindsight. This is in line with the general Canadian principle that damages ought to be reasonable and not overcompensate the plaintiff.

v Assumptions

In a similar vein to financial projections, assumptions are a necessary and important element in the quantification of prospective losses such as future income, care, financial loss and business.

It is common in Canada for a party to clearly outline the key assumptions a valuator has made in its written expert report. The basis of the valuator’s conclusions ought to be clearly understood if the court is to base its damages award on the report.

Parties can offer damages reports containing different assumptions and calculations to allow the court to assess a number of options. Canadian courts are free to accept or reject the assumptions that underlie the party’s submission quantifying their damages. To challenge the quantification of a damages assessment, the party may critique the assumptions made by another party in their submitted damages calculation. The assumption that is to be accepted by the court ought to be reasonably supported by the evidence and the facts of the case.

vi Discount rates

Discount rates are applied to Canadian judgments to account for the fact that money may be paid in advance of when it otherwise would have been received, thus generating interest that would otherwise not have been earned. The discount rate reflects the rate of interest that the award of damages will earn, the effect of inflation and the effect of income taxes on the award, known as the time value of money.

In Canada, the regimes in various provinces and territories differ on whether the discount rate is legislated or if the rate is determined by the court having heard the evidence. Where imposed by legislation, evidence may be led to rebut the statutory discount rate.

The following table outlines the current discount rates that apply to each province or territory.

<table>
<thead>
<tr>
<th>Discount rates applicable for tort cases across the country</th>
<th>Item of pecuniary loss</th>
<th>Source</th>
<th>Discount rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>British Columbia</td>
<td>Future care</td>
<td>Law and Equity Act, at Section 56(2)(b), BC Reg 352/81</td>
<td>2%</td>
</tr>
<tr>
<td></td>
<td>Future wage loss</td>
<td>Law and Equity Act, at Section 56(2)(a), BC Reg 352/81</td>
<td>1.5%</td>
</tr>
</tbody>
</table>

23 Cohen & Lobo, note 20.
26 Waddams, note 3 at Chapter 3.990.
Canada

<table>
<thead>
<tr>
<th>Item of pecuniary loss</th>
<th>Source</th>
<th>Discount rate</th>
<th>Item of pecuniary loss</th>
<th>Source</th>
<th>Discount rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Future care and wage loss</td>
<td>No mandatory discount rate</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>Future care and wage loss</td>
<td>Queen's Bench Rules, at Section 284B(1)(b)</td>
<td>3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Saskatchewan</td>
<td>Future care and wage loss</td>
<td>Court of Queen's Bench Act, at Sections 83(1) and 83(2)</td>
<td>3%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Manitoba</td>
<td>Future care and wage loss</td>
<td>Rules of Civil Procedure, RSO 1990, Chapter C-43 at Section 53.09 (Ontario Rules of Civil Procedure)</td>
<td>0% for first 15 years, 2.5% thereafter for any later period covered by the award</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ontario</td>
<td>Future pecuniary loss</td>
<td>Civil Code, Regulation under Article 1614</td>
<td>2%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quebec</td>
<td>Other future pecuniary loss</td>
<td>Civil Code, Regulation under Article 1614</td>
<td>3.25%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Future pecuniary loss</td>
<td>Rules of Court, NB Reg. 82-73, at Section 54.10(2)</td>
<td>2.5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nova Scotia</td>
<td>Future pecuniary loss</td>
<td>Civil Procedure Rules, at Section 70.06(1)</td>
<td>2.5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prince Edward Island</td>
<td>Future loss of business income</td>
<td>Civil Procedure Rules, at Section 70.06(2)</td>
<td>2.5%</td>
<td>A party may prove a discount rate to be used in calculating the difference between estimated investment and price inflation rates for calculating the value of damages for future loss of business income</td>
<td></td>
</tr>
<tr>
<td>New Brunswick</td>
<td>Future pecuniary loss</td>
<td>Rules of Civil Procedure, at Section 53.09(1)</td>
<td>2.5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Newfoundland and Labrador</td>
<td>Future pecuniary loss</td>
<td>No mandatory discount rate</td>
<td>2.5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Northwest Territories</td>
<td>Future pecuniary loss</td>
<td>Judicature Act, RSNWT 1988, Chapter J-1, at Section 57(1)</td>
<td>2.5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Nunavut</td>
<td>Future pecuniary loss</td>
<td>Judicature Act, SNWT 1998, Chapter J-1, at Section 56(1)</td>
<td>2.5%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Yukon</td>
<td>Future pecuniary loss</td>
<td>No mandatory discount rate</td>
<td>2.5%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Currency conversion

The Canadian Currency Act

The Canadian Currency Act\(^{27}\) requires that any monetary award in a legal proceeding in Canada be stated in Canadian currency. As a result, many Canadian courts convert awards for loss into Canadian dollars, even if the loss stems from a foreign currency.

Because the date of the assessment of damages is typically the date of breach, fluctuations in foreign exchange rates between the date of the breach and the trial date can become an issue in cross-border litigation. For example, if a plaintiff is wronged and commences an action to recover judgment to satisfy a debt denomination in US currency, and the value of the Canadian dollar decreases between the date of the wrong and the date of the trial, the defendant benefits as fewer US dollars will be required to satisfy the judgment. In the past, Canadian jurisprudence has stubbornly clung to the date of the breach for the currency conversion.\(^{28}\) However, some provincial jurisdictions, such as Ontario and British Columbia, have statutorily prescribed that the currency conversion occurs on the date of judgment.

\(^{27}\) RSC, 1985, Chapter C-52, Section12.

Courts typically recognise that a plaintiff should be subjected to the risk of a fluctuating exchange rate. For example, in the British Columbia Supreme Court decision of *Naturex Inc v. United Naturals Inc*, United Naturals had contracted to have Naturex deliver plant extract products. The shipments were payable in US dollars. When United Naturals stopped paying Naturex, Naturex sued to recover US$248,000 from United Naturals. Between the date the tort occurred and the claim was commenced, the value of the Canadian dollar fell against the US dollar. Unless adjusted, on the date of judgment, United Naturals would have received a ‘windfall’, as it would require far fewer US dollars to pay the judgment in Canadian dollars. The court held that the most appropriate date upon which to order the conversion calculation was the date the claim was actually commenced.

### VIII Interest on Damages
In Canada, pre-judgment interest is typically added to a damages award to acknowledge that if a cause of action arises, and the wronged party waits for years to receive its judgment, the wronged party has been dealt two wrongs. Accordingly, pre-judgment interest is typically calculated from the day the cause of action arose to the date of the judgment.

Post-judgment interest may also apply to damages awards to account for the period of time between the date of the judgment and the date of actual payment.

The application and calculation of interest rates may be provided by the agreement between the parties, which the court will likely uphold. For example, the Ontario Superior Court of Justice recently upheld a post-judgment interest rate of 24 per cent. Although the Court noted this appeared to be ‘excessive’, it held it was necessary to enforce this clause to uphold the principle of freedom of contract between parties.

The applicable statutory regimes govern where there is no agreement, or where the agreement is silent as to interest rates. Legislation from each provincial or territorial jurisdiction within Canada permits or requires the court to award interest on monetary judgments, and provides the applicable rates. Some provinces specify the rate to be applied, but the court is free in all provinces to award interest at commercial rates. Although the

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29 Wei v. Mei, 2018 BCSC 1057 at Paragraph 54 (CanLII), aff’d Wei v. Li, 2019 BCCA 114.
31 ibid.
32 Waddams, note 3 at Chapter 7.330.
33 Waddams, note 3 at Chapter 7.1000.
35 ibid.
36 id. at Paragraph 16.
37 Judgment Interest Act (Alta); Court Order Interest Act (BC); Court of Queen’s Bench Act (Man); Judicature Act (NB), Section 45; Judgment Interest Act (Nfld & Lab); Judicature Act (NWT), Sections 55, 56, 56.1, 56.2; Judicature Act (NS), Section 41; Courts of Justice Act (Ont), Sections 127-8; Judicature Act (PEI), Sections 56-60; Pre-judgment Interest Act (Sask). Also see Waldron, *The Law of Interest in Canada* (Toronto, Carswell, 1992) at pp. 131–59.
38 Waddams, note 3 at Chapter 7.470. See Ontario, for example, which sets out the applicable interest rate in the Courts of Justice Act, RSO 1990, Chapter C. 43 at Section 127(1).
courts retain their discretionary power to adjust the amount of interest that is payable under statute, the legislation in each jurisdiction contains different language, which may limit how a court exercises its discretion.  

Parties should therefore be mindful of the legislation in each province or territory that both specifies a party’s entitlement to interest and may impose limits on whether a court will deviate from the interest award under statute.

ix Costs

The well-established principle in Canadian law is that costs of the litigation follow the result. This means that, generally, the successful party to the litigation is awarded its costs of the action for damages, subject to exceptional circumstances that require the court to exercise its discretion.

Costs are typically awarded on a partial indemnity scale, which typically amounts to 55 to 60 per cent of a reasonable actual rate. Costs may be awarded on an elevated scale in exceptional circumstances. For example, if a party has engaged in conduct during the course of litigation that is worthy of rebuke from the court, such as tactical motions to delay the disposition of the matter, the scale of costs may be adjusted. In proceedings where an offer to settle has been made by a party, and that offer is not accepted, and the action is disposed of by the Court in an amount equal to or worse than the settlement offer, the offering parties is entitled to its costs from the date the settlement offer was made, typically on an elevated scale.

In all cases, costs awards must be fair and reasonable in the circumstances. To give effect to this principle, the court may find that a different costs award is appropriate from what is specified in the legislation.

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39 See Bank of America Canada v. Mutual Trust Co, 2002 SCC 42 (CanLII). In that case, the Supreme Court of Canada held, despite Ontario’s Courts of Justice Act, compound interest could be awarded in some circumstances at common law.
41 For example, see Ontario’s Courts of Justice Act, RSO 1990, Chapter C-43, at Section 131(1); Rules of Civil Procedure, RSO 1990, Chapter C-43 at Section 57.01(1). In The Law of Costs, Orkin has also classified several categorical exceptions to the general rule that costs follow the result, following the case of Cooper v. Whittingham: (1) misconduct of the parties; (2) miscarriage in the procedure; (3) oppressive and vexatious conduct of the proceedings; and (4) other cases.
43 Orkin, note 40 at Chapter 205.2
45 ibid.
In Canadian law, there is no deduction to the plaintiff’s damages award for the income tax that would have been paid on a compensatory award for lost income, earnings, or profit.\(^46\) Canadian law rejects that the defendant can reduce the amount of damages owed to the plaintiff on the grounds of applicable taxes. Canadian courts have referred the question of how to tax damages awards to the Canadian legislature as a matter of tax policy.\(^47\)

In very limited circumstances, a tax benefit may reduce a damages award where it is found that ‘but for the loss’, the plaintiff would otherwise not have received tax benefit.\(^48\) This is only where sufficient evidence is led to specifically calculate the tax benefit and it is not merely hypothetical.\(^49\)

### The taxation of the damages award

Once the plaintiff has received a damages award, how the award is taxed under Canada’s Income Tax Act (ITA), from either the payor or payee’s perspective, depends on how the award is characterised with reference to the provisions under the ITA and the existing jurisprudence, if any.\(^50\) Although the jurisprudence in this area is not always clear, general rules have emerged that can assist counsel in determining the tax liability that may arise from a damages award. Counsel must carefully scrutinise what type of damages award is being received.

Under the ITA, a taxpayer is liable to pay tax on any income arising from the non-exhaustive ‘source’ listed in the ITA, which is income from office, employment, business and property, or any other provision under the ITA that may give rise to tax liability.\(^51\) Further, the damages award may be taxable if it is compensation for taxable income under the ITA.\(^52\) If the award is compensation for a non-taxable capital receipt, then it is likely not taxable.\(^53\)

Based on these principles, it is clear that if the damages award can reasonably be considered to be income that would otherwise be taxable under the ITA then it is taxable in the hands of the recipient.\(^54\) For example, the compensation for a finder’s fee, loss of profits, or disability insurance benefits in arrears have all been held to be taxable as income.\(^55\) A

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\(^{47}\) *Cunningham*, note 45; *Waddams*, note 3 at Chapter 3.950.


\(^{49}\) ibid.


\(^{51}\) ITA, note 49 at Section 3.


\(^{54}\) Bulletin IT-365R2, note 51; *Schwartz*, note 50 at Paragraph 52.

\(^{55}\) CED 4th (online), Income Tax, ‘Damages and Settlements’ at (IV.7.(a)) Section 301 [CED].
payment for damaged or destroyed property is treated as a taxable capital receipt that would otherwise have been received had the property been sold. Punitive damages are considered to be ‘windfalls’ that are non-taxable.

Damage awards for personal injury claims are treated differently. All amounts that qualify as pecuniary special or general damages are excluded from taxable income regardless of the fact that the amount of such damages may have been determined with reference to loss of earnings of the taxpayer.

From the payer’s perspective, as a general rule, a damages payment and related costs will be deductible if incurred for the purpose of earning, producing or protecting business income; acquiring or protecting a capital asset.

III EXPERT EVIDENCE

i Introduction

The use of expert evidence is an exception to the ‘opinion rule’ established in Canadian common law that requires a witness to testify to facts gained from their senses. In addition to the principles discussed below, Canadian jurisdictions have legislated procedural preconditions that must be complied with in order for written and oral expert evidence to be admitted at trial.

ii The role of expert evidence in calculation of damages

Expert witnesses are frequently retained in commercial and personal injury matters to assist the court in quantifying the plaintiff’s loss. The purpose of expert evidence is to assist the court to understand the evidence regarding the party’s loss so that the court can reach the correct damages award.

For example, accounting, financial or valuation experts are frequently called upon by parties to assist the court in the quantification of damages. In particular, courts routinely admit expert evidence in cases where the quantification of a financial loss or business value is complex, involves a significant dollar amount, or is in dispute between the parties.

56 ibid.
58 Bulletin IT-365R2, note 51; Bellingham, note 57 at Paragraph 45; CED, note 55 at (IV.7.(b)) Section 303.
60 Gordon D. Cudmore, Civil Evidence Handbook (Carswell: 2018) (loose-leaf, online version) at Chapter 14.1 [Cudmore].
61 For more information relating to the jurisdiction, see the Provincial Rules of Practice and Provincial and Federal Evidence Acts.
62 For further discussion on how Canadian courts weigh the evidence of parties, please see Cudmore, supra note 60 at Recommended Readings: Prem M. Lobo and Peter J. Henein, ‘Credibility under scrutiny: A study of the weight placed on expert valuation and damages evidence in Canadian court judgments.’
63 ibid.
The court’s role excluding and managing expert evidence

Admission of expert evidence for a damages assessment depends on whether it meets the following basic criteria established by the Supreme Court of Canada in *R v. Mohan*: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert. The evidence will not be admitted if the court finds that the expert opinion does not meet this criteria.

Once expert evidence is admitted, the trier of fact (typically a judge, as opposed to a jury, in commercial matters) determines how much weight is to be afforded to an expert’s testimony when reaching its conclusion. For example, in *Rousta v. MacKay*, even though the court admitted the expert’s opinion into evidence, it placed no weight on the opinion concerning the valuation of the plaintiff’s future income-earning capacity. This was because the expert’s methodology and assumptions had failed to account for certain factors when projecting for the plaintiff’s businesses future income. In this case, the expert had made a projection assuming the plaintiff would work full-time, without considering that throughout the business’ past performance the plaintiff had only worked part-time.

Independence of experts

To be considered a properly qualified expert under the *R v. Mohan* framework, the expert must be able to fulfil his or her overriding duty to give an opinion that is impartial, independent and absent of bias. The impartiality and independence of an expert is a threshold requirement that the court considers in determining whether the expert is properly qualified to give an opinion on the issue in question prior to admitting his or her evidence. Expert evidence should be ruled inadmissible if the expert is not impartial, in the sense that they cannot objectively assess the questions at hand. Expert evidence is also inadmissible when it is established that he or she is providing evidence that is not the product of his or her independent judgement.

Many provinces and territories also provide explicit requirements related to the independence of expert witnesses.
Independence does not require that counsel and the retained expert do not consult with one another in preparing for litigation. For example, in *Moore v. Getahun*, the Ontario Court of Appeal determined that consultation and collaboration between counsel and expert witnesses is essential to ensure that the expert’s report assists the court in determining the issues. Collaboration between counsel and a retained expert does not necessarily erode the ability of the expert to remain independent and objective.  

A recent example that illustrates the importance of an independent expert is *Davies v. The Corporation of the Municipality of Clarington*. In this case, a plaintiff who had been injured retained an accountant to give evidence regarding the plaintiff’s past and future earning capacity. Finding that the expert’s evidence was ‘little more than a regurgitation of what he was told’ by the plaintiff, the Ontario Superior Court excluded the evidence because the expert had not independently reviewed the evidence in reaching their conclusions. The exclusion of this evidence left the plaintiff without an expert to assist the court in quantifying his losses. Instead, the trial judge quantified damages after considering documentary and lay witness evidence. The trial judge made no award for past or future loss of income. The plaintiff had requested damages in excess of US$60 million, partly comprised by his request for US$2,555,136 per annum to age 65 for past and future loss of income. Instead, the plaintiff was awarded general damages of US$50,000.

v Challenging expert’s credentials

As discussed, an expert must be properly qualified to give evidence on the subject matter to which his or her testimony relates. An expert’s credentials are considered by Canadian courts in qualifying the expert. Once the trial judge rules that the witness has the requisite credentials to provide opinion evidence in relation to a damages assessment, the extent of the expert’s accomplishments and experience is a matter of weight to be given to that expert’s opinion.

At the admissibility or qualification stage, whether the expert has the requisite credentials or not depends on particular facts of the case, the expert and the opinion that he or she is offering. Canadian courts do not apply a rigid analysis in assessing an expert’s credentials.

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Saskatchewan Queen’s Bench Rules, Section 5-37(3); British Columbia Supreme Court Civil Rules, Section 11-2(2); Ontario Rules of Civil Procedure, Section 53.03(2.1); Nova Scotia Civil Procedure Rules, Section 55.04(1)(a); Prince Edward Island Rules of Civil Procedure, r. 53.03(3)(g).

74 2018 ONSC 4370 (CanLII)
75 id. at Paragraph 79.
76 id. at Paragraphs 95–96, 113–114.
77 id. at Paragraph 451.
78 id. at Paragraph 6.
80 ibid.
81 *R v. Pham*, 2013 ONSC 4903 at Paragraph 31. In the context of a drug case involving a large quantity of heroin, Durno J set out a lengthy list to consider in determining whether a proposed expert witness is adequately qualified. The factors listed are as follows: the manner in which the witness acquired the special skill and knowledge upon which the application is based; the witness’ formal education (i.e., degrees or certificates); the witness’ professional qualifications (i.e., a member of the College of Physicians and Surgeons); the witness’ membership and participation in professional associations related to his or her proposed evidence; whether the witness has attended additional courses or seminars related to the areas of

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As long as the trial judge is satisfied that the witness is sufficiently experienced, the court will not focus on whether the expertise was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.\textsuperscript{82}

On the issue of weight, the more tailored a party’s expert’s credentials are to the expert opinion he or she is providing, the more likely that the party’s expert’s opinion will be accepted or favoured by the court.\textsuperscript{83} This is especially important if the court is faced with opposing experts who are similarly qualified. For example, in \textit{Orr v. Metropolitan Toronto Condominium Corp No 1056}, both experts were qualified to give an opinion regarding the valuation of the difference between a two-storey and three-story condominium unit. However, the court preferred the evidence of the plaintiff’s expert. This was in part because one of the defendant’s experts had testified that they were not familiar with the authoritative textbook for appraisers in Canada.\textsuperscript{84}

\textbf{vi} \hspace{1em} \textbf{Novel science and methods}

An expert opinion that is based on novel science or a novel methodology must meet the same framework for admissibility as set out above. The Supreme Court of Canada has further held that a novel scientific theory or technique is subject to special scrutiny. Prior to being admitted, an opinion based on novel science must satisfy the basic threshold test of reliability.\textsuperscript{85} While there is a more intense investigation into the reliability and validity of the science underlying the opinion, there is no requirement that the science on which the opinion is based must be generally accepted in the scientific community.\textsuperscript{86}

A court may evaluate the reliability of novel science or methods based on factors identified by the United States Supreme Court in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc}, which has been adopted in Canada.\textsuperscript{87} These factors include whether the theory or technique can be and has been tested; whether the theory or technique has been subjected to peer review and publication; the known or potential rate of error or the existence of evidence in dispute; the witness’ experience in the proposed area or areas; whether the witness has taught or written in the proposed area or areas; whether, after achieving a level of expertise, the witness has kept up with the literature in the field; whether the witness has previously been qualified to give evidence in the proposed area or areas, including the number of times and whether the previous evidence was contested; whether the witness has not been qualified to give evidence in the proposed area or areas and if so, the reason or reasons why; and whether previous case law or legal texts have identified the contested area as a proper area for expert evidence and, if so, who might give the evidence. After considering these factors, Durno J found that a police officer could testify (with the exception of a few issues) based on his years of experience dealing with heroin users, although he had no scientific background.

\textsuperscript{82} Sopinka, note 79 at p. 853 (emphasis added).

\textsuperscript{83} See for example: \textit{Municipal Property Assessment Corp, Region No. 15 v. Clublink Corp}, 2009 64 OMBR 225; CarswellOnt 8241. The defendant put forth an expert to opine on the valuation of golf course facilities. The expert had numerous professional certifications specifically regarding the appraisal of golf courses, and was considered a ‘leading authority’.

\textsuperscript{84} \textit{Orr v. Metropolitan Toronto Condominium Corp No. 1056}, 2016 ONSC 7630 at Paragraphs 28, 33, 2016 CarswellOnt 19819.

\textsuperscript{85} \textit{Mohan}, note 64 at Paragraph 28.


\textsuperscript{87} id. at Paragraph 33.
standards; and whether the theory or technique used has generally been accepted.\textsuperscript{88} This is a flexible analysis and these factors are non-exclusive.\textsuperscript{89} What factors the court considers and the weight given to each is case specific.\textsuperscript{90}

vii Oral and written submissions

In Canadian litigation, the parties in a trial before a judge may make both oral submissions and written submissions regarding the appropriate damages award if liability is established. There are typically only oral submissions in trials before Canadian juries.

IV RECENT CASE LAW

i Apotex v. Nordion (Canada) Inc

In January 2019, the Ontario Court of Appeal upheld a trial judge's award of C$8.3 million in damages to Apotex Research Inc (Apotex) arising out of breach of contract and negligence by a pharmaceutical company that Apotex had enlisted to conduct clinical research studies in support of Apotex's application to the Federal Drug Administration (FDA) for the approval of two drugs.\textsuperscript{91}

The damages decision in Apotex is notable for the trial and appellate courts’ consideration of the test for assessing lost profits based on market share, and the weight given to an expert’s opinion on causation where that expert’s credentials are tailored to the specific subject matter of the opinion.

The facts of the case

Apotex entered into agreements with MDS Pharma Services (MDS) (now Nordion), a full-service pharmaceutical contract research organisation, to carry out bioequivalence studies that were included in Apotex's US FDA applications for the approval of two generic drugs. As a result of MDS’s failure to comply with the US regulatory framework for conducting research studies, the FDA refused to accept the MDS studies with Apotex's submissions, requiring Apotex to repeat the studies, which delayed US market entry. Apotex sued MDS for breach of contract and negligence in relation to its losses flowing from those delays.

The decision

The trial judge held that MDS’s failure to meet US regulatory requirements amounted to both negligence and a breach of contract. This finding entitling Apotex to compensation for repeat study costs and lost profits arising from the delay in bringing the two drugs to market.

On the issue of damages, the determination of lost profits required a calculation of two variables: first, the period during which Apotex would have sold the two drugs on the US market ‘but for’ the delay caused by MDS’s breaches (i.e., the delay period); and second, the net revenue Apotex would have earned during the delay period, based on its projected sales, less its projected costs of manufacturing and distribution. The determination of projected

\textsuperscript{88} ibid.

\textsuperscript{89} R v. Trochym, 2007 SCC 6 at Paragraph 139 (CanLII).

\textsuperscript{90} id. at Paragraphs 139–141.

\textsuperscript{91} Apotex v. Nordion (Canada) Inc, 2019 ONCA 23 [Apotex].

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sales depended, in part, on Apotex’s estimated market share for the drugs in the generic market. The greater its market share, the higher the estimated sales during the delay period, and the greater the damages.  

Both parties called expert evidence to establish the ‘but for’ world, including experts in business valuation that sought to quantify Apotex’s loss. Both experts followed the same methodology to determine Apotex’s net revenues, but disagreed on its estimated market share for the drugs.

One of MDS’s experts was qualified as an expert on the marketing and sales of pharmaceuticals, including generic drugs. He prepared a report on Apotex’s estimated market share and critiqued the methodology used by Apotex’s damages expert (who was not a pharmaceuticals expert). MDS’s expert considered the best predictor of Apotex’s market share in the ‘but for’ world to be its actual market performance, and calculated market share using a weighted average based on Apotex’s actual market share for each drug. Apotex’s expert estimated market share based on average and median market share achieved by ‘comparator’ drugs manufactured by Apotex, and exercised his professional judgement to create a ‘smooth ramp-up’ of market share over the delay period.

The trial judge preferred the evidence and approach of MDS’s experts, and rejected the approach to market share used by Apotex’s expert. The trial judge awarded C$609,420.38 in lost profits arising from the delay in selling one of the drugs, C$7,729,781.10 in lost profits from the second drug, C$2,963,930.31 in reimbursement costs for the repeat studies and prejudgment interest of C$3.4 million.

MDS appealed and Apotex cross-appealed the quantification of damages based on its original lost profits claim for C$12.6 million. The damages issue in the cross-appeal was the trial judge’s finding concerning Apotex’s prospective market share.

At the Court of Appeal, Chief Justice Strathy dismissed Apotex’s cross-appeal and upheld the trial judge’s C$8.3 million damages award. The court held that the ‘palpable and overriding error’ standard of review applies to a trial judge’s assessment of conflicting expert evidence. On that standard, the court accepted the trial judge’s reasons for accepting MDS evidence on the basis that MDS’s expert had relevant expertise in matters of pharmaceutical sales and marketing that Apotex’s expert lacked.

**The significance of the decision**

The Apotex appeal illustrates the importance of ensuring an expert is properly qualified to give evidence on the issue of damages. As discussed above, the more tailored a party’s expert’s credentials are to the opinion they are providing, the more likely that the court will accept or favour that party’s expert’s opinion. As Apotex illustrates, this is especially important if the court is faced with opposing experts who are similarly qualified.

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92 id., at Paragraphs 130–13.
93 id., at Paragraphs 133–134.
94 id., at Paragraphs 134–135.
95 id., at Paragraph 136.
97 Apotex, note 96 at Paragraph 139.
98 id., at Paragraphs 129–139.
99 id., at Paragraph 139.
100 id., at Paragraph 138.
In February 2018, the Ontario Court of Appeal held that a lawyer’s duty to his or her client includes the duty to advise clients of the quantum of recoverable damages notwithstanding the client’s commercial sophistication.101 The plaintiff, Oravital, claimed its former lawyers, Aird & Berlis LLP, were negligent in failing to advise that its damages had crystallised years earlier and its lost profit and damages claims were no longer tenable.

The facts of the case
Oravital Inc is a private company that sells dental hygiene products to dental clinics throughout North America. In 2009, Oravital entered into discussions with an investor who signed a non-disclosure agreement and was given access to Oravital’s proprietary information as part of its diligence exercise. The transaction did not proceed. Shortly after, the investor started two competing businesses that offered services nearly identical to those offered by Oravital.

Oravital retained Aird & Berlis as counsel to bring a lawsuit against the investor alleging misappropriation of Oravital’s confidential information to launch competing businesses. Aird & Berlis prepared a claim seeking C$5 million in general damages, including damages for loss of profit and corporate opportunity and C$2 million in punitive damages.

A few months after Oravital commenced its action, the investor ceased operating its competing businesses. At the time, Oravital was still in start-up mode and had yet to make any profit. The investor advised Oravital that his competing businesses had also not made any money. Aird & Berlis advised Oravital that the closure of the competing businesses had ‘no effect’ on the strategy for the litigation, and spent the next four years pursuing Oravital’s claim, billing over C$500,000 in legal fees. Aird & Berlis never advised Oravital that (1) its damages had been crystallised when the competing businesses closed, (2) its damages were negligible because no profit was lost, or (3) that the C$5 million general damages claim was no longer tenable.

Nearly five years after the commencement of litigation, Oravital terminated its retainer with Aird & Berlis. Aird & Berlis then sued Oravital to recover C$182,569.63 in unpaid legal fees. Oravital defended the claim by alleging that Aird & Berlis was negligent in failing to advise that damages had crystallised in March 2011 and were likely negligible. Oravital’s expert opined that Aird & Berlis had breached the standard of care of a barrister practising in Ontario by failing to reassess the litigation after the competing businesses closed, and by failing to provide Oravital with any meaningful assessment of its recoverable damages.

The motion judge ruled in favour of Aird & Berlis on summary judgment. The Court did not determine whether Aird & Berlis met the standard of care, but held that even if Aird & Berlis had breached the standard by failing to advise Oravital as to the quantum of recoverable damages, the breach did not cause Oravital damage. According to the motion judge, Oravital’s principals were sophisticated businesspeople who were actively involved in the litigation and therefore knew, or ought to have known, of the nominal value of their claim.

Oravital appealed. It claimed that the motion judge erred in law in concluding that sophisticated businesspeople are presumed to understand their entitlement to damages in a complex commercial proceeding. Damages are a legal concept, not simply a financial one, and a lawyer has a positive obligation to advise even sophisticated commercial clients of the quantum of recoverable damages.

101 Oravital v Aird & Berlis LLP, 2018 ONCA 164.
The decision

The Court of Appeal agreed with Oravital, overturning the lower Court's decision. In a brief decision, it held that:

the motion judge erred in law in finding that the appellants as sophisticated businesspeople were aware of the value of the damages and risks of litigation. This finding reflects a misapprehension of the solicitors' duty of care to advise the clients about the legal basis for the damages and the risks of litigation.

The significance of the decision

Oravital appears to be the first time a Canadian appellate court has held that lawyers have a duty to advise clients on the issue of damages at an early stage of litigation. The decision demonstrates the importance for counsel to advise even sophisticated clients of the prospective value of a claim and the risks of litigation, both from the outset of the litigation and as circumstances change and evolve.
Chapter 10

INDIA

Percival Billimoria

I  OVERVIEW

India follows the common law system. Judicial decisions of the courts of the UK (or other common law jurisdictions) are not binding on courts in India. However, such precedents have persuasive value and may be turned to for guidance in situations where the courts in India may have not established the jurisprudence on a particular question of law.

The law of damages in India pertaining to breach of contracts is contained in the provisions of Sections 73 and Section 74 of The Indian Contract Act, 1872 and judicial decisions pertaining to these provisions. There are also provisions for damages in several other statutes such as The Sale of Goods Act, 1930, statutes pertaining to the protection of intellectual property rights. This chapter contains the law of India on damages from breach of contracts, more specifically compensatory damages and does not include the law of damages in tort or under specific statutes.

The law of damages in India is prone to misconceptions largely because the statute itself is quite antiquated and the resulting extensive reliance on English law, which may not be contextually understood. However, Indian courts have over the years pronounced judgments that adopt developments in common law on the subject and with conceptual clarity, which can only be lauded.

II  THE LAW ON DAMAGES

i  Section 73 of The Indian Contract Act, 1872 (Section 73)

Section 73 embodies the common law on damages first set out in Hadley v. Baxendale. The statute itself refers to ‘compensation’ and provides that the party suffering the breach must be compensated for loss or damage ‘which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it’.

Section 73 further clarifies that there can be no compensation for any ‘remote or indirect loss or damage’ sustained by reason of the breach.

1 Percival Billimoria is a counsel at Chambers of P S Billimoria. The author acknowledges Aamir Khan and Sanandika Pratap Singh for assistance rendered.

2 Prior to the enactment of The Sale of Goods Act, 1930, provisions pertaining to sale of goods were contained in Chapter VII of The Indian Contract Act, 1872.

3 (1854) EWHC J70.
ii   Breach of contract – an essential prerequisite

An essential prerequisite for a damages claim is breach of a contract.

The common law principle that a party cannot be allowed to benefit from its breach is well recognised. Accordingly, in early decisions it was found to be essential that the plaintiff had performed or was prepared to perform its obligations under the contract and was not itself in breach.

This rule is commonly followed in contracts for simple transactions such as sale of a chattel or property where the buyer who defaults in paying consideration cannot recover damages from the seller in breach. However, in more complex commercial transactions where a suit for damages can be expected to be followed by a counterclaim, the plaint should be decided on the question of which party committed the first breach as well as the question of whether the subsequent breach was consequential to the first breach and whether the obligation to perform the subsequent breach was qualified by the performance of the first breach. A party may also have breached an obligation separate and distinct from the one for which it instituted the plaint, in which case a set-off for the counterclaim may be allowed if both breaches are found to have occurred independently of each other.

iii   Underlying principle of damages as a remedy for breach

Damages as a remedy for breach of contract is premised on the fundamental principle that the plaintiff who has suffered a loss because of breach must be put in the same position in which it would have been, had such breach not have occurred. This follows the English law principle set out in Robinson v. Harman.4

This principle was reiterated in British Westinghouse Electric and Mgf Co Ltd v. Underground Electric Railways Co of London Ltd,5 quoted as follows:6

That as far as possible he who has proved a breach of a bargain to supply what he has contracted to get is to be placed as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis thus is compensation for the pecuniary loss which naturally flows from the breach, or as stated by Lord Wright in Monarch Steamship case,7 broad principle of the law of damages is that the party injured by the other party’s breach of contract is entitled to such money compensation as will put him in the position he would have been in but for the breach.

This approach is commonly referred to as ‘expectation interest’, which requires the courts to endeavor to restore the plaintiff’s position as if the contract had not been breached (i.e., as if the expectations from the performance of the contract had been realised). Such damages would include compensation for the loss because of the defective performance or curing of such defective performance and the loss or cost incurred as a direct consequence of such defective performance.

It follows that the damages arising out of breach may either be what one would normally expect (also referred to as direct or general damages) and loss arising as a consequence of the

4 (1848) 1 Ex 850.
7 Monarch Steamship Co Ltd v. AIB Karlschanss Oljefabrikker (1949) AC 196 at 220 per Lord Wright, [1949] 1 All ER 1 at 12.
breach (also referred as indirect or special damages). Direct damages are losses, costs and 
expenses that would normally arise, while consequential damages are peculiar to the plaintiff 
and may not therefore be said to follow naturally from the breach. It is necessary that the 
fact that such damages may arise was within the knowledge of the parties at the time that the 
contract was entered into.

It is noteworthy that the test of whether the parties had knowledge at the time of 
entering into the contract of the loss or damage likely to result by its breach is different from 
the test set out in *Hadley v. Baxendale*, which requires only a reasonable supposition that the 
parties had been in contemplation of such damages as the probable outcome of breach. The 
distinction is not strictly followed by courts in India, which adopt the criteria of whether it is 
reasonable to suppose that the implications of breach would likely have been known and not 
whether it was actually known or disclosed.

It has been recognised that:

> The word ‘contemplation’ is considered more accurate to describe the state of mind required 
> for operation of the second branch of the rule, than foresight or reasonable foresight. As regards 
> contemplation, the plaintiff need not show that the parties contemplated the breach, or that the 
> defendant actually considered the loss likely to result from it, but that a reasonable person in the 
> position of the defendant would have concluded, upon consideration of the matter that the given type 
> of loss was like to result.

Nevertheless, the principle in *Robinson v. Harman*, when applied to consequential damages 
could result in some difficulty in ascertaining the measure of such damages, especially because 
the question of whether the consequential loss was within the reasonable contemplation of 
parties is applied. In *Kanchan Udyog Ltd v. United Spirits Ltd (Kanchan Udyog)*, the Supreme 
Court of India in consideration of the question of the casual connection between the breach 
and the loss sustained relied on *Chitty on Contracts* within *Kanchan Udyog* to find that the 
‘important issue is whether a particular loss was within the reasonable contemplation of the 
parties’.

### iv  Duty of mitigation of loss

Indian courts have recognised the English law principle of the duty of the plaintiff to mitigate 
the loss caused by breach of the contract.

The Explanation to Section 73 of the clarifies as follows:

> In estimating the loss or damage arising from a breach of contract, the means which existed of 
> remedying the inconvenience caused by the non-performance of the contract must be taken into 
> account.

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8 Nilima Bhadbhade (ed.), Pollock & Mulla, The Indian Contract Act and Specific Reliefs Acts, Volume II 
(updated 14th edn, LexisNexis Butterworths), pages 1190–1191.
9 The Heron II, Koufos v. C Czarnikow Ltd (1969) 1 AC 350, [1967] 3 All ER 686 at 716 per Lord Upjohn, 
[1967] 3 WLR 1491 (HL).
11 The Heron II, Koufos v. C Czarnikow Ltd (1969) 1 AC 350, [1967] 3 All ER 686 at 700-701 per Morris, 
[1967] 3 WLR 1491 (HL).
The Supreme Court of India in *Murlidhar Chiranjilal v. Harishchandra Dwarkadas*, in setting out the measure of damages, held that when a breach of a bargain to supply goods is proved, the party must ‘be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claim in any part of the damage which is due to his neglect to take such steps’.

**v No gain or benefit**

Section 73 in its terms is compensatory in nature. Further, to put the plaintiff in the same position as it would have been if there were no breach, it follows that the damages awarded must be commensurate with the loss incurred. The plaintiff cannot therefore benefit from the breach and damages for breach cannot include an element of profit. This is so even if the defendant has gained from the breach and the measure of the damages awarded is less than the quantum of the profit reaped by the defendant. Damages are based on loss to the plaintiff and not the gain to the defendant.

It follows as a natural corollary that any gain or benefit to the plaintiff arising as a direct consequence of the breach of the contract should be adjusted from the amount of loss sustained.

**vi Exemplary or punitive damages**

The provisions for damages for breach of contract are compensatory in nature. The objective of damages is to place the injured party in the same position as if performance had occurred, and damages are not intended to be a deterrence against breach. Indian law does not therefore require damages to be punitive or exemplary.

This general rule pertains only to damages for breach of contract. In the recent past, Indian courts have awarded punitive damages in cases of tort, breach of duty and violation of intellectual property rights. These aspects are not within the scope of this chapter.

**vii Causation**

An important aspect to be determined is whether the breach caused the loss. This is apparent from Section 73 itself according to which the plaintiff suffering a breach is entitled to compensation ‘for any loss or damage caused to him thereby’. There has to be a clear nexus between the breach of contract and the loss or damage to be compensated.

It is noteworthy that the nexus of the breach to the loss to the plaintiff is required to be proximate or *causa proxima*, and not remote if damages have to be awarded as a remedy for the breach.

The law pertaining to causation reiterated by the Supreme Court of India, is similar to English law and may be summarised as follows:

1. if the loss or damage to the plaintiff did not occur consequential to the breach, damages would not be awarded; and
2. if there is more than one cause for the plaintiff sustaining loss or damage, the breach must be the dominant cause for the loss or damage.
There could be situations where there are two causes for the occurrence of the loss, both of which contributing equally to such loss while one of the causes is breach of the contract. There is as yet no definite finding on such a situation in Indian law. English law, however, imposes liability for breach on the defendant in such a situation.

viii Claims for loss of profit attributable to breach of contract

The ‘expectation interest’ of the plaintiff requires that the injured party be placed in the same situation as it would be if there were no breach of the contract. This may be further classified into two requirements: (1) that the injured party or plaintiff be put in the same situation as if the performance of the contract had not been breached, and (2) further, that where the performance is designed to put the injured party in a position where it would enable it to carry on business and earn profits, then it must be compensated for such profits lost in the absence of performance.

A commonplace example is where the contract breached is one of supply of goods where the buyer would have in turn used the goods to trade or convert to finished products, which when sold would have reaped a profit.

It is noteworthy that a claim for loss of profit is not an exception to the general rule that damages cannot include an element of gain. The profits lost are those that would have been earned, but for the occurrence of the breach. Further, profits that are not earned are in fact a loss and a claim for damages comprising of loss of profits is in fact a claim for compensation of a loss.

ix Incidental losses

The rule of *causa proxima* need not limit damages for incidental losses. The classification of losses such as ‘incidental’ does not determine the question of whether these would be awarded as damages, as the nomenclature of damages and losses is not relevant.

Incidental losses include those that may not necessarily pertain to the subject matter of performance, but this does not mean that such losses become remote only because they may be said to be incidental. The test of causation and remotesness is to be applied only in determining how losses arose, and the question of whether the losses are incidental or not is not a determining factor.

Incidental losses may also be sustained in discharging the duty of mitigation and would therefore arise after the event of breach becomes known.

Incidental losses may be either in the normal course of things or consequential and where these are consequential, the question of whether these were in the contemplation of the parties at the time of the contract would be a factor to be considered.

x Reliance interest

A claim for damages comprising of compensation for expenses incurred in preparation of expected performance by the counter party is maintainable to protect what is said to be ‘reliance interest’, that is, outlays made in reliance of the contract and on the belief that performance will be forthcoming as per the contract. In the absence of performance and subsequent breach of the contract, the plaintiff party having made such outlay incurs a loss to that extent.

While a claim premised on reliance interest is maintainable, it is noteworthy that such a claim, if awarded, would put the plaintiff in a situation as if it would not have entered into
the contract in the first place. This is in contrast to expectation interest, where the premise is to put the plaintiff in a situation as if performance had occurred. It is not therefore normally open to a plaintiff to sue for damages under expectation interest as well as reliance interest.

xi  Specific Relief Act

The rule of enforcement bestowed upon courts in India the discretion to enforce performance of a contract. Certain contracts, however, were not enforceable.14 These included contracts of a personal nature or one where the enforcement would require ongoing supervision of the court. Further, a contract was not specifically enforceable if compensation in damages was considered to be adequate relief for its non-performance.

An amendment to this statute15 now provides that specific performance is in fact the rule subject to limited exceptions. Therefore, specific performance is now a statutory relief to be granted instead of an equitable discretionary relief. In particular, the general rule commonly applied according to which specific performance would not be granted where damages were considered to be an adequate relief is no longer in force and the statute now requires strict enforcement of contracts. This amendment adopts the rule for specific performance found in civil law jurisdictions. How the jurisprudence on this amendment will evolve is something to be considered, as the author is of the view that disputes based on the doctrine of frustration and impossibility of performance are bound to arise.

xii  Indemnity

Indemnity is conceptually different from damages. The right to be indemnified arises from an obligation of contract while damages are a consequence of breach of an obligation in a contract. In most situations the distinction is, however, moot. In Krishnaswami Iyer v. Thathia,16 it has been famously held that these two rights are ‘confounded and the reason for the confusion is that when the contract is broken, indemnity is often found to coincide with the measure of damages.’

The question of whether the right of indemnity should be preferred often arises and is a vexed one. While the view that an indemnity is wider in scope and extent under the statute itself is correct, the author is of the view that the matter does not lend itself to such generalities that should not therefore by used as truisms. Because indemnity is an absolute obligation, the extent of liability largely depends on the terms of the contractual provisions. In commercial contracts it is not uncommon for parties to provide an absolute limit on indemnity, sometimes with subsidiary limits on indemnity for each type of breach. There may also be aspects pertaining to the validity or survival of the indemnity obligation (as opposed to the law of limitation in case of damages for breach). On the other hand, indemnity for breach of representations and warranties could also result in other legal rights.

xiii  Risk purchase clauses

The correct measure of damages for breach of a contract for the supply of goods or the performance of work would be the price that the injured party was able to obtain for similar goods or services. The party in breach will be liable in respect of the alternative contract

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14  Section 14 of The Specific Relief Act, 1963.
15  The Specific Relief (Amendment) Bill, 2018.
16  AIR 1928 Mad 43.
entered into as long as it is for the purchase of the same item or the same work. Indian courts have held that in such a subsequent purchase the objective parameters of such subsequent tenders must be the same, so as to ensure that it is comparable to the contract in breach.\footnote{\textit{Daisy Trading Corporation v. Union of India} 2011(3) Arb LR 3 (Del)(DB).} In such cases the costs incurred by the party in breach in attempting to perform are not relevant.

In public works and infrastructure contracts it is commonplace to find ‘risk purchase’ clauses where a company imposes on the contractor the obligation to bear the cost of purchases at its risk and costs. Such clauses are very broadly crafted and are to be found in standard form contracts imposed by public sector undertakings. Because such clauses may set out obligations that may be far more extensive than the general principle of damages, the first question that arises is whether such clauses necessarily need to be interpreted according to the law of damages. This again would depend on the language of such clauses, including especially whether they are stated to be remedies for breach or are to be read as contractual obligations imposed as alternative to performance.

The concept of substituted performance has been incorporated in the statute by an amendment.\footnote{Section 20 of The Specific Relief Act, 1963.} The injured party will therefore have the option to either sue the party in breach for specific performance or cause substituted performance after due notice in writing of not less than 30 days calling upon the party in breach to perform the contractual obligations.

Substituted performance does not impinge on the right of the party suffering the beach from claiming compensation.\footnote{Sub-section (4) of section 20 of The Specific Relief Act, 1963.} The author is of the view that once substituted performance is opted for, this provision can allow compensation only for losses attributable to the non-performance. Examples that come to mind are expenses incurred on inviting bids for the substituted performance and losses arising from delay caused by the non-performance of the contract (i.e., between the date on which performance was due and the date on which the substitute performance occurred). It is also noteworthy that this amended provision does not refer to damages under the provisions of the law,\footnote{Section 73 and Section 74 of The Contract Act, 1872.} but rather compensation. Although these provisions in turn specify compensatory damages, the language of the amendment is likely to refer to litigation on the question of its interpretation.

**xiv Onus of proof**

The onus of proof of the breach, and the loss suffered is on the plaintiff. The quantum of damages must be proved with reasonable certainty. Any fact that enables a court to determine the amount of damages to be awarded is considered to be a relevant fact.\footnote{Section 12 of the Indian Evidence Act, 1872.}

**xv Liquidated damages**

Where a contract contains provisions specifying the amount payable consequential to a breach (or a stipulation for penalty) the injured party is entitled to receive ‘reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for’.\footnote{Section 74 of The Indian Contracts and Specific Reliefs Act.} While judicial pronouncements have settled the law on the question of liquidated damages, this provision continues to remain prone to controversy.

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\footnote{\textit{Daisy Trading Corporation v. Union of India} 2011(3) Arb LR 3 (Del)(DB).}
\footnote{Section 20 of The Specific Relief Act, 1963.}
\footnote{Sub-section (4) of section 20 of The Specific Relief Act, 1963.}
\footnote{Section 73 and Section 74 of The Contract Act, 1872.}
\footnote{Section 12 of the Indian Evidence Act, 1872.}
\footnote{Section 74 of The Indian Contracts and Specific Reliefs Act.}
It is common for parties to specify the quantum of damages expected to be sustained in the event of a breach, in an effort to meet the test that such damages were in contemplation at the time of the contract. This expectation, however, may be misplaced because the rule for consequential damages pertains to the nature of the loss to be incurred and not so much its quantum. Further, the statutory provision itself reiterates the fundamental principle of ‘reasonable compensation’ and specifies that liquidated damages is in the nature of an upper limit and it is only damages that are considered reasonable that ought to be awarded.

The provision is typically fortified by language providing that the parties consider the specified sum to be a genuine pre-estimate. In situations where it is difficult to quantify the amount of damages, a question may arise as to how the parties arrived at the pre-determined sum at the time of the contract itself when it could not lend itself to estimation after the loss is sustained. However, in such cases, the statutory provision would enable the party suffering the breach to claim the amount specified. It would be up to the defendant to establish that the pre-estimate is not ‘reasonable compensation’ under the circumstances. The legal position therefore is that while stipulation in a contract that the parties consider the amount specified to be a genuine pre-estimate would be persuasive, the courts will not be precluded from looking into the question of whether the specified amount constitutes ‘reasonable compensation’. This also follows from the dictum that parties can negotiate a contract but cannot bargain on remedial rights. The Supreme Court of India in Bharat Sanchar Nigam Ltd v. Motorola India Pvt Ltd found that a provision preventing a party from contesting a pre-determined sum would amount to an agreement in restraint of proceedings.

It is noteworthy that while the provision requires that a breach of contract ought to have occurred, it also states that ‘reasonable compensation’ is payable ‘whether or not actual damage or loss is proved to have been caused thereby’. The question that arises is whether the language of the statute does not require the plaintiff to prove that loss or damage was caused as a proximate cause of the breach.

If the statute prescribes for only ‘reasonable compensation’ and the parties have agreed that they consider the pre-determined sum to be a genuine pre-estimate, then the burden of proof to demonstrate that such pre-estimated quantum is not ‘reasonable compensation’ shifts to the defendant. This does not mean that the pre-estimated quantum stated in the contract would be payable regardless of any other consideration.

The authoritative decision on this provision of Indian law is Fateh Chand v. Balkishan Das, where a five-member constitutional bench of the Supreme Court of India upheld the principle that the plaintiff is entitled to ‘reasonable compensation’ and further that this test has to be ascertained having regard to the conditions existing on the date of the breach. This decision also set out the principle that the term ‘whether or not actual damage or loss is proved to have been caused thereby’ does not mean that compensation would be due even if no loss is sustained. Once the measure of ‘reasonable compensation’ is stated to be the norm, it is axiomatic that compensation paid even where no loss is demonstrably suffered would not be considered ‘reasonable’. This phrase therefore only shifts the burden of proof away from the plaintiff. The decision in Re. Fateh Chand sets out this principle as follows:

23 (2009) 2 SCC 337.
24 AIR 1963 SC 1405.
25 ibid.
Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of “actual loss or damage”. It does not justify the award of compensation when in consequence of breach no legal injury at all has resulted . . .

A later decision of the Supreme Court of India, Oil & Natural Gas Corporation Ltd v. Saw Pipes Limited, overruled an award by an arbitral tribunal which concluded that the purchaser should prove the loss suffered because of delay in supply of goods. This decision is consistent with the principle set out in Re. Fateh Chand that the onus of proof to show that the amount stated is not ‘reasonable compensation’ is on the defendant and not on the plaintiff.

This sum and substance of this decision is that where the parties have agreed that a pre-determined loss is likely to result from breach, it would not be necessary to lead evidence to disprove the loss. The meaning of the phrase ‘whether or not actual damage or loss is proved to have been caused thereby’ is clarified to mean that once parties have agreed that a loss of a specified sum is a genuine pre-estimate it would not be necessary for the plaintiff to prove the loss. It would still, however, be open to the defendant to disprove the presumption of the loss suffered as ‘reasonable compensation’ and the plaintiff would be awarded the pre-determined amount, or the amount considered by the court to be ‘reasonable compensation’, whichever is less.

These principles have been clarified and reiterated by the Supreme Court of India in Kailash Nath Associates v. Delhi Development Authority and Anr, which clarified that liquidated damages can be awarded only if it is a genuine pre-estimate of damages and found to be such by the court. Only ‘reasonable compensation’ can be awarded not exceeding the amount of liquidated damages agreed upon. It was also reiterated that reasonable compensation or loss caused by breach of contract is sine qua non for the applicability of the statutory provision on liquidated damages.

III QUANTUM OF DAMAGES

i Measurement and quantification

The measure of damages depends on several principles that have been discussed above. The actual quantification of the damages is concerned with the computation of the compensation due. This is referred to commonly as ‘quantum’ owing to the fact that proceedings on quantum of damages to be awarded usually follow the establishment of the case on damages.

Sometimes it may not be possible to quantify the damages to be not taken to mean damages which are penal or exemplary. The correct reference is in substance or what is considered to be real or equitable.

Conversely, in cases where there is a breach, but no loss is proved, nominal damages (i.e., damages of a token amount to signify the breach) may be awarded.

Expert evidence

The role of experts is recognised in Indian law. Evidence of experts is considered to be of higher probative value and may be rejected only on limited grounds such as bias or fraud. Cases where there are multiple experts representing each party can get complex. One of the first tasks then is to ensure that the evidence of experts offering different opinions is comparable and on the same set of assumptions. The qualifications and background of the experts is also a significant consideration. When it comes to computation of damages, knowledge and qualification in accountancy may be considered essential, but industry knowledge and expertise is indispensable in many cases.

Owing to the rule of causa proxima, a test which is commonly used by parties and their respective experts is the ‘but for’ test. The analysis undertaken answers the question framed as follows: ‘but for’ the breach, what would be the loss (if any) suffered by the plaintiff? Although extensive studies of market conditions and the like are conducted, the opinion of the expert must be clear on the question of whether all factors that have a bearing on the answer to this question have been considered. For instance, where an expert is considering the question of loss sustained in a commercial contract, they may undertake a study to show that the market share decreased as a result of the breach. Even if this proposition is substantiated by a detailed market study, the manner in which the expert addresses the question of whether there were factors, other than the breach itself, which could have led to loss of market share, would be determinative in assessing the probative value of the evidence furnished.

IV RECENT CASE LAW

i Koninlijke Philips NV v. Amazestore (2019)(260 DLT 135)

The facts of the case

The plaintiff sought a permanent injunction restraining violation of multiple statutory and common law rights. They also sought a decree in damages from the defendants for infringement of copyright and passing off of trade dress – for the passing off of the defendants’ impugned products (beard trimmers) as belonging to the plaintiff by use of trademarks, trade dress and copyright, which were identical or deceptively similar to those of the plaintiff.

The plaintiff claimed actual damages and additionally aggravated damages on account of the extreme bad faith actions and the wrongful conduct of the defendants.

The decision

The High Court of Delhi, holding the defendants liable for violation of statutory and common law rights on multiple counts, found that the plaintiff had proved the facts stated in the plaint and that the products of the defendants bore a close resemblance to those of the plaintiff. A permanent injunction to prevent infringement was therefore granted and compensatory damages awarded.
While considering the claim for aggravated (exemplary) damages, the High Court of Delhi referred to the principles set out in *Hindustan Unilever Limited v. Reckitt Benckiser India Limited*,\(^{28}\) which in turn relied on the decisions of the House of Lords in *Rookes v. Barnard*\(^{29}\) and *Casell & Co Ltd v. Broome*.\(^{30}\)

The High Court of Delhi noted that punitive and exemplary damages might be awarded for wrongful conduct by the defendant that have been calculated by him or her to make profit for himself or herself that may well exceed the compensation payable to the claimant.\(^{31}\) In such cases, the defendant calculates that even after having paid damages imposed by courts he or she would still stand to gain from the wrongful acts,\(^{32}\) and noted with emphasis the observation of the House of Lords that: ‘Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay.’

The High Court of Delhi also noted the three conditions set out in *Re Rookes v. Barnard*, which are to be satisfied before an award for aggravated or exemplary damages is granted. First, that the plaintiff cannot recover exemplary damages unless he or she is the victim of the punishable behaviour. Second, the cautionary restraint that the award of damages ought not to ‘amount to a greater punishment than would be likely incurred if the conduct were criminal’.\(^{33}\) And thirdly, that although the means of the parties are irrelevant in the assessment of compensation, they are nevertheless material in the assessment of exemplary damages.

Thereafter, relying on *Re Cassell & Co*, the High Court further concluded that such damages are not to be added as separate components but rather awarded in substitution, although the rounded total sum shall have to be calculated by adding an additional amount to the compensatory damages.

**The significance of the decision**

This judgment authoritatively sets out the contemporary law on exemplary or aggravated damages. Although the decision itself pertains to infringement of intellectual property rights, its applicability to cases of tort in a broader sense is not limited. While the important conditions to be satisfied are set out in the judgment, it is significant that the most fundamental requirement is the clear finding of deliberate bad faith conduct as was evidently proven in this case.

In this context, while the court concluded that the bad faith intention of the defendants to infringe the plaintiffs’ rights was evident, it also considered added misdemeanours such as wilful contempt and failure to appear to defend the case against them.

\(^{28}\) 2014(57) PTC 495.

\(^{29}\) 1964) 1 All ER 367.

\(^{30}\) (1972) AC 1027.

\(^{31}\) The other categories are oppressive, arbitrary or unconstitutional action by the servants of the government, and any case where exemplary damages are authorised by the statute.

\(^{32}\) The High Court of Delhi emphasised the following observation in the judgment of the House of Lords: ‘Where a defendant with a cynical disregard for the plaintiff’s rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity.’

\(^{33}\) Especially since heavy damages awarded would be without the safeguards that criminal law affords to an offender.
Fortune Infrastructure and Anr v. Trevor D’Lima & Ors (2018)(5 SCC 442)

The facts of the case

The respondents had booked property in the year 2011 in a redevelopment project undertaken by the appellants. In 2015, the appellants, being aggrieved by the fact that the appellants were unwilling to deliver the property, approached the National Consumer Disputes Redressal Commission (NCDRC) with prayers to declare the appellants to be deficient in service and unfair trade practices and for directions that the property be delivered. Alternatively, the respondents prayed for an equivalent property. The respondents also prayed for compensation for inconvenience, mental agony and legal costs.

The NCDRC ruled in favour of the respondents, directing the appellants to refund the amounts paid by the respondents for the property and also directed the payment of compensation and legal costs. The appellants maintained that, owing to the increase in costs beyond expectations, they had transferred the project to another company.

The decision

On appeal, the Supreme Court of India ruled in favour of the respondents. In doing so, it held that while the general principle consistently applied is that damages are compensatory and that the innocent party is to be placed, as far as money can, in the same position as if the contract had been performed, this rule is more qualified within the real estate sector.

Noting that the appellants had not given any valid reasons as to why the project property was transferred to another company, despite their contractual obligation to the respondents (having received a major part of the consideration), the Supreme Court of India held that: (1) the appellants were required to show that they were unable to transfer the property to the respondents; and (2) even though there was no delivery period stipulated in the agreement, a reasonable time has to be taken into consideration. Given that there had been no redevelopment of the property, there was deficiency of service.

On the quantum of damages, the Supreme Court of India ruled that while it is settled that damages have to be considered at the time of the breach, this rule allows flexibility and needs to be assessed in the facts and circumstances of each case.

However, the Supreme Court of India also held that the claim of the respondents granted by the NCDRC surpassed the actual loss-based damages and held that damages awarded should be compensatory and not result in an element of gain to the party suffering the breach.

The significance of the decision

This decision suggests that Indian courts may be inclined to consider the principles of damages as flexible and capable of liberal application in matters concerning consumer rights. Nonetheless, the generally accepted principle that damages are compensatory in nature remains sacrosanct.
Chapter 11

RUSSIA

Yaroslav Klimov and Ekaterina Merkulova

I OVERVIEW

In Russia, recovery of damages is a universal remedy available for a wronged party.

The universal nature means that, as a general rule, a wronged party may recover damages regardless of whether there are other remedies available to the party or whether the party’s right to recover damages is specifically mentioned in law or in an applicable agreement.

Historically, claims for recovery of damages before the Russian courts have been very difficult to prove because of the high threshold of evidence required. For many years, the courts acted on the basis that both the amount of damages and causal link between the breach and the harm must be proved with ‘absolute certainty’.

The trend for lowering the high evidential burden for recovery of damages began with the Supreme Arbitrazh (Commercial) Court of the Russian Federation in 2011 when the court applied a lower standard of evidence to secure the interests of the party who suffered loss and render a fair judgment.

Substantial amendments to the Civil Code of the Russian Federation (the Civil Code) in effect from 1 June 2015 and additional clarifications of the provisions in the Civil Code dealing with recovery of damages that have been recently issued by the Supreme Court of the Russian Federation (the Supreme Court) have continued this trend of lowering the evidential standard and simplifying the procedure for evidencing damages claims.

The most important changes were introduced (1) to reduce the threshold of evidence required to prove the amount of damages and the causal link between the breach and the damage; (2) to introduce ‘concrete’ and ‘abstract’ methods as a universal method for calculating damages arising out of the breach of contracts; and (3) to extend the possibility for wronged parties to recover damages resulting from bad faith negotiations.

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2 There are two branches of civil courts in Russia: state arbitrazh (commercial) courts, primarily dealing with commercial disputes between legal entities, corporate and bankruptcy disputes, and courts of general jurisdiction, primarily dealing with non-commercial disputes between individuals. The Supreme Arbitrazh (Commercial) Court was the highest court for state arbitrazh (commercial) courts in Russia until it became defunct on 6 August 2014 with its functions transferred to the Supreme Court of the Russian Federation, which has since been the highest court for both state arbitrazh (commercial) courts and courts of general jurisdiction.
i Amount of damages and causal link between the breach and the damage

According to the amended Civil Code, the amount of damages must be proved to ‘a reasonable degree of reliability’. This test is significantly lower than the previous standard of ‘absolute certainty’.

Furthermore, if a claimant fails to prove the amount of damages to a ‘reasonable degree of reliability’, it does not constitute a ground for dismissal of the claim. The court must still determine the amount of damages by taking into account all the circumstances of the case, based on principles of fairness and proportionality of liability stemming from the breach.

In addition, in relation to lost profit, the Supreme Court in its recent clarifications ruled that the calculation of the amount of lost profit need not be precise and may be based on approximation. For example, the amount of loss of profit may be calculated using the actual profit of the creditor for a similar period prior to the breach committed by the debtor.

According to the new rules, the causal link between the damage suffered and the breach will be established if such damage is deemed a normal consequence of the breach committed by the defendant. This is a new principle for the courts. Previously, the court required that the causal link is also proved with ‘absolute certainty’.

Though the above amendments were introduced in relation to contractual damages, they should also apply in the context of tortuous liability.

ii ‘Concrete’ and ‘abstract’ methods for calculating damages

Recent amendments to the Civil Code further simplify the process for proving damages by introducing the ‘concrete’ and ‘abstract’ methods of calculating damages. These methods were introduced into the Civil Code with effect from 1 June 2015 as a universal method that may be used when calculating damages in relation to all types of contracts. Previously, the Civil Code provided for these methods only in relation to supply agreements and there was no unified approach in court practice as to whether such methods were applicable to the calculation of damages in other types of contracts.

The ‘concrete method’ of calculation applies where a claimant has mitigated a loss by entering into a replacement transaction to replace an original transaction that has been terminated owing to non-performance or improper performance by a defendant. The calculation is based on the price difference between the original transaction and the replacement transaction.

The ‘abstract method’ applies if a claimant has not mitigated its loss by entering into a replacement transaction, but where an actual price for similar goods or services can be established. The difference between the price in the original agreement and the actual price is used to calculate the amount of abstract damages.

iii Damages resulting from bad faith negotiations

The recent amendments to the Civil Code further extend possibilities for the wronged party to restore the rights violated during negotiations by introducing the notion of bad faith negotiations and requiring a party who negotiated in bad faith to compensate the other party for damages suffered. In particular, the party who negotiated in good faith will be compensated for expenses relating to the negotiations and the lost opportunity to enter into an agreement with a third party.
II QUANTIFICATION OF FINANCIAL LOSS

i Introduction
The Civil Code provides for two types of damages: actual loss and lost profits.

Actual loss encompasses loss or damage to the property or assets of a party as well as subsequent costs the party has or will have to incur to restore that party to its original position.

Lost profits refers to income not obtained by the party, which would have been obtained under normal conditions, if there was no breach on the part of the defendant.

Unless otherwise provided by law or by contract, damages must be compensated in full. The intention is to place the party in the position that it would have been in if a breach had not occurred.

A claimant seeking to recover damages must prove: (1) that there is a breach on the part of the defendant; (2) the amount of harm suffered; and (3) a causal link between the breach and the harm suffered.

As a general rule, the Civil Code also recognises that there must be fault on the part of the defendant. However, the fault is presumed and, therefore, the burden lies with the defendant to satisfy the court that they are not at fault. Moreover, in instances provided by the Civil Code, a party that causes the damage is held liable regardless of whether such party is found to be at fault for the breach or not. For example, where damage arises from the breach of a commercial contract, the party may only be released from liability in case of force majeure.

ii Evidence
There is no specific type of evidence required in Russia to prove damage. Depending on the complexity of the circumstances of the dispute, the claimant may need to provide expert reports and additional types of evidence to prove the amount of damage. In complex disputes, the courts tend to rely on expert evidence.

iii Date of assessment
As a general rule, unless otherwise provided by law or by contract, there are two main approaches to assessing the date on which damages are calculated, along with a third, less commonly used approach.

Day of voluntary performance
The first approach applies when the party who caused damage voluntarily agrees to compensate the other party. Here damages are calculated based on the price of goods or services on the day of voluntary performance.

Day the claim was submitted
The second option applies when the court finds the defendant liable for damages suffered by the claimant. Here damages are calculated based on the price of goods and services on the day the claim was submitted to the court.
**Date of the judgment**

There is a third approach the court may apply at its own discretion. The court has discretion to calculate damages by taking into account the price of goods and services on the date of the judgment. This discretion allows the court the flexibility to render a fair judgment in cases where, for example, prices have fluctuated significantly by the date of judgment.

**iv Financial projections**

Russian law does not directly mention financial projections in relation to the calculation of damages. However, the Civil Code does allow a claimant to factor into its damages calculation the costs that it projects it will be forced to incur to recover from the breach (the non-concrete part of real damage) and any profits not made (as lost profit). Therefore, the Civil Code allows a consideration of financial projections to some extent when calculating damages.

Following amendments to the Civil Code (which came into effect from 1 June 2015) and further clarifications of the Civil Code by the Supreme Court, the threshold required to prove the amount of damages has reduced from ‘absolute certainty’ to ‘a reasonable degree of reliability’. This, in turn, has increased the scope for using financial projections in the calculation of damages.

However, despite the reduced threshold required to prove the amount of damages and the increased scope for the use of financial projections, the courts have tended towards more conservative approaches when calculating damages. Where the circumstances would allow for use of financial projections, the courts have favoured approaches that have less reliance on expert speculations. For example, in one recent case where the claim was for recovery of lost profit, the court adopted an approach that had a stronger correlation with the factual evidence, leaving smaller scope for interpretation by an expert.

**v Assumptions**

A claimant seeking to recover damages may rely on the following presumptions.

**Fault**

As a general rule, the fault of the defendant is presumed, unless proved otherwise. The burden lies with the defendant to satisfy the court that they are not at fault.

**Amount of damages**

To prove the amount of damages suffered, the claimant is required to present evidence sufficient for the court to determine the amount of damages to the standard of ‘a reasonable degree of reliability’.

**Amount of lost profit**

Where the defendant has profited from a breach, there is a presumption that the claimant can recover at least the amount of the defendant’s profit that flows from the breach.

**Causal link**

The causal link between the damage suffered by the claimant and the breach is presumed to be proved if the damage suffered is a normal consequence of the breach.
In addition, there are certain presumptions applicable to specific situations.

a Abstract and concrete damages: when calculating concrete damages (explained in the overview above), it is presumed that a claimant entered into the replacement transaction in good faith and reasonably.

b Bad faith negotiations: as a general rule, it is presumed that negotiating parties act in good faith. By itself the refusal to continue negotiations without specifying reasons does not mean that a party is acting in bad faith.

However, in the following situations, the above presumption is reversed and a party is presumed to have entered into negotiations in bad faith:

a if a party provides the other party with incomplete or misleading information, including non-disclosure of material conditions that, taking into account the nature of the transaction, should be communicated to the other party; or

b if a party abruptly and unreasonably terminates negotiations where the other party could not reasonably expect such termination.

The defendant has the right to challenge any of the above assumptions.

vi Discount rates

Russian law does not take into account discount rates. A defendant does not have the right to apply to the court to request the awarded amount of damages be discounted based on the claimant’s opportunity to invest the awarded amount.

vii Currency conversion

As a general rule, all payments in Russia must be made in roubles.

Regardless of whether the amount agreed by the parties is in a foreign currency or non-conventional monetary units (‘special drawing rights’, etc.) payment is still required by law to be made in roubles.

By law, the payment amount in roubles is determined according to the official exchange rate as of the day of payment. However, a different exchange rate or an exchange rate from a different date can be used where agreed by the parties.


viii Interest on damages

As a general rule, if there is a delay in payment of damages required by a judgment or agreement, the creditor is entitled to require payment of interest on the outstanding amounts. Such interest is defined in the Civil Code as interest for ‘unlawful usage of another person’s money’.

Unless another interest rate is agreed by the parties or is provided for by law, the amount of interest due is calculated based on the key rate (or base rate) of the Bank of Russia, existing during the delay period. For example, from 17 June 2019, the key rate of the Bank of Russia is fixed at 7.5 per cent per annum.3

If the interest rate agreed by the parties is higher than the key rate established by the Bank of Russia, the defendant can make an application to the court, which has discretion to reduce the amount of interest set by the parties if the court considers that the amount of interest is clearly inadequate considering the consequences of the breach, but not lower than the key rate of the Bank of Russia.

If damages are deemed recoverable by the court, interest on the damages will accrue from the date the judgment becomes effective.

If a party that caused damage and a party that suffered damage entered into a subsequent agreement pertaining to compensation for the damages, then interest will accrue in accordance with the terms of that agreement.

As a general rule, the interest will accrue until full payment of the amount due to the creditor is made.

If the delay in payment causes damage to the creditor and the amount of such damage is not fully covered by the amount of interest accrued for the delay period, then the creditor has the right to require the defendant to pay damages in excess of the amount of interest.

ix Costs

As a general rule, the unsuccessful party in a dispute must pay the successful party’s costs. If the claim is only partially successful, costs will be allocated proportionately.

The successful party has the right to recover any costs deriving from the dispute – for example, any state fees relating to the dispute, amounts paid to the party’s representatives, experts, specialists, witnesses, translators and others. The successful party may also recover costs incurred in relation to the collection of evidence, legalisation of documents received in another country, and issuance of a power of attorney. The list of costs that may be recovered by the successful party is not exhaustive.

Following the court’s judgment on the merits of the case, the court will consider which party is liable for costs and to what extent, and the reasonableness of such costs. Costs are considered reasonable if they correspond to normal pricing.

The party required to pay costs can apply to the court to reduce the amount of costs, if the costs are proven to be unreasonable. For example, it is common practice in Russia for the court to significantly reduce the recoverable amount of fees paid to representatives. As a result, fees recovered may be several times lower than fees paid.

Though contingency fees are not prohibited by law, according to current court practice contingency fees are not recoverable.

x Tax

Payment of taxes is regulated by the Tax Code of the Russian Federation (the Tax Code).

Pursuant to the provisions of the Tax Code, damages received by a claimant (on the basis of a court decision or as a result of voluntary payment by the defendant), penalties and other sanctions are subject to 20 per cent corporate income tax in Russia, unless there is a double tax treaty between Russia and the country of residency of the creditor, which provides for a lower tax rate on received income.

It is important to note that the taxable amount of damages received by the claimant could be reduced based on what the claimant states as their expenses pursuant to the Tax Code.

The amount of damages, penalties and other sanctions received by the claimant are not subject to VAT. For many years there was no unified approach as to whether VAT may
be included by the claimant in the amounts of damages due to them. In 2013, the Supreme Arbitrazh Court ruled that VAT should not be included in the amount of damages due to the claimant, provided that the claimant has the right to VAT deduction. Generally, the courts follow this position.

III EXPERT EVIDENCE

i Introduction

Procedural rules for involving experts are established by the Civil Procedural Code of the Russian Federation4 (CPC) and by the Arbitrazh Procedural Code5 (APC).

The court has the right to involve an expert where it considers that specific professional knowledge is needed to resolve a dispute. This includes experts who are employees of state-owned or private expert organisations, or who have their own private practice.

There are no legal restrictions as to the qualifications of persons who may act as experts in court. The only exception is experts who are employees of state-owned organisations. According to the Federal Law on State Court and Expert Activities No. 75-FZ dated 31 May 2011 (the Law on State Court and Expert Activities), they must possess a higher education degree, additional professional education in a specific and relevant expertise area, and be qualified to conduct independent court examination. The level of expertise of state experts must be reconfirmed every five years.

The court also has the right to involve a ‘specialist’ to assist in resolving the dispute. The difference between a specialist and an expert is that the expert is involved by the court to conduct research and prepare an expert report reflecting their findings, while the specialist gives advice in a court hearing without conducting an examination and preparing a report. Specialists are rarely involved by Russian courts.

Also, in Russia it is common practice for a party to a dispute to hire its own expert, whom it believes is best qualified to conduct the examination. A party to the dispute will then formalise questions, and provide materials and documents to allow the expert to carry out the requested examination. Once ready, the party’s expert report is submitted to the court. Though such reports cannot be considered expert reports as referred to in the APC and CPC, courts accept such reports and treat them as equal to other evidence.

ii The role of expert evidence in the calculation of damages

When calculating damages, Russian procedural rules do not give any preference to expert evidence over other sources of evidence available in a particular dispute.

When making a decision, the court will evaluate relevance, admissibility and reliability of each set of evidence separately and collectively.

This means that when rendering its judgment, the court may rely on the expert evidence as long as such evidence is not contradicted by other evidence presented to the court.

In practice, however, it is more common that contradictions arise between expert evidence provided by court-appointed experts and expert evidence presented by the parties.

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Based on analysis of available court practice and our own experience, in such instances, judges tend to prefer the opinions of court-appointed experts to the reports of party-appointed experts.

However, the Supreme Court has repeatedly stated that expert reports presented by the parties cannot be rejected simply on the basis that the experts who prepared such reports were not appointed by the court. In a recent case where the lower courts (i.e., first instance, appeal and cassation) accepted the findings of the court’s expert report and rejected the expert report obtained by a party to the dispute, the Supreme Court, referring to the unresolved contradictions between the report of the expert retained by the claimant and the report of the expert appointed by the court sent the case for reconsideration to the first instance court. The Supreme Court ruled that contradictions between the court-appointed expert and the party’s expert must be resolved when rendering the judgment.

iii The court’s role excluding and managing expert evidence
In Russia, the court itself appoints the experts.

As a general rule, the court appoints the expert examination upon a motion of either party to the dispute. The court will consider that motion and if the motion is convincing then the court will initiate an expert examination. In the arbitrazh courts, the court may also proceed without an initial motion from either party and suggest the appointment of an expert. If either of the parties agrees, the expert examination will be appointed by the court.

The parties to the dispute have the right to present to the court their own expert candidates. The court is free to select experts from a proposed pool of candidates or to select its own candidates. In practice, the court generally selects experts from the candidates proposed by the parties.

The court will provide questions for the experts. The parties have a right to ask the court to add questions.

A request for expert examination must be filed with the court of first instance (i.e., the trial court). An expert examination may only be ordered by the court of appeal (the second level court) in a limited number of instances; for example, if the lower court refused to grant the party’s motion to carry out the expert examination. Courts of higher instances (cassation courts and the supervisory court) cannot order an expert examination.

Parties have no right to challenge a court’s rejection of a request for expert examination or the court’s ruling on the appointment of an expert to conduct an examination (e.g., because of the court’s choice of experts or questions for the experts). The only avenue to challenge these rulings is to present the party’s arguments when appealing the court’s judgment rendered on the merits of the case before the higher courts.

iv Independence of experts
Russian procedural rules require experts to act independently when conducting the expert examination initiated by the courts.

The following rights and obligations guarantee the independence of experts in court.

Disqualification and self-disqualification of experts
The CPC and the APC provide the grounds for disqualification of experts, which are similar to the standards for the judiciary.
The expert will be subject to disqualification if: (1) he or she is a relative of a party involved in the dispute or of a representative of such party; (2) he or she is personally, directly or indirectly, interested in the outcome of the dispute, or there are other grounds that could raise doubts about his or her impartiality; (3) he or she is, or was, under employment or another position of subordination to a party involved in the dispute, or the representative of such party. This is not an exhaustive list.

The court may disqualify the expert on its own initiative. The parties to the dispute also have a right to request the disqualification of an expert. If there are grounds for disqualification, the expert can also self-disqualify.

Disqualification or self-disqualification must be done prior to commencement of consideration of the dispute on merits. After that, the disqualification or self-disqualification can only be requested if the grounds for disqualification became known to the requesting party after consideration of the dispute on merits commenced.

**Expert fees**

Experts receive their fees from the court upon completion of their examination. Prior to initiation of the examination at the request of the court, the parties to the dispute are required to transfer to the court’s bank account the amounts due to the experts.

**Provision of experts with materials for analysis**

Experts are not allowed to contact the parties to the dispute directly. Materials necessary for the experts to conduct the examination are provided to them by the court. Experts can receive explanations from parties in a court hearing with a court’s consent.

**Expert independence in choosing the analysis method**

The expert has the right to choose a method of analysis that provides validity, credibility and can be verified by using generally accepted scientific and practical data.

**Criminal liability of the expert for giving a knowingly false opinion**

An expert is criminally liable for knowingly giving a false opinion.

**Criminal liability for influence on the expert or his or her relatives**

Both the court and the parties to the dispute are prohibited from influencing the conclusions of the expert examination. Any party deemed to have influenced the expert will be subject to criminal liability under the Russian Criminal Code of the Russian Federation.

**Challenging expert credentials**

**Prior to initiation of the expert examination**

Expert candidates proposed by the parties will be considered at a court hearing.

The parties have a right to present arguments as to why the expert candidates proposed by the opposing party should not carry out the required expert examination. In practice, the most common argument is the absence of the necessary education and experience in relation to the matter.
After completion of the expert examination

Questioning of expert

Any of the parties to a dispute can request that an appointed expert appears before the court for questioning. However, it is ultimately at the discretion of the court whether it considers that questioning is necessary to clarify aspects of a written expert report. The court is, therefore, entitled to refuse such a request.

Additional and repeated expert examination

If an expert report lacks certain necessary findings, either party to the dispute or the court may request that the court appoint another expert examination. In such circumstances a party may request an additional expert examination into the outstanding issues by the same or a new expert, or make a request to have the expert examination repeated in its entirety by a new expert.

After consideration of the dispute on merits

After the first instance court has handed down its judgment on the merits of the claim, the parties will also have an opportunity to raise disagreements with the expert opinion when challenging the first instance judgment in the higher courts (i.e., court of appeal, cassation or supervisory court).

vi Novel methods and science

The Civil Code establishes only a general framework for damages calculation. In particular, the Civil Code: (1) defines that damages should be calculated with a ‘reasonable degree of reliability’; (2) establishes that the calculation of loss of profit may be based on approximation; and (3) allows experts calculating the amount of damages the right to use methods of calculation of concrete and abstract damages (as explained in more detail above).

Furthermore, the Law on State Court and Expert Activities contains the general rule that an expert must carry out his or her examination objectively, thoroughly and fully, based on scientific and practical standards within the limits of his or her specialisation. The expert’s opinion must be based on assumptions that are verifiable and relevant, and must draw reliable conclusions derived from the scientific and practical data.

In addition, there are subordinate legislative acts that define the methodology for calculating damages in specific cases. For example, there is a specific methodology for the calculation of damages arising from the illegal dissemination of insider information.6

vii Oral and written submissions

Experts are required to issue their reports in writing.

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IV RECENT CASE LAW

In general, precedents are not binding in Russia. However, lower courts tend to follow the positions of the higher courts, though without relying on them directly (except for certain positions of the highest courts in Russia – the Supreme Court and the Constitutional Court).

i Recovery of real damages

The facts of the case

We would like to elaborate on two claims for recovery of real damages. These claims have similar grounds, but different outcomes with regard to the amount of proven damages (i.e., which evidence could be deemed sufficient for proof of damages).

In both cases, claimants asked to recover from defendants incurred real damages, being the claimants’ expenses for preparation of technical documentation.

In the first case for recovery of damages, a customer claimed that it had to restore the technical documentation, which was required to operate a sewage system, because the contractor did not transfer such documentation originally.

In the second case, a contractor asked for termination of the contract with a customer because of the customer’s default of payment obligations and for the recovery of damages for preparation of documentation under the contract. Pursuant to the concluded contract, the contractor had to develop technical terms for electrical grid connection and carry out the connection itself.

The decisions

In the first case, the customer’s claim was satisfied in court. As evidence of the amount of damages, the first instance court accepted the expert report for market value of the documentation, which had to be alternatively prepared. The defendant’s arguments that the market value did not reflect the claimant’s factual expenses to restore the documentation were rejected by the court. Courts of higher instances upheld the above judgment.

In the second case, the court dismissed the claim on recovery of damages on the grounds that the claimant failed to prove the amount of damages. As evidence of the amount of damages the claimant referred to calculations based on the methodology on determination of the cost of connecting to the electrical grid as approved by the Russian Federal Tariffs Service. The methodology provided for the calculations to determine costs for development of the documentation. The court pointed out that the methodology provides for calculations on the basis of average expenses for connecting to the power supply system and, therefore, did not reflect factual expenses incurred by the claimant.

The significance of the decisions

In these cases, the courts applied recently introduced provisions of the Civil Code providing for a lower standard of evidence when proving the amount of damages under which the amount of damages must be determined with a reasonable degree of reliability rather than with absolute certainty. A failure to do so does not constitute grounds for dismissal of a claim but requires the court to determine the amount of damages, taking into account all circumstances of the case, based on the principles of fairness and proportionality.

Despite the fact that in both cases the courts were provided with calculations that were not based on factual expenses incurred by the claimants, in the first case the court decided
that such evidence was sufficient to determine the amount of damages with a reasonable
degree of reliability, while in the other case the court decided that the provided evidence was
not sufficient.

This shows that the position of the courts regarding what evidence may prove the
incurred damages with a reasonable degree of reliability is still being developed. Claimants
shall thoroughly evaluate that available evidence, which they plan to present to the court as
proof of incurred damages.

ii Recovery of lost profits

The facts of the case

A lessee entered into a lease agreement with a lessor, a local municipality, for a boiler
facility and boiler equipment. During the lease term, the lessor issued a municipal ruling to
unilaterally terminate the lease agreement. After the lease termination, the local municipality
leased the boiler facility and equipment to another lessee.

The lessee applied to the court to declare the municipality ruling on termination of the
agreement void. The court ruled in favour of the lessee.

Then, the lessee initiated a case against the local municipality with a claim for lost
profits (i.e., proceeds that the lessee would have received from providing heat supply services
during the lease period if the lessor had not unlawfully terminated the lease agreement).

The decision

The first instance court dismissed the claim on the grounds that the lessee's calculations of the
lost profit were based solely on its assumptions and therefore were insufficient to determine
the amount of lost profit. In addition, the court stated that the lessee failed to present initial
supporting documents evidencing what expenses the lessee would have incurred from
provision of services under the heat supply agreement, as such expenses should have been
deducted from the amount of lost profit claimed.

The appeal court set aside the first instance court judgment. The appeal court stated
that the conclusion of the first instance court that the lessee's calculations were insufficient
to determine the amount of lost profits could not be grounds for dismissal of the claim.
Instead, the court had to require the parties to present additional evidence. Moreover, as the
lessee did not provide heat supply services because the lease agreement had been terminated,
its expenses for providing such services may be calculated solely on the basis of assumptions
rather than initial documents.

The appeal court further appointed an expert examination to evaluate the amount of
lost profit that would have been received by the lessee and requested that the lessor present
information on factual expenses associated with providing heat supply services during the
period in question.

Taking into account the expert examination and information presented by the lessee,
the appeal court reduced the amount of lost profit initially claimed by the lessee and partially
satisfied the claim.

The higher courts upheld the appeal court decision.
The significance of the decision

Until recently, the courts required that the amount of lost profit had to be proven with absolute certainty. However, lost profit (i.e., the proceeds from something that did not take place) is extremely difficult to prove with certainty, as there is always some level of probability and approximation. Therefore, in a majority of cases the courts used to dismiss the claims on recovery of lost profit on the grounds that the claimant had failed to prove the amount of lost profit with certainty.

This case is a positive example of how, in practice, the Russian courts now apply the recently introduced amendments to the Civil Code together with the recent clarifications of the Supreme Court, allowing for calculations of lost profit to be based on approximation.

This makes recovery of lost profit a more effective method of restoring the rights of a wronged party.

iii Recovery of ‘concrete’ damages

The facts of the case

The lessee and the lessor entered into a real estate lease agreement (the Original Agreement).

As the lessee repeatedly failed to make lease payments on time, the lessor unilaterally terminated the Original Agreement.

The lessor entered into an alternative lease agreement with another lessor (the Replacement Agreement).

As the lease payments under the Replacement Agreement were lower than in the Original Agreement, the lessor claimed that the difference in price constituted its damages and applied to the court to recover these damages from the lessee under the Original Agreement.

The decision

First, the appeal and the cassation courts dismissed the claim on the grounds that:

a the Civil Code allows the recovery of damages only if the price under the Replacement Agreement would have been higher than that under the Original Agreement;

b the existence of different lease terms in the Original Agreement and in the Replacement Agreement prevent qualification of the Replacement Agreement as that which replaced the Original Agreement;

c the lessor entered into the Replacement Agreement with a lower price at its own will and, therefore, the lessee shall not bear the negative consequences, in this respect.

The lessor filed an appeal to the Chamber for Commercial Disputes of the Supreme Court, which set aside the lower courts’ rulings and transferred the case for reconsideration to the first instance court on the following grounds.

a The law aims at restoring creditors’ rights as if the Original Agreement would have been performed properly. However, the lower courts’ approach released the defendant from its obligations to compensate the claimant from negative consequences resulting from termination of the Original Agreement due to improper performance by the defendant of its obligations. If the price under the Replacement Agreement would have been higher than in the Original Agreement, the lessor would not have grounds to claim damages.

b The existence of different lease terms in the Original Agreement and the Replacement Agreement does not constitute grounds for dismissal of the claim.
When entering into the Replacement Agreement with a lower price, the claimant tried to minimise the negative consequences of termination of the Original Agreement. To justify the lower price, the lessor presented evidence showing the rent price decrease in the real estate market as at the time of the Replacement Agreement’s signing and that such evidence was not countered by the defendant.

When reconsidering the case, the first instance court made a judgment in favour of the claimant, the lessor under the Original Agreement. The lessor did not appeal the judgment with the higher courts.

**The significance of the decision**

This case is important because it illustrates the application by the Russian courts of the recently introduced ‘concrete’ method of damages calculation. When considering a case, the Supreme Court reiterated its approach on a number of important issues related to the application of concrete damages.

First, the concrete method works not only in situations where the price in the Replacement Agreement is higher than in the original one, but also vice versa to place the wronged party in the position it would have been in had the obligations been properly performed.

Second, to recover concrete damages, the original and the replacement transactions do not need to be identical.

Third, the good faith of the wronged party entering into the replacement agreement shall be presumed, unless proven otherwise by the defendant.

**iv Recovery of damages for bad faith negotiations**

**The facts of the case**

A claimant (potential lessor) and the defendant (potential lessee) had been negotiating the terms of a warehouse lease agreement for more than six months.

The defendant initiated such negotiations by sending to the claimant a letter of intent to enter into the warehouse lease agreement.

During the negotiations, the claimant specifically terminated the existing lease agreements with its former lessors in anticipation of the new warehouse lease agreement with the defendant and to prepare the warehouse for the new lease.

Once the claimant and the defendant agreed on all material provisions of the warehouse lease agreement, the defendant sent the execution version of the warehouse lease agreement to the claimant for signing. Upon receipt of the signed warehouse lease agreement from the claimant, the defendant stopped all communication with the claimant.

The claimant applied to the court and claimed the lost profit (i.e., lease payments that the claimant would have received from its former lessees for the six months – the period from the termination of the lease agreements with the former lessees to the date when the claimant entered into an alternative warehouse lease agreement with another party).

**The decision**

The first instance court satisfied the claim in full and pointed out that the defendant’s actions made the claimant believe that the defendant had a strong intention to enter into the warehouse lease agreement with the claimant. In particular, during negotiations the defendant had supervised preparatory works of the warehouse, reviewed draft documents provided by
the claimant, requested additional documents, approved commercial and technical terms of the warehouse lease agreement, and repeatedly extended the date of the warehouse lease agreement’s signing.

Based on the above, the court ruled that the defendant had acted in bad faith as it had abruptly and unreasonably terminated negotiations in circumstances where the claimant could not reasonably expect such termination.

The higher courts, including the Supreme Court, upheld this ruling.

**The significance of the decision**

This case is one of the first on recovery of damages for bad faith negotiations. Therefore, it helps shed light on what could be considered as bad faith negotiations in terms of recovery of damages.

Also, while considering this case the courts formulated their approach towards damages resulting from bad faith negotiations, according to which the right of the wronged party is not limited by recovery of damages explicitly set out in the relevant provisions of the Civil Code (i.e., expenses relating to the negotiations and damages relating to the lost opportunity to enter into an agreement with a third party).

The courts have stated that the purpose of recovering damages is to place the wronged party in the position it would have been in had it not entered into negotiations, and therefore the claimant has the right to recover all other damages. For example, in this case the court ruled to recover from the defendant an amount of damages equal to the lease payments from the former lessors not received by the claimant during the six-month negotiation period.
Chapter 12

SINGAPORE

William Ong Boon Hwee

I OVERVIEW

The approach of the Singapore courts with regard to compensatory damages claimed in civil litigation has been based on the usual principles like causation, remoteness of damages and mitigation. The claimant or plaintiff bears the burden of proving both the fact and amount of loss, and therefore must adduce sufficient evidence to quantify the damage. In terms of proving loss suffered by the plaintiff in claims for unliquidated damages, the Court of Appeal in Singapore has stated that an award of compensatory damages in contract law should be based ideally on the plaintiff’s own loss rather than measuring it by reference to the defendant’s gains or profits.

Most notably perhaps, the Singapore courts have remained committed to the traditional principles of remoteness of damages espoused under Hadley v. Baxendale, declining to follow the new test set out by Lord Hoffman in The Achilleas, which is whether the defendant assumed responsibility for the loss that arose from the breach. Thus in MFM Restaurants Pte Ltd v. Fish & Co Restaurants Pte Ltd, the Court of Appeal expressly decided against adopting the ‘assumption of responsibility’ test, pointing out, inter alia, that the ‘assumption of responsibility’ approach (which is agreement-centred and based on whether the contract breaker had, on a true interpretation of the contract, assumed responsibility) appeared to exclude the operation of the very doctrine of remoteness of damage in contract law itself. The Court of Appeal was concerned with the practical uncertainties in applying this new test, given that parties at the time of entering the contract would usually not be thinking of assuming responsibility for the consequences of a future breach. The court thus did not accept Lord Hoffman’s approach, except to the extent that the concept of assumption of responsibility is already incorporated in both limbs of Hadley v. Baxendale. The position under Singapore law was reaffirmed in Out of the Box, where the Court of Appeal reiterated its preference for the

1 William Ong Boon Hwee is a partner at Allen & Gledhill. The author would like to thank Dion Loy, trainee at Allen & Gledhill LLP, for his assistance in the production of this chapter.
2 Robertson Quay Investment Pte Ltd v. Steen Consultants Pte Ltd and another [2008] 2 SLR(R) 623; [2008] SGCA 8 at [27].
3 MFM Restaurants Pte Ltd and another v. Fish & Co Restaurants Pte Ltd and another appeal [2011] 1 SLR 150 at [66].
4 (1854) 9 Exch 341; (1854) 156 ER 145.
6 MFM Restaurants (see footnote 3) at [92]–[95].
7 id. at [92]–[100].
8 id. at [140].
orthodox approach under Hadley. The court also stressed that, conceptually, ‘it is important that cases that in fact concern the interpretation of a contract to identify the specific nature of the obligation that has been undertaken not be conflated, or for that matter confused, with cases that truly are concerned with questions of remoteness’.10

While this is a chapter on compensatory damages, it should be noted that the Singapore courts have expressed caution on the award of restitutionary damages recognised by the UK courts under AG v. Blake,11 or at least the characterisation of AG v. Blake damages as restitutionary in nature. AG v. Blake was an exceptional case, where the defendant breached his contractual undertaking not to divulge official information gained as a member of the UK intelligence service by entering into a publishing deal for his autobiography, and where the Attorney General sought a full account of his wrongfully gained profits. AG v. Blake therefore allowed the award of damages based on the defendant’s gains or profits, rather than the plaintiff’s losses. The Court of Appeal in Singapore held that the main difficulty with recognising AG v. Blake damages as a part of Singapore law is the uncertainty of the legal criteria to be applied in awarding such damages.12 Nonetheless, the court left open the possibility that AG v. Blake damages could be recognised, although the precise status and scope of this category of damages under Singapore law is likely to remain unresolved until it is determined by the court in the future.13

In addition, while the Court of Appeal recently accepted Wrotham Park damages as a part of the contractual remedies available under Singapore law, its approach differs from the UK position in some important respects that will be briefly discussed below.14

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

The quantification of financial loss usually underpins any compensatory claim for damages – while such quantification may involve technical evidence assisted by the relevant experts, it is usually on the basis that damages should compensate the plaintiff for the defendant’s wrongdoing. In tort, the purpose of damages is to put the claimant back into the position in which he would have been, if the tort had not been committed.15 In a contractual claim, damages seek to put the plaintiff in the position he or she would have been in had the contract been performed; this is often seen as compensation for the plaintiff’s expectation loss – such expectation loss would encompass the plaintiff’s total (or gross) loss – including the expected (or net) profit that the plaintiff would have received had there been no breach of contract as well as his or her expected expenses, which he or she would have recouped if the contract had been performed.16 Both approaches in tort and contract are compensatory, and seek to compensate the claimant for his or her loss.

10 id. at [29].
12 Turf Club Auto Emporium Pte Ltd and others v. Yeo Boong Hua and others and another appeal [2018] SGCA 44 at [252]–[254].
13 id. at [255].
14 See Section IV for a more thorough discussion.
15 Swiss Butchery Pte Ltd v. Huber Ernst and others and another suit [2013] 4 SLR 381 at [14].
16 Turf Club (see footnote 12) at [125].
Hence, quantification of financial loss in contractual claims would often be premised on a valuation of the position that the plaintiff would be in had the contract been performed, complete with the expected costs or expenses incurred in performing the contract. For example, damages for breach of warranty in a contract are to be assessed on the basis of what would be required to put a plaintiff in a position he would have been in, had there been no breach of the warranty\textsuperscript{17}. The Court in \textit{Holland Leedon Pte Ltd v Metalform Asia Pte Ltd}\textsuperscript{8} noted that this may be assessed in one of two ways, with reference to the diminution in value (the difference between the market value of the business warranted and the actual value of the business) or the costs of cure.

Quantification of financial loss for tort would involve an exercise of what would have happened if the tort had not been committed – so a conspiracy to divert business away from a claimant would involve assessing the revenue or profits that had been lost, complete with the expected costs or expenses in serving the customers had they not been diverted away by the conspirators. Likewise, for the tort of conversion, the measure of damages is essentially the market value of the converted equipment at the date of conversion or the cost of replacing the converted equipment\textsuperscript{19}.

An award of substantial damages where loss is asserted will only be justified where the court is satisfied as to both the fact of damage (i.e., the adverse consequence) and the amount.\textsuperscript{20} If the plaintiff satisfies the court on neither, he will at the most be awarded nominal damages where a right has been infringed or where liability is established.\textsuperscript{21}

\textbf{ii \quad Evidence}

It is well established that a plaintiff claiming damages must adduce before the court sufficient evidence of his or her loss. This approach has been affirmed by the Court of Appeal, which has held that proof of damage is very much a primary matter – topics such as remoteness and mitigation are potentially relevant only after there is proof of damage to begin with.\textsuperscript{22} Such proof depends wholly on the factual matrix concerned, which can take a myriad of forms.\textsuperscript{23}

That being said, where it is clear that some substantial loss has been suffered, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages.\textsuperscript{24} In this respect, ‘[w]here precise evidence is obtainable, the court naturally expects to have it, [but] where it is not, the court must do the best it can’.\textsuperscript{25} The court must do the best it can on the evidence available and adopt a flexible approach where it is clear that some substantial loss has been incurred.\textsuperscript{26}

\textsuperscript{17} \textit{Columbia Asia Healthcare Sdn Bhd and another v. Hong Hin Edward and another and other suits} [2014] 3 SLR 87 at [241].
\textsuperscript{18} \textit{Holland Leedon Pte Ltd v. Metalform Asia Pte Ltd} [2012] 3 SLR 377 at [54].
\textsuperscript{19} \textit{Marco Polo Shipping Co Pte Ltd v. Transport Services Pte Ltd} [2015] 5 SLR 541 at [28]–[33].
\textsuperscript{20} \textit{Biofuel Industries Pte Ltd v. V8 Environmental Pte Ltd and another appeal} [2018] 2 SLR 199; [2018] SGCA 28 at [41].
\textsuperscript{22} \textit{Robertson Quay} (see footnote 2) at [27].
\textsuperscript{23} ibid.
\textsuperscript{24} \textit{McGregor on Damages} (see footnote 21) at Paragraph 10-002.
\textsuperscript{25} \textit{Biggin & Co Ltd v. Permanite, Ltd} [1951] 1 KB 422 at 438.
\textsuperscript{26} \textit{Robertson Quay} (see footnote 2) at [30].
In doing its ‘best’, the courts will adopt a flexible approach,\(^{27}\) so as to balance the plaintiff’s burden of adducing sufficient evidence of his or her loss on the one hand, and the fact that absolute certainty and precision is impossible to achieve in some cases on the other.\(^{28}\) In this regard, the Court of Appeal acknowledged the reality that ‘some educated guesses have to be made – regardless of the precise methodology ultimately adopted by the court’, and that ‘life is far more complex than simple law school hypotheticals and even textbooks would have us believe’.\(^{29}\)

Thus, where the plaintiff has done its level best to prove its loss and the evidence is cogent, the court should allow it to recover the damages claimed.\(^{30}\) Even where ‘the available evidence on which to base an award of damages’ is ‘far from satisfactory’, the courts are still able to award ‘just and fair sums to plaintiffs if the legal rules and principles justified them’.\(^{31}\)

Where the defendant has made it difficult for the plaintiff to prove the quantum of its loss, the defendant will not be able to take advantage of the situation. In *Sea-Shore Transportation Pte Ltd v Tecknik-Soil (Asia) Pte Ltd*,\(^{32}\) the court accepted the principle in *Armory v Delamirie*\(^{33}\), which raises an evidential presumption in the claimant’s favour, giving him the benefit of any relevant doubt where the defendant has made it difficult or impossible for him to adduce relevant evidence. The court held that the *Armory* principle should be subject to some qualifications, as follows. First, the full rigour of an adverse presumption applies only where a party has intentionally and in bad faith destroyed or refused to produce the subject matter in question so as to prevent the claimant from adducing evidence that could prove his or her case. Next, it should only apply where the wrongdoer’s acts make it difficult or impossible for the innocent party to prove its loss or where the facts needed to prove the loss are known solely by the wrongdoer and he or she does not disclose these facts to the innocent party. Further, any presumption must still be consistent with the rest of the facts of the case and founded on the evidence that has been presented.\(^{34}\)

The flexible approach does not mean that a plaintiff could simply claim that evidence was not available or irrelevant without more. Where the plaintiff has failed to attempt its level best to prove its loss and adduce cogent evidence, this failure to meet the evidentiary threshold necessary to quantify its loss will result in the award of nominal damages only.\(^{35}\)

### iii Date of assessment

As a general rule, damages for breach of contract or tort are assessed as at the date of breach.\(^{36}\) In *The Golden Victory*,\(^{37}\) the UK Supreme Court held that this general rule is not inflexible, and that the courts are not precluded from taking into account events that

\(^{27}\) ibid.

\(^{28}\) *Ramesh v/o Krishman v. AXA Life Insurance Singapore Pte Ltd* [2017] SGHC 197 at [65].

\(^{29}\) *MFM Restaurants* (see footnote 3) at [62].

\(^{30}\) *Robertson Quay* (see footnote 2) at [31].

\(^{31}\) *MFM Restaurants* (see footnote 3) at [62] and [65].

\(^{32}\) *Sea-Shore Transportation Pte Ltd v. Tecknik-Soil (Asia) Pte Ltd* [2018] SGHC 231.

\(^{33}\) *Armory v. Delamirie* (1722) 1 Stra 505, 93 ER 664.

\(^{34}\) *Sea-Shore Transportation Pte Ltd v. Tecknik-Soil (Asia) Pte Ltd* [2018] SGHC 231 at [70].

\(^{35}\) *Biofuel Industries* (see footnote 20) at [42]–[45].

\(^{36}\) *Tay Joo Sing v. Ku Yu Sang* [1994] 1 SLR(R) 765 at [36]–[37].

occur subsequent to a breach of contract, if doing so would give effect to the overriding compensatory principle that the damages awarded should represent no more than the value of the contractual benefits of which the plaintiff had been deprived.

The High Court of Singapore has also recognised that the general rule that damages are to be assessed as at the date of the breach is not an absolute one. Thus, the court held that where it is necessary to compensate the plaintiff adequately for the damage suffered, or if it would otherwise lead to injustice, a different date of assessment can be selected.\(^{38}\)

In *Swiss Singapore Overseas Enterprises Pte Ltd v. Exim Rajathi India Pvt Ltd*,\(^{39}\) the High Court distinguished *The Golden Victory* based on its facts – the overriding compensatory principle was that damages awarded should represent no more than the value of the contractual benefits that the claimant had been deprived and therefore where at the date of assessment an event had already happened that would have terminated the contract had it been still in place, the court should have regard to what actually occurred.\(^{40}\) In *Swiss Singapore* there was a one-off sale and delivery contract, as opposed to the longer-term contract in *The Golden Victory* that provided for obligations to be performed over a period of time.\(^{41}\)

However, any notion that there is a material distinction between one-off contracts and contracts for performance over a prolonged period of time for the purposes of the date of assessing damages was rejected by the UK Supreme Court in *Bunge SA v. Nidera BV*.\(^{42}\) In *Bunge v. Nidera*, there was a one-off contract for the sale and purchase of Russian milling wheat. Following Russia’s introduction of an embargo on the export of wheat, the sellers notified the buyers of the embargo and purported to cancel the contract. The buyers treated this cancellation as premature, and thus a repudiation, which they accepted. On the assessment of damages, the sellers argued that, even if the termination was premature, the fact that shipment under the contract would have been subject to the ban when the time for shipment came meant that no loss had been suffered. The UK Supreme Court stated that the compensatory principle in *The Golden Victory* is not limited to instalment contracts, and awarded the buyers nominal damages. Lord Sumption held that ‘(t)here is no principled reason why, to determine the value of the contractual performance that has been lost by the repudiation, one should not consider what would have happened if the repudiation had not occurred’, as this is ‘fundamental to any assessment of damages designed to compensate the injured party for the consequences of the breach’.\(^{43}\)

While certainty as engendered by the breach date rule for assessment of damages may be valuable, the courts have shown that they are willing to take into account supervening events that have occurred post-breach to ensure that the claimant is truly compensated for his or her loss. Although *Swiss Singapore* dealt with a one-off contract, the decision on which date to assess damages did not turn on whether the contract was a one-off contract or instalment contract. Thus, the Singapore courts will, in accordance with the compensatory

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38 *Justlogin Pte Ltd and another v. Oversea-Chinese Banking Corp Ltd and another* [2007] 1 SLR(R) 425; [2006] SGHC 209 at [66].
40 id. at [77].
41 id. at [78].
42 [2015] UKSC 43.
43 id. at [23].
principle, exercise the flexibility of taking into account supervening events that have taken place by the date of assessment to ensure that the claimant is truly compensated for the loss he or she has suffered (if any).

iv  Financial projections

Financial projections are sometimes necessary where a quantification of financial loss involves assessing loss of a prospective nature. For example, this may be achieved through a loss of profits analysis, whereby the plaintiff is awarded the difference between its actual profits and the profits it would have obtained ‘but for’ the defendant’s breach. Alternatively, a business valuation analysis may be available, whereby loss is quantified as the diminution in value of a business, income stream or other specified asset as a result of the defendant’s breach of contract.

The courts are cognisant of the fact that such financial projections, which involve projections into the future, are inevitably speculative to some degree. As such, regardless of what calculation or valuation method is used for the financial projections, so long as the application of the method rests on certain assumptions, the court will look to scrutinise the reasonableness of these assumptions. In any event, the use of any projection or valuation method would be deemed inappropriate if it is significantly at variance with the evidence of what actually happened. Therefore, in the English Court of Appeal case of *Senate Electrical Wholesalers Ltd v Alcatel Submarine Networks Ltd (formerly STC Submarine Systems Ltd)* [1999] 2 Lloyd’s Rep 423, a business was sold to the plaintiff for £90 million, but the plaintiff subsequently discovered that the profits of the business was overstated by £1.7 million, which was a breach of warranty by the seller. For damages, the plaintiff quantified his loss by applying a multiplier of 13.67 to the difference between the warranted profit and the actual profit, but this approach was rejected by the English courts. The English Court of Appeal was not convinced that this approach was appropriate on the facts of the case, but might be appropriate where the purchase price was derived in that manner. Similarly, in *Columbia Asia Healthcare Sdn Bhd v. Hong Hin Kit Edward and another and another appeal* [2014] 3 SLR 87, the Singapore High Court rejected a multiplier approach in valuing damages as it found that the claimant had failed to establish that EBITDA coupled with an appropriate multiplier was the main basis for deriving the actual purchase price. The case went on appeal and the High Court’s decision was affirmed by the Court of Appeal where it was held that:

> the expert evidence cannot be significantly at variance with evidence of what the purchaser actually valued the shares. When considering an expert’s valuation evidence, the court will also look at the realities of commercial bargaining and market competition to determine if the valuation model used and the assumptions underpinning such a model could be said to reflect what a willing purchaser would pay a willing vendor.

v  Assumptions

It is common knowledge that each financial or valuation model for the purposes of loss assessment is highly dependent on its underlying assumptions. For instance, the discounted

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44  *Poh Fu Tek and others v. Lee Shung Guan and others* [2018] 4 SLR 425; [2017] SGHC 212 at [41].
45  *Columbia Asia Healthcare Sdn Bhd v. Hong Hin Kit Edward and another and another appeal* [2015] 2 SLR 395 at [38]. (Note: this was in the context of a share valuation dispute.)
47  *Columbia Asia Healthcare Sdn Bhd v. Hong Hin Kit Edward and anor* [2015] 2 SLR 395 at [41].
cash flow (DCF) model, which is widely used in both loss of profits and business valuation analyses, is nothing more than a calculation machine – the value that emerges from the model is completely dependent on the values it has been fed with. The integrity of the financial model is thus dependent on the assumptions underpinning the specific method.

As such, where financial projections rest on certain assumptions, the court will consider both qualitatively whether the assumption is reasonable in light of the evidence and also quantitatively the likelihood of the assumed event actually materialising. For instance, if one were to make a projection based on the DCF model, that likelihood of the assumption materialising – to the extent that it is found to be less than a certainty – represents a risk to the business that must be accounted for in the analysis. As such, parties looking to rely on the various models for financial projections or valuations ought to be aware that such projections are not just a matter of arithmetical calculation – obtaining reliable information and making credible assumptions for the financial model are just as important in producing an accurate valuation or assessment.

### vi Discount rates

It is generally accepted that a discount has to be given for accelerated receipt of any sums that had not fallen due at the date of the breach (i.e., future loss of profits), so as to properly account for the potential interest accrued by the plaintiff until the final date on which money would have been due. An award of compensation that failed to take this into account would overcompensate the plaintiff. This is largely standard practice – the High Court has recognised that ‘this was the discount to be given to the [defendant] because the damages were being crystallised at one go and [the plaintiff] would be paid the damages immediately instead of having the payment stretched over a number of years’.

In addition, many financial projections, especially those involving cash-flow models, do factor in discount rates that are applied to the projected cash flows. For instance, under the DCF model, a discount rate is applied to transform the future cash flows into their net present value. This discount rate should reflect the risk inherent in the forecast future cash flows, and can, for example, be the company’s or business’ weighted average cost of capital (WACC), which is a measure of a company’s return to those who finance its business by both debt and equity.

Where the court finds that the discount rate used in a particular financial projection fails to reflect certain risks to the business, it will not shy away from making an appropriate

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49 *Poh Fu Tek* (see footnote 44) at [42]; see also the Australian case of *Pownall v. Conlan Management Pty Ltd* (1995) 16 ACSR 227, where evidence pertaining to financial projection and valuation of shares was deemed inadmissible because the assumptions underlying the DCF valuation were not proved.
50 ibid.
51 *Christopher Moran Holdings Ltd v. Bairstow and another* [2000] 2 AC 172 at 184E. Though this is in the context of a disclaimer of a lease by a liquidator, the court held that assessing compensation payable pursuant to a statutory right of compensation arising from the disclaimer is ‘precisely the same exercise as has to be undertaken when assessing the damages for a breach of contract’: see 180D.
52 *Swiss Butchery* (see footnote 15) at [22].
54 *Poh Fu Tek* (see footnote 44) at [110].
adjustment to account for those risks.\textsuperscript{55} Thus, in Poh Fu Tek, the High Court increased the discount rate to reflect the risk of the company losing the right to continue its operations at its two key properties, and the risk that a major customer may not place any orders with the company in the future.\textsuperscript{56}

\textbf{vii Currency conversion}

The law on currency conversion for damages is governed by the Miliangos principle, which establishes that an English court could give judgment for a sum of money expressed in foreign currency and, if it was necessary to execute on the judgment, the judgment in foreign currency would be converted to local currency on the date when the plaintiff was given leave to levy execution.\textsuperscript{57}

This principle has been applied in Singapore, and the High Court has confirmed that there is no right of election – of asking for judgment in local currency or for conversion of the judgment sum from foreign currency to local on a date other than the date of execution – open to the plaintiff.\textsuperscript{58} The court reasoned that the rationale for the Miliangos doctrine was that it was right to allow judgment to be entered in a foreign currency either because it was the relevant currency of the transaction or because it was the currency in which the plaintiff had most truly suffered his loss. In addition, the House of Lords in Miliangos was not giving the plaintiff an option to select his currency but was instead redefining the obligation of the debtor to pay the sum owed in the relevant currency, and had found that using the date on which the court authorised execution as the date for conversion of the foreign currency into the local currency was nearest to securing to the plaintiff exactly what he bargained for.\textsuperscript{59}

\textbf{viii Interest on damages}

The power of the Singapore courts to award interest on damages is derived from Paragraph 6 of the First Schedule of the Supreme Court of Judicature Act. Section 12 of the Civil Law Act allows the court to order that interest be awarded on the judgment sum at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

A plain reading of Section 12 suggests that interest is not awarded as of right – it is a matter of the court’s discretion.\textsuperscript{60} However, as a matter of principle, plaintiffs who have been kept out of pocket without basis should be able to recover interest on money that is found to have been owed to them from the date of their entitlement until the date it is paid. Thus, the purpose of the judicial discretion is to enable the courts to achieve justice according to the unique circumstances of each case. Such discretion would extend to a determination of whether to award interest at all; what the relevant rate of interest should be; what proportion of the sum should bear interest; and the period for which interest should be awarded.\textsuperscript{61}

\textsuperscript{55} ibid.
\textsuperscript{56} id. at [124]–[130].
\textsuperscript{57} Miliangos v. George Frank Ltd [1976] 1 AC 443.
\textsuperscript{59} id. at [35].
\textsuperscript{60} Grains and Industrial Products Trading Pte Ltd v. Bank of India and another [2016] 3 SLR 1308; [2016] SGCA 32 at [138].
\textsuperscript{61} ibid.
The general rule is that interest should commence from the date of accrual of loss; however, this is subject to the court’s discretion to order that interest run from a date later than the date of accrual of loss. The court can therefore delay the start date for calculating interest where there has been an unjustifiable delay on the part of the plaintiff in bringing his or her action to trial.62 Thus in Robertson Quay, the Court of Appeal ordered that interest on damages awarded should run only from the date of service of the statement of claim. The court departed from the general rule because of the plaintiff’s unwarranted delay (of five years after its loss accrued) in commencing the suit.63

With respect to the nature of the interest awarded, Section 12 of the Civil Law Act specifically enables the courts to award simple pre-judgment interests on debts and damages – the provision does not authorise the award of compound interest. However, the High Court has found that this did not necessarily prohibit the court from granting compound interest per se or from granting damages assessed with reference to the actual compound interest lost or foregone by the plaintiff who had suffered those damages.64 Thus the court held that the Singapore courts have an ‘unfettered discretion to award simple or compound interest as damages’. This approach ‘accords with commercial and economic reality’ and would better reflect a plaintiff’s loss because if it were otherwise, a plaintiff in a long-running case risks being severely under-compensated in damages, especially where the interest rate was ascertained to be very high.65

The key distinction here is between ‘interest as damages’ and ‘interest upon the damages’. Section 12(2)(a) of the Civil Law Act states that nothing in the section ‘shall authorise the giving of interest upon interest’, but the court has held that this section will not apply to an award of interest as damages, which comprises of the loss to the plaintiff assessed with reference for instance to the compound interest that the money could possibly have earned. This separate head of damage represented by the compound interest is therefore not within the scope of Section 12.66

ix Tax
Any quantification of financial loss (and subsequent calculation of the quantum of damages) must take into account the relevant tax implications so as to restore the plaintiff to the position it would have been in had the relevant breach or tortious conduct not occurred.

The relationship between taxation and damages awarded for the loss of future earnings was established in British Transport Commission v. Gourley.67 It was held that the award of damages should reflect the deductions that would have been made for tax and national insurance in arriving at the settlement figure, because ‘to ignore the tax element at the present day would be to act in a manner which is out of touch with reality’.68

The Court of Appeal has since affirmed the Gourley principle,69 and it is clear that where damages are awarded for taxable losses (i.e., loss of future income, loss of profits), an income

62 id. at [139].
63 Robertson Quay (see footnote 2) at [104]–[108].
64 The Oriental Insurance Co Ltd v. Reliance National Asia Re Pte Ltd [2009] 2 SLR(R) 385 at [127]–[128].
65 id. at [137]–[138].
66 id. at [129].
68 id. at 203.
tax or corporate profits tax deduction ought to be made. However, where the damages are meant to compensate for a non-taxable loss (i.e., loss of a capital asset, loss of capital gains), it would be inappropriate to make a deduction for tax as the plaintiff would not have incurred any tax liability thereon.\textsuperscript{70}

x \hspace{1em} \textbf{Minority discount on valuation of shares}

Where a minority shareholder successfully sues for shareholder oppression and the court orders the majority shareholder to buy out the shares of the minority shareholder, an issue that may arise is whether the valuation of the shares should incorporate a discount for lack of control, or a minority discount as it is often called. Minority shareholders do not control the running of a company generally, and valuers often apply a discount for lack of control to a valuation of their shares. Conversely, where a majority bloc of shares that confers control to any buyer is valued, a premium may be applied to their valuation. However, when a minority shareholder is forced out of the company by the oppressive acts of the majority such that the former has to seek a buy-out of his shares, should the discount for lack of control apply? The court will be concerned to ensure that the oppressor does not profit from his or her wrongful behaviour.\textsuperscript{71} On the other hand, it is a fact that a minority shareholding may be relatively harder to dispose of, and this difficulty remains even if the minority shareholder seeks a buyer in normal circumstances (sans any oppressive behaviour by the majority shareholder).

Where the company concerned is a quasi-partnership, a presumption that there is no discount for lack of control applies. However, there is no general rule in cases involving companies that are not quasi-partnerships. The court must look at all the facts and circumstances:

\begin{quote}
(\textit{f})or instance, the court will be more inclined to order no discount where the majority’s oppressive conduct was directed at worsening the position of the minority as shareholders so as to compel them to sell out . . . or entirely responsible for precipitating the breakdown in the parties’ relationship . . . As with cases involving quasi-partnerships . . . the court is likely to order a discount where the conduct of the minority contributed to their exclusion from the company or the oppressive conduct complained of . . . The court will also consider relevant background facts such as whether the minority had originally purchased their shares at a discounted price to reflect their minority status, or for full value . . . Ultimately, the broad task for the courts is to ensure that the forced buyout is fair, just and equitable for the parties in all the circumstances.\textsuperscript{72}
\end{quote}

\textbf{III \hspace{1em} EXPERT EVIDENCE}

\textbf{i \hspace{1em} Introduction}

The role of expert evidence in legal proceedings is set out in Section 47(1) of the Evidence Act, which establishes that ‘when the court is likely to derive assistance from an opinion upon a point of scientific, technical or other specialised knowledge, the opinions of experts upon that point are relevant facts’.

\textsuperscript{70} id. at 645.

\textsuperscript{71} \textit{Thio Syn Kym Wendy v Thio Syn Pyn} [2018] SGHC 54 at [27]–[31]

\textsuperscript{72} id. at [31]
The role of expert evidence in calculation of damages

There is no difference in the principles governing experts in different fields. They all relate to impartiality, and this is reflected in the relevant requirements for expert witnesses outlined in Order 40A of the Rules of Court.

Typically, expert evidence on assessment of damages involves (but is not limited to) issues such as making of assumptions, projection of cash flows and valuation of hypothetical scenarios. Thus, expert evidence usually plays an important role in helping the court understand how each party had derived the figures they have relied upon in their respective cases. The Singapore High Court has stated, in the context of valuation evidence on the valuation of shares, that:

\[\text{the court must not defer too readily to expert evidence . . . [T]he Court must assess for itself the reasonableness of an expert's opinion against the criteria of fact and logic. This will sometimes require the court to go deeper into the technical basis upon which the expert valuation has been performed and to consider whether that basis for valuation has been applied using assumptions which are reasonable and justified by the facts.}\]

The courts have recognised that an accountant expert may be engaged to fulfil one of at least three roles in connection to litigation. These include: (1) acting as an independent expert and providing an opinion on liability, quantum or both; (2) acting as a consultant assisting in the preparation of the case of one of the litigants; and (3) acting in a supporting administrative role in managing the documentary information required for the litigation. It is only in the first role that the forensic accountant is acting as a forensic expert. When the accountant acts as a consultant, his or her role is inconsistent with the expert’s duty to be independent; therefore, the accountant should not accept a role that requires him or her to be a consultant as well as an independent expert.

The court’s role excluding and managing expert evidence

The court’s role in excluding and managing expert evidence is illustrated by Order 25 Rule 3 of the Rules of the Court. In particular, the court will determine, inter alia, whether an order should be made limiting the number of expert witnesses; whether any direction should be made for a discussion between the experts prior to the exchange of their affidavits exhibiting their reports for the purpose of requiring them to identify the issues in the proceedings and where possible, reach agreement on an issue, and if such a direction should be made, whether: (1) to specify the issues which the experts are to discuss; and (2) to direct the experts to prepare a joint statement indicating the agreed issues, the issues not agreed and a summary of the reasons for any non-agreement; and whether directions should be given pursuant to Order 40A.

Where it is apparent that the experts’ further assistance is necessary, the courts have seen fit to conduct a hot-tubbing exercise where each expert gives his or her reasons to support his

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73 Poh Fu Tek (see footnote 44) at [27].
75 Order 25 Rule 3(1)(d) and Order 40A Rule 1.
76 Order 25 Rule 3(1)(f).
77 Order 25 Rule 3(1)(b).
or her conclusions and challenge the opposing expert’s conclusions, with the opposing expert having the opportunity to respond immediately. This could be done with the court and counsel asking questions on the reasons and counsel providing facts to support or challenge the reasons given.78

Also, in cases where valuation evidence on shares as well as assessment of damages is undertaken, the court has suggested that parties should consider whether the same person should be appointed as the valuer of shares and assessor of damages, to avoid any concern that there may be some discrepancy in the approaches.79

In relation to expert evidence, a judge should not substitute his or her own views for those of an uncontradicted expert. On the other hand, a court must not unquestioningly accept unchallenged evidence and the evidence must be weighed and evaluated in the context of the factual matrix and the objective facts, and an expert’s opinion ‘should not fly in the face of proven extrinsic facts relevant to the matter’.80 Further, the court may not adopt a valuation approach that parties have not been given the opportunity to lead evidence or make submissions on.81

iv Independence of experts

The duties of an expert are well summarised in Ikarian Reefer,82 but probably the most important duty is that of independence. The independence of expert witnesses is governed by Order 40A Rule 2(1), which establishes ‘the duty of an expert to assist the Court on the matters within his expertise’. This duty overrides any obligation to the person from whom he or she has received instructions or by whom he or she is paid.83

There is no overriding objection to a properly qualified person giving expert evidence just because he or she is employed by one of the parties.84 The fact of the expert witness’ employment may affect the weight of the evidence but that is a separate matter from the question of the expert’s independence.85

That being said, when an accountant expert acts as a consultant and assists in the preparation of a party’s case, he or she is assisting in the advocacy of the client’s case, which is a role that is inconsistent with the expert’s need for independence. As such, careful consideration should be accorded to the evidence of an expert accountant who has been engaged as an investigator and collator of facts, and later reprises in court the role of an advocate in support of evidence that he or she has gathered. The courts are cognisant that such evidence may, at times, be coloured by the difficult and sometimes conflicting roles being discharged by the expert accountant.86

In addition, the evidence of an expert ‘should not only be independent but should also be seen to be independent’.87 This means that while the courts will permit a strong defence

78 Swiss Butchery (see footnote 15) at [114].
79 id. at [112].
80 Sea-Shore Transportation Pte Ltd v. Tecknik-Soil (Asia) Pte Ltd [2018] SGHC 231 at [72].
81 Columbia Asia Healthcare Sdn Bhd v. Hong Hin Kit Edward and anor [2015] 2 SLR 395 at [42].
82 [1993] 2 Lloyds rep 68.
83 Order 40A Rule 2(2).
85 ibid.
86 Vita Health (see footnote 74) at [84]–[85].
87 Ku Jia Shuen (an infant suing through her mother and next friend, Tay Pei Hoon) & Anor v. Government of Malaysia & Ors [2013] 4 MLJ 108 at [37].
of an expert’s independent views and position, the expert should not stray into engaging in partisan advocacy to advance his or her client’s cause. If he or she appears to do so, his or her independence will be called into question and he or she will inexorably lose credibility. The expert’s advocacy is thus limited to supporting his or her independent views and not the client’s cause – this must be brought to the expert’s attention by the instructing solicitor.

In addition, in the interests of ensuring that the independence of the expert is preserved, if an expert ‘either has or has previously had a significant relationship with any interested party, particulars of this too ought to be disclosed without any prompting. A failure to make proper disclosure in a timely manner may raise serious concerns about apparent or actual bias on the part of the expert.’

Order 40A Rule 3(2)(h) further sets out the requirement for an expert’s report to ‘contain a statement that the expert understands that in giving his report, his duty is to the Court and that he complies with that duty’. This emphasises that it is to the court that the expert’s overriding duty is owed irrespective of who instructed or called the expert.

v Challenging experts’ credentials

Per Section 47(2) of the Evidence Act, ‘[a]n expert is a person with such scientific, technical or other specialised knowledge based on training, study or experience’. There is no need for the expert to be qualified professionally – as long as the court is satisfied that the witness has sufficient knowledge or expertise to qualify as an expert, he or she could be regarded as such. Thus an expert’s credentials may be established by his or her experience concerning the matters in question, so long as the experience relates specifically to those matters. Nonetheless, it remains open for any party to challenge an expert’s credentials on the basis of his or her lack of professional qualifications or experience, as such matters still affect the weight accorded to the expert evidence.

The expert witness is also required to give details of his or her qualifications in the expert report. At the very minimum, a curriculum vitae detailing the expert’s relevant experience should be provided, with special regard to the issue on which the expert’s opinion is sought. The expert’s report should state the precise manner, and not merely the general area of inquiry, in which the witness would be of use to the court. A party may thus use this information as a basis upon which to challenge the expert’s credentials.


89 Pacific Recreation Pte Ltd v. SY Technology Inc and another appeal [2008] 2 SLR(R) 491; [2008] SGCA 1 at [70].

90 Id. at [72].

91 HSBC Institutional Trust Services (Singapore) Ltd v. Tobin Development Singapore Pte Ltd [2012] 4 SLR 738 at [71].

92 Judicial Commissioner Foo Chee Hock, Singapore Civil Procedure Volume 2018 Volume 1 (Sweet & Maxwell 2018) at 40A/2/1.

93 id. at 40A/1/2.

94 Leong Wing Kong v. Public Prosecutor [1994] 1 SLR(R) 681 at [15].

95 Singapore Civil Procedure 2018 (see footnote 92) at 40A/1/2.

96 Kong Nan Siew v. Lim Siew Hong [1971] 1 MLJ 262.

97 Order 40A Rule 3(2)(a).

98 Pacific Recreation (see footnote 89) at [67].
vi  Oral and written submissions

Unless the court otherwise directs, expert evidence must be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him or her testifying that the report exhibited is his or hers and that he or she accepts full responsibility for the report.99 Such a report must, inter alia: (1) give details of the expert’s qualifications;100 (2) give details of any literature or other material that the expert has relied on in making the report;101 (3) contain a statement setting out the issues that he or she has been asked to consider and the basis upon which the evidence was given;102 (4) where there is a range of opinion on the matters dealt with in the report, summarise the range of opinion, and give reasons for his or her opinion;103 and (5) contain a summary of the conclusions reached.104

So, for instance, where damages are to be assessed by reference to a business valuation prepared by an expert witness, the expert should consider the full range of the common methods used in such a valuation (i.e., asset, market and income). Any omission to prepare a valuation on one or more of these methods should be explained in his or her report; likewise, the ultimate choice of valuation should be justified, and where divergent valuations are attained, these should be discussed and explained.

Non-compliance with these requirements does not automatically render the evidence inadmissible.105 However, it may result in the expert’s opinion being accorded little or no evidentiary weight as well as in adverse cost consequences for the party who engaged that expert.106

IV  RECENT CASE LAW

i  Turf Club Auto Emporium v. Yeo Boong Hua

The facts of the case

The facts of Turf Club revolve around a failed joint venture (JV) between two groups of shareholders to develop a plot of land in Singapore, and a settlement recorded in a consent order that was subsequently breached. The majority group of shareholders, the SAA Group, had leased a plot of land from the Singapore government authority (the Singapore Land Authority) under a head lease. The SAA Group then granted corresponding subtenancies to the JV companies, which in turn granted sub-subtenancies of the units on the site to ultimate tenants. The revenue of the JV companies therefore would come from the rent payable by the ultimate tenants. While the site was being developed, the two groups fell into dispute. The parties eventually reached a settlement that was recorded in a consent order. The consent order provided for a bidding exercise, where both groups of shareholders agreed that the higher bidder would purchase the shares of the lower bidder. It was also agreed that if the

99  Order 40A Rule 3(1).
100  id., at Rule 3(2)(a).
101  id., at Rule 3(2)(b).
102  id., at Rule 3(2)(c).
103  id., at Rule 3(2)(e).
104  id., at Rule 3(2)(f).
106  Pacific Recreation (see footnote 89) at [89].
minority group was the higher bidder, the majority group would use their best endeavours to transfer the lease to the JV companies. Valuers were appointed to conduct an independent and fair valuation of the shares and supervise the bidding exercise.

While the valuation process was ongoing, and unbeknown to others, the SAA Group renewed the head lease with the Singapore Land Authority for another three years but failed to grant corresponding subtenancies to the JV companies. After this came to light, the minority group commenced legal proceedings against individual members of the SAA Group, claiming contractual breaches of the consent order and in tort.

The decision
In a landmark decision, the Court of Appeal affirmed in Turf Club the availability of Wrotham Park damages as part of the remedies under contract law in Singapore. Prior to Turf Club, references have been made to Wrotham Park damages by the Singapore courts, although such damages have never been awarded. Wrotham Park damages are measured (objectively) by such a sum of money as might reasonably have been demanded by the plaintiff from the defendant as a quid pro quo for relaxing the covenant between them. This is akin to a ‘licence fee’ that the plaintiff could reasonably have extracted in return for his or her consent to the defendant’s actions that would otherwise constitute a breach of contract.

The Court of Appeal established that the legal requirements for the award of Wrotham Park damages under Singapore law are as follows:

(a) the court must be satisfied that orthodox compensatory damages (measured by reference to the plaintiff’s expectation or reliance loss) and specific relief are unavailable;

(b) it must, as a general rule, be established that there has been (in substance, and not merely in form) a breach of a negative covenant; and

(c) the case must not be one where it would be irrational or totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis.

The assessment is objective and by reference to a hypothetical bargain rather than the actual conduct of the parties.

Applying the law to the facts, the Court of Appeal held that Wrotham Park damages could not be claimed because orthodox compensatory damages were available to the plaintiffs, which could be identified as the loss of the value of their shares in the JV companies caused by the breaches of the consent order.

Finally, the Court of Appeal also set out some tentative observations on AG v. Blake damages. The court indicated that the primary difficulty in recognising such damages as part of Singapore law was the uncertainty of legal criteria to be applied in awarding such damages. If AG v. Blake damages were to be accepted as part of the law on contractual damages in Singapore, it may perhaps be recognised as an exceptional remedy confined to the unique category of cases where the law has a legitimate basis for punishing the defendant or deterring non-performance.

107 See YH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd and another appeal [2017] 2 SLR 129 at [80]; see also MFM Restaurants (see footnote 3) at [55].

108 Wrotham Park Estate Co Ltd v Parkside Homes Ltd and others [1974] 1 WLR 798 at 815.

109 Turf Club (see footnote 12) at [217].

110 id., at (see footnote 12) at [244].

111 id., at [254].

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The significance of the decision

The decision in *Turf Club* has made it clear that *Wrotham Park* damages are recognised as a head of contractual damages in Singapore. The Court of Appeal explained that the doctrine fills a remedial lacuna that arises in cases where the court is unable to award orthodox compensatory damages or grant specific relief, but where there is still a need to provide the plaintiff with a remedy to protect the plaintiff’s performance interest (i.e., the primary right to performance of the defendant’s obligations).

In an illuminating judgment, the Court of Appeal also examined the conceptual foundation of *Wrotham Park* damages. While the court indicated that *Wrotham Park* damages may be restitutionary as a matter of description, given that often at least some of the gains of the defendant are disgorged, they are in fact compensatory in nature. In fact, a restitutionary approach suggests or implies that *Wrotham Park* damages should be available only where the defendant concerned derives a benefit from his or her breach of contract, but that is not the case. Indeed, the Court of Appeal explained that *Wrotham Park* damages are objective compensatory awards aimed at compensating the plaintiff for the loss of the performance interest of which the plaintiff has been deprived owing to the defendant’s breach of contract.\(^\text{112}\)

Further, given that such damages are assessed by reference to the hypothetical bargain, the Court of Appeal indicated that it is not clear why the tests of causation and remoteness of damages apply, since they are premised on the need to establish a sufficient link between the defendant’s breach and the subjective loss of the plaintiff.

However, the Court of Appeal declined to follow the UK Supreme Court in *One Step* if it indeed limited the award of such damages to cases where the contractual right breached is considered to be an economically valuable ‘asset’ (i.e., where the breach results in the loss of a valuable asset created or protected by the right that was infringed, such as in cases involving a restrictive covenant over land, intellectual property or confidential information).\(^\text{113}\) The Court of Appeal was of the view that it was not clear when a contractual right can be considered an ‘asset’ or when there would be (as per Lord Carnwarth’s concurring judgment with the majority) ‘the abstraction or invasion’ of ‘property and analogous rights’.\(^\text{114}\) In its judgment, the Court stated that there should be no reason to deny protection to a plaintiff’s performance interest where the contractual right breached was of a personal nature, as opposed to property rights, when orthodox contractual remedies are not available.

Looking forward, the UK Supreme Court in *One Step* had identified examples of breaches of contractual rights that can be protected under this doctrine such as breaches of confidentiality. Breaches of confidentiality, where the plaintiff is unable to restrain the breach in time, often can give rise to situations where compensatory damages may be hard to quantify. It may even be possible to envisage that compensatory damages in such cases, having regard to the three requirements highlighted by the Court of Appeal in *Turf Club*, are unavailable, as opposed to just being hard to quantify. Applying the test set out in *Turf Club*, one can appreciate that the third requirement may be difficult to satisfy – parties to a confidentiality obligation would generally not care to bargain for the release of the confidentiality or non-disclosure covenant and would instead insist on the strict compliance with the covenant. If that is so, it may be difficult to envisage cases of breach of confidentiality that satisfy the third requirement, which is that the case must not be one where it would be irrational or

\(^{112}\) id., at [215].

\(^{113}\) *One Step (Support) Ltd v. Morris-Garner and another* [2018] 2 WLR 1353 at [92]–[94].

\(^{114}\) *Turf Club* (see footnote 12) at [279].
totally unrealistic to expect the parties to bargain for the release of the relevant covenant, even on a hypothetical basis. It remains of interest for a case to come up for consideration in future where a party seeks *Wrotham Park* damages in Singapore for breach of a confidentiality covenant, and whether the first and third requirements as set out by the Court of Appeal in *Turf Club* can be satisfied where confidentiality covenants are breached. Nonetheless, breaches of confidentiality and whether they can qualify for *Wrotham Park* damages aside, it is now clear that *Wrotham Park* damages are available as a contractual remedy in Singapore for breaches of contract, and that such damages are compensatory in nature.

V  **CIVIL JUSTICE REFORMS**

In October 2018, the Ministry of Law in Singapore sought public consultation on civil justice reforms, following the recommendations of the Civil Justice Review Committee (CJRC) and Civil Justice Commission (CJC). By way of context, the CJC was constituted by the Honourable Chief Justice Sundaresh Menon on 5 January 2015 with the mandate to, inter alia, ‘transform, not merely reform, the litigation process by modernising it, enhancing efficiency and speed of adjudication and maintaining costs at reasonable levels’. Subsequently, the Ministry of Law announced the establishment of the CJRC on 18 May 2016 to recommend reforms to Singapore’s civil justice system. The recommendations made by the CJC and CJRC are wide and far-reaching, ranging from instituting a more judge-driven process in the case management system to an arbitration-style discovery regime to introducing scale costs in litigation. Among the recommendations is one that adopts a default position where a single court expert will be appointed in cases where expert evidence is necessary. The court expert will be granted access to all evidence to assist in the formulation of his or her expert opinion and, generally, no party expert witnesses will be permitted.

The rationale driving the recommendation was that the current system of party-appointed experts has its difficulties, namely: (1) the expert witnesses often have irreconcilable differences in opinion – their evidence may then unnecessarily complicate the issues before the court, thus becoming counterproductive rather than helpful to the adjudicative process; (2) party-appointed experts are presented with the facts of the case framed according to a particular perspective by the party engaging them, which may influence their interpretation of the evidence; and (3) the disproportionately high costs usually incurred in the preparation and presentation of expert testimony.

There is merit in the recommendation as there is much value in having an impartial expert whose paramount duty is to the court, and who has access to all available evidence from both sides to formulate his or her views. It is not uncommon to see party-appointed experts present to the court starkly different opinions, leaving the court with the unenviable task of assessing which of the opinions (if any) to adopt. Under the recommendation, however, the court retains the discretion to allow parties to have their own party-appointed experts in appropriate cases.

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115 Civil Justice Commission Report, 29 December 2017, foreword by the Honourable Judge of Appeal Tay Yong Kwang at [1].
116 Report of the Civil Justice Review Committee at [94].
117 id. at [95].
I OVERVIEW

Under South African law, claims for damages are financial claims that are brought to compensate a plaintiff as a result of a loss-causing event that occurred because of the fault of the defendant.

A claim for damages may be instituted by a plaintiff: (1) in the event of a breach of contract; (2) in the event that the defendant has committed a delict (tort) against the plaintiff; or (3) where there has been a breach of a statute that provides for an award of damages or compensation in the event of such a breach.

Each of these causes of action require that certain elements must be proven. Because of the fact that these cases inevitably involve disputes of fact between the parties, they are always brought by way of action proceedings (as opposed to motion proceedings) and culminate in a trial where evidence is led.

When dealing with a claim for damages, it is particularly important to note the following:

a South African law does not allow a plaintiff to claim punitive damages from a defendant in a private claim, as this is seen as being contrary to public policy. A plaintiff is only entitled to the damages that he or she can prove that they have suffered.

b In the context of a delict, claims for pure economic (financial) loss, with no accompanying harm to an individual’s person or property, are only available in limited circumstances.

i Contractual damages

Under the South African common law, an automatic remedy that stems from a breach of contract is a claim for damages against the breaching party, in the hands of an innocent party.

To successfully claim damages, a plaintiff must show that: (1) a contract exists or existed; (2) the contract was breached by the defendant; and (3) the plaintiff suffered damage (loss) as a result of the defendant’s breach.

Under the South African law of contract, a claim for damages may also be coupled with a claim for specific performance of the contract.

In addition to the above automatic remedy, parties are also free to agree to terms that vary their common law rights, insofar as such variation is lawful. Examples of such variations that may affect a claim for damages as a result of a breach of contract are:

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1 Jonathan Ripley-Evans is a director and Fiorella Noriega Del Valle is an associate at Herbert Smith Freehills.
Limitation clauses: Parties may agree that any claim for damages, because of a breach of contract, is limited to a specific amount (such as the amount of the contract price).

Penalty clauses: Parties may also agree that a liquidated (pre-calculated) amount of damages or an agreed penalty amount may become payable in the event of a breach of contract.²

## Delictual damages

The following elements must be present, to successfully claim damages as a result of a delict:

- The defendant must have committed an act, or an actionable omission;³
- that is ‘wrongful’;³
- that caused;⁴
- harm,⁵ in the form of damage or loss,⁶ to the plaintiff;
- because of the fault (whether intentionally or negligently) of the defendant⁷.

## Damages for ‘pure economic loss’ in the context of a delict

In circumstances where a plaintiff: (1) has no contractual relationship with a defendant; (2) has sustained no harm to their property or person; and (3) alleges that a defendant has, nonetheless, caused it financial loss, through a specific act, South African courts have held that such ‘pure economic loss’ claims are available in limited circumstances only.⁸

This is particularly because of that fact that the elements of a delict (as set out above) must still be satisfied when ‘pure economic loss’ claim is brought. It is, however, far more difficult to prove that an act or omission that causes financial loss (without any damage to person or property) is wrongful.⁹

Examples of ‘pure economic loss’ claims that have been held to be actionable include the claim of ‘interference in contractual relations’ and ‘negligent misstatements’.¹⁰

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² It should be noted, however, that the Conventional Penalties Act 15 of 1962 (1) does not allow a plaintiff to recover both the penalty amount and common law damages and (2) the penalty must be in proportion to the prejudice suffered by the innocent party as a result of the breach.

³ A positive ‘act’ that causes harm is wrongful (Country Cloud Trading CC v. Member of the Executive Council, Department of Infrastructure Development, Gauteng 2014 (12) BCLR 1397 (CC)). However, in order for an omission to be wrongful, a legal duty to have acted must be shown to exist on the part of the defendant (Minister of Safety and Security v. Van Duivenboden 2002 (6) SA 431 (SCA)).

⁴ A ‘causal link’ must exist between the act or omission and the harm suffered (Oppelt v. Head: Health, Department of Health, Provincial Administration: Western Cape 2015 (12) BCLR 1471 (CC)).

⁵ Oppelt v. Head: Health, Department of Health, Provincial Administration: Western Cape 2015 (12) BCLR 1471 (CC) Paragraph 34.


⁷ Country Cloud Trading CC v. Member of the Executive Council, Department of Infrastructure Development, Gauteng 2014 (12) BCLR 1397 (CC) Paragraph 40. See Kruger v. Coetzee 1966 (2) SA 428 A 430 as to the test for negligence.


¹⁰ Country Cloud Trading CC v. Member of the Executive Council, Department of Infrastructure Development, Gauteng 2014 (12) BCLR 1397 (CC) Paragraph 24.
In addition, the tests applied by South African courts to ascertain whether such a cause of action exists are generally quite strict.

iv Statutory damages
The circumstances under which a plaintiff may be awarded compensation under certain legislation is particular to the provisions of the specific statute that is being relied upon. Examples include the following:

a. The Competition Act: Section 49D(1), read with Section 65(6) of the Competition Act entitles the Competition Tribunal to hand down a consent order that may contain an award for damages because of loss suffered as a result of a breach of the Competition Act;

b. The Consumer Protection Act: Section 61 states that a producer, importer, distributor or retailer of ‘goods’ (as defined in the Act) is liable for any harm caused by unsafe or defective goods, which do not comply with the Consumer Protection Act; and

c. constitutional damages may be awarded to a plaintiff by a court, as compensation where a breach of a person’s constitutional right occurs.

II QUANTIFICATION OF FINANCIAL LOSS
i Introduction
As discussed above, a plaintiff in a civil claim is generally only entitled to claim the damages that it can prove it suffered. Accordingly, the quantification of the loss is a crucial component of any claim for damages.

It is often the case that the trial in respect of the ‘merits’ of a claim (i.e., whether a defendant is liable) are separated from the ‘quantum’ portion (i.e., how much the defendant is liable for) of the claim, to save time and money in the event that the plaintiff’s claim is not successful on the merits.

In other words, parties may agree, or the court/tribunal may order, that the evidence on the quantum will only be led once the plaintiff has proved that the defendant is liable, in principle.

ii Evidence
The South African law of evidence is heavily influenced by English Law. Although there is no actual civil code, there are two pieces of legislation that (apart from the common law) are deemed to be the main source of law in this field; namely, the Criminal Procedure Act and the Civil Proceedings Evidence Act.

The quantification of a plaintiff’s loss generally requires the presentation and evaluation of factual oral, written or expert evidence, or both. Expert evidence (which will be dealt...
with in further detail below) must be distinguished from factual evidence in that it relates to
the specialist knowledge of an expert in regard to a particular issue in dispute and which is
required to assist the court or tribunal. On the other hand, factual evidence is evidence that
proves an ascertainable fact.

Because of the fact that plaintiffs in South Africa are required to prove their allegations
on a balance of probabilities, the onus rests on the plaintiff to lead evidence of the loss
suffered by it. In cases where damages are capable of exact mathematical computation, the
plaintiff must produce sufficient evidence to substantiate the exact amount of the damages.\(^\text{17}\)
Where the plaintiff is unable to do so, the court will, in some cases, assess the damages on
the evidence available.\(^\text{18}\) However, where the plaintiff has simply failed to produce all the
available evidence to substantiate his or her claim, the court is likely to give the defendant
absolution from the instance,\(^\text{19}\) thereby dismissing the claim.

Quantification of loss involves the presentation of both oral and written evidence and,
in many cases, may also involve the leading of expert evidence, depending on the complexity
of the matter. The manner in which the evidence is led and the type of evidence that is led is
highly dependent on the nature of the claim and the complexity of the loss suffered.

In addition, and as has been alluded to earlier in this chapter, in the case of damages
for a breach of contract, it may sometimes be the case that parties have agreed on a specific
method for the calculation of damages or on a pre-agreed ‘liquidated’ or ‘penalty’ amount.
In such instances, the evidence that needs to be led in order prove the quantum of the claim
may be far more simple.

Although the law of evidence is an entire topic in and of itself, it is important to note
that the general rule in South Africa in respect of the admissibility of factual evidence is that
all facts of sufficient probative value are relevant and admissible, unless there is a specific
exclusionary rule that prohibits its admissibility.\(^\text{20}\) In addition, although it may be found that
evidence is admissible, the weight that will be afforded to the evidence depends on a variety
of factors (including its relevance), which is in the discretion of the tribunal or court that is
adjudicating the matter.\(^\text{21}\)

iii  Date of assessment

The date at which the plaintiff’s loss will be assessed is dependent on the particular facts of
each case and the cause of action.

\(a\) Delictual damages: these will usually be assessed on the date of the commission of the
delict (including prospective loss).\(^\text{22}\) However, certain exceptions to this rule have been
established.\(^\text{23}\)

\(^{17}\) Versfeld v. SA Citrus Farms Ltd 1930 AD 452.
\(^{19}\) ibid.
\(^{22}\) General Accident Insurance Co SA Ltd v. Summers; Southern Versekeringsassosiasie Bpk v Carstens; General
Accident Insurance Co SA Ltd v Nhlumayo 1987 2 All SA 345 (A).
\(^{23}\) For example in General Accident Insurance Co SA Ltd v. Summers; Southern Versekeringsassosiasie Bpk v.
Carstens; General Accident Insurance Co SA Ltd v. Nhlumayo supra 613C–E, the court viewed loss of income
due to bodily injuries (loss of earning capacity) as damage that continues into the future, well after
the time of the commission of a delict. This theory prompted the court to discount damages for loss of earning
capacity and loss of support only to the date of trial and not to the date of delict. Also, in Drake Flemmer
b Contractual damages: there are various possibilities regarding the date when damage is to be assessed and this is specific to each case. Examples of assessment dates include the date of the breach of the contract,\(^\text{24}\) the date when performance was due,\(^\text{25}\) the date on which it would have been reasonable for repairs or remedial work to have been done\(^\text{26}\) and the date of cancellation.\(^\text{27}\)

iv Financial projections

There are numerous situations and scenarios where financial projections may be required when proving losses suffered. For example, ‘prospective losses’ may also be claimed from a defendant, by a plaintiff.

In essence, a ‘prospective loss’ is damage that may manifest itself in the future (i.e., after the date of assessment), as a result of the earlier damage-causing event.\(^\text{28}\) Examples of prospective losses that are recognised by South African courts include:\(^\text{29}\)

\begin{itemize}
  \item \textit{a} future expenses because of a damage-causing event (for example, future medical expenses);
  \item \textit{b} loss of future income or earning capacity;
  \item \textit{c} loss of prospective business or profit;
  \item \textit{d} loss of support; and
  \item \textit{e} loss of a chance.
\end{itemize}

A plaintiff is required to claim its prospective loss at the same time as it claims the loss that it has already suffered, because of the ‘once-and-for-all’ rule, which requires that all claims arising from the same cause of action are to be claimed at the same time.

As a result of the fact that the damage may not yet have arisen, the quantification of prospective damage involves speculation, as exact calculations may not possible.

Financial projections, utilised to prove aspects such as prospective losses, generally take the form of complex actuarial and accounting calculations that are presented to the court or tribunal as evidence. These financial projections must be supported by correct factual evidence and data, and expert evidence given by individuals with specialist knowledge, who can substantiate the numerical calculations. A court or tribunal may reject such calculations if it is not satisfied with the investigations underpinning it.\(^\text{30}\)

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\(^{24}\) \textit{Mostert v. Old Mutual Life Assurance Co (SA) Ltd} 2001 4 All SA 250 (SCA).


\(^{26}\) \textit{Rens v. Coltman} 1996 1 SA 452 (A) (here, the plaintiff was held not to have been acting reasonably in mitigating his damages).

\(^{27}\) \textit{Culverwell v. Brown} 1990 1 All SA 253 (A) (this is relevant in the case of repudiation).

\(^{28}\) \textit{Visser \& Potgieter Law of Damages 129}


v Assumptions

When estimating prospective loss, it is not necessary for a plaintiff to prove that there is a possibility of more than 50 per cent that it will sustain damage in the future. If it can be shown that there is some chance that damage may be suffered, a South African court will make certain assumptions to award damages that will cater for the possibility that some damage may be suffered.

For example, where liability has been established and the plaintiff proves on a balance of probabilities that there is a 40 per cent chance that he or she may suffer damage in the amount of 1,000 South Africa rand in future, the court will usually make an award of damages calculated on an equitable basis as follows: 40 per cent × 1,000 rand = 400.14 rand. Although this assumption is not particularly accurate or ideal, it has been described as a 'necessary evil' flowing from the once-and-for-all rule.

Contingencies

In addition to the above, when awarding damages for future loss, courts usually make provision for 'contingencies', which are assumed. These have been described as 'hazards that normally beset the lives and circumstances of ordinary people', which must also be taken into account when calculating the future loss that will possibly be suffered by the plaintiff. Contingencies include any other possible relevant future event that (1) might otherwise have caused the damage or a part thereof; or (2) may otherwise influence the extent of the plaintiff's damage.

In other words, contingencies usually reduce (but sometimes increase) the amount of damages to be awarded to the plaintiff. This is because the court makes provision for the fact that the prospective loss (which is possible at the time of assessment of damage) might, in any event, possibly have occurred independently of the delict or the breach of contract in question.

Provision for contingencies is a matter for the discretion of the court, who will look at what is reasonable and fair. South African courts have held that direct evidence on this issue cannot be given by an actuary, because an actuary is not qualified to give evidence as to the hazards and contingencies applicable to any particular type of work.

31 See Burger v. Union National South British Insurance Co 1975 3 All SA 647 (W); 1975 4 SA 72 (W); Blyth v. Van den Heever 1980 1 All SA 148 (A); 1980 1 SA 191 (A) 225F–226B (confirming the approach in the Burger case).
33 AA Mutual Insurance Association Ltd v. Van Jaarsveld (1) 1974 2 QOD 360 (A). See also Sigournay v. Gillbanks 1960 2 All SA 319 (A); (the ordinary accidents and chances of life); Southern Insurance Association Ltd v. Bailey 1984 1 All SA 360 (A) (the fortunes of life); Road Accident Fund v. Guedes 2006 5 SA 583 (SCA) (the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors).
34 Southern Insurance Association Ltd v. Bailey 1984 1 All SA 360 (A) 117B–D.
36 Southern Insurance Association Ltd v. Bailey 1984 1 All SA 360 (A).
37 Shield Insurance Co Ltd v. Hall 1976 4 All SA 374 (A); 1976 4 SA 431 (A) 444F.
vi Discount rates
After damages for prospective patrimonial loss have been calculated, a court will reduce these using a ‘rate of discount’. 38

The ‘rate of discount’ is utilised to counter the benefit obtained by the plaintiff as a result of the fact that it has received compensation in advance of the date upon which the loss is expected to arise (particularly in respect of loss of earning capacities and loss of future support). This is calculated by determining: (1) the ‘present values’ of the future benefits and losses; (2) the rate of return at which it is assumed that the plaintiff would have invested the lump sum; and (3) the likely future rate of inflation. The calculation is performed by actuaries who rely on, among other things, tables of capital values and annuity and discount tables. 42

Usually, damages are discounted to the date when the delict occurred; however, as far as loss of earning capacity (future loss of income) and future loss of support are concerned, damages are discounted only to the date of trial and not the date when the delict occurred. 43

vii Currency conversion
In South Africa, it is permissible for a judgment to be expressed in foreign currency. 44 It has been held that the currency in which the loss is suffered is the proper currency in which the award is to be expressed.

In circumstances where the damages are to be determined in a foreign currency, but the plaintiff wishes the judgment to be made in South African currency, the rate of exchange must be proved by the plaintiff and is not a matter of judicial notice. The appropriate date at which the exchange rate must be calculated is dependent on the facts of each matter and whether the damages arose as a result of a delict or a breach of contract. 46 In some instances, parties may even agree to the rate of exchange that is to be utilised.

viii Interest on damages
South African courts generally award interest on top of any award that they might make in respect of damages. The date, and rate, utilised to calculate the amount of interest owed is dependent on the facts of each case.

38 See, generally, Koch, Lost Income 40, pp 76–89.
42 ibid., pp 132–141.
46 In Voest Alpine Interntridge Gesellschaft MBH v. Burwill and Co SA (Pty) Ltd 1985 (2) SA 149 (W), for example, the court held that the rate of exchange should be assessed on the date when the breach of contract occurred.
**Rate of interest**

The Prescribed Rate of Interest Act\(^47\) is applicable when determining what interest rate should be used in the following circumstances:

- \(a\) where a debt bears interest and the interest rate is not governed by any other law, agreement, trade or custom;
- \(b\) when calculating interest on an unliquidated debt; and
- \(c\) when calculating the interest due on an unpaid judgment debt. This includes the sum awarded under a judgment, including an order as to costs.

In particular, the Act states that the Minister of Justice, in consultation with the Minister of Finance, shall prescribe a rate of interest that is applicable in the above scenarios, by notice in the Government Gazette.

The current prescribed rate is linked to the South African repo rate plus 3.5 per cent. As of 1 January 2019, the prescribed interest rate is therefore 10.25 per cent.

In respect of contractual damages, parties may also have agreed their own interest rates. In such circumstances, South African courts will give effect to the agreement between the parties.

Unless expressly agreed by the parties to a contract, interest will be payable calculated as simple interest and not as compound interest.\(^48\)

**Date at which interest is calculated**

In terms of contractual damages, parties are free to agree when interest commences to run in their contract, and this will be given effect to by a South African court. In the absence of an agreement, the Prescribed Rate of Interest Act is applicable.

In this regard, the Act states that (1) interest on unliquidated debts (which includes a claim for unliquidated damages) shall commence to run from the date on which payment of the debt is claimed by service on the debtor of a demand or a summons, whichever date is earlier;\(^49\) and (2) judgment debt (including costs) shall bear interest from the day on which such judgment debt is payable.\(^50\)

As a result (in the absence of an agreement to the contrary), a plaintiff’s claim for unliquidated damages will accumulate interest from the date of demand, until such time as the judgment debt is paid by the defendant. The amount payable for any costs awarded will accumulate interest from the date of judgment.

This may entail, particularly in instances where another interest rate has been agreed in respect of the damages, that a different interest rate will apply after the judgment has been granted.

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47 Act 55 of 1975.
49 Section 2A(2)(a) of the Prescribed Rate of Interest Act.
50 Section 2(1) of the Prescribed Rate of Interest Act.
ix  Costs

The general rule in South Africa is that, in the absence of special circumstances, a successful litigant is entitled to his or her costs.\(^{51}\) This rule applies in respect of an award of damages as well.

It should be noted, however, that in court proceedings, the ‘costs’ awarded to a successful litigant are, very rarely, the actual costs incurred by the litigant in prosecuting, or defending, the claim.

In this regard, unless it has been otherwise agreed or unless there are circumstances that warrant a punitive award of costs against the unsuccessful party, costs will be awarded on the ‘party-and-party’ tariff (which is published for each court). This tariff limits the amount that a successful party can claim in respect of their legal expenditure, to the amounts stipulated in the tariff, regardless of what the successful party actually paid.

Despite the general rule, it is not always the case that the successful party is entitled to an award of costs and that an unsuccessful party should pay them. In this regard, examples of some of the factors that are considered when a court is determining what the appropriate costs order should be, are:

- if a plaintiff has advanced a grossly extravagant and unreasonable claim for damages, and is only awarded a small portion thereof, they may still be mulcted in costs, despite their success;\(^{52}\)
- the importance of the rights involved;\(^{53}\)
- the public interest;\(^{54}\)
- the complexity of the matter;\(^{55}\) and
- the duration of the trial.\(^{56}\)

x  Tax

When calculating and assessing the extent of past and future loss of earning capacity, the tax that would have been paid by the plaintiff is also deducted from the amount of damages awarded to the plaintiff,\(^{57}\) provided that there is sufficient certainty as to the extent of the tax.\(^{58}\) The onus of proving the size of the allowance for tax is on the plaintiff. If the plaintiff is unable to do so, the court may reduce the damages awarded to the plaintiff by a percentage that it deems appropriate.\(^{59}\)

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51 Fripp v. Gibbon & Co 1913 AD 354.
52 Naidoo v. Auto Protection Insurance Co Ltd 1963 4 SA 798 (D); Palmer v. SA Mutual Life & General Insurance Co Ltd 1964 3 SA 434 (D); Nedcor Bank Ltd v. SDR Investment Holdings Co (Pty) Ltd 2008 2 All SA 627 (SCA) (claim of over 20 million rand succeeding in respect of R93 986,65 only; plaintiffs awarded 20 per cent of their costs).
54 Seria v. Minister of Safety & Security 2005 2 All SA 614 (C).
55 Seria v. Minister of Safety & Security 2005 2 All SA 614 (C).
56 Mathe v. Minister of Police 2017 4 All SA 130 (GJ).
57 British Transport Commissioner v. Gourley 1955 3 All ER 796 (HL) 802–803; Oberholzer v. SANTAM Insurance Co Ltd 1970 1 All SA 179 (N); Krugell v. Shield Versekeringsmy Bpk 1982 4 All SA 505 (T); Minister of Defence v. Jackson 1991 3 All SA 354 (ZS); Barclay v. RAF 2012 3 SA 94 (WCC).
58 Sigournay v. Gillbanks 1960 2 All SA 319 (A); Muller v. Mutual & Federal Insurance Co Ltd 1994 1 All SA 199 (C).
The stage of the calculation at which tax is taken into account is important, as it may substantially affect the quantum that is ultimately awarded to the plaintiff and could amount to double taxation. South African courts have previously (somewhat inconsistently) followed the English approach that was set out in the case of British Transport Commission v. Gourley. However, in 2012 the court in the case of Barclay v. Road Accident Fund expressly declined to do so and the position is now further divided.

In South Africa, either income tax or capital gains tax is levied on receipts of sums of money by individuals, depending on whether the amount is of a revenue or capital nature. It is therefore also important, for purposes of calculating tax on the damages awarded, to draw a distinction between loss of earnings claims as opposed to claims for a loss of earning capacity. Because of the fact that an award of damages takes on the character of the loss in respect of which it was paid, the former is an income and the latter is of a capital nature. As such, it is essential that this be borne in mind when calculating the taxation amount to be deducted. Income tax should not be deducted from an amount that is ‘capital’ in nature.

III EXPERT EVIDENCE

i  Introduction

An expert is utilised in circumstances where the court does not have the necessary special knowledge and expertise to make a decision on a particular issue. An expert is therefore utilised in circumstances where he or she is better qualified to express an informed opinion on an issue that falls within his or her expertise.

For this reason, an expert must have the necessary skill, training or experience to enable him or her to materially assist the court in reaching a conclusion on a particular issue, in order for his or her evidence to be admissible.

ii  The role of expert evidence in calculation of damages

Experts are most frequently utilised, in damages claims, to quantify the loss suffered by the plaintiff. As has been set out above, and particularly in a situation where prospective losses are being claimed, this usually involves highly complex calculations that are undertaken and performed by actuaries and other experts.

iii  The court’s role excluding and managing expert evidence

Expert witnesses are utilised to assist the court, but a court is not bound by the opinion of the experts. The court always remains the sole arbiter of fact, and all expert evidence must be weighed up, accepted or rejected by the court in the same way as any other evidence.

60 [1955] All ER 796 (HL).
61 2012 (2) SA 94 (WCC).
62 Barclay v. Road Accident Fund 2012 (2) SA 94 (WCC) par 16.
South African courts have cautioned that ‘opinion evidence must not usurp the function of the court. The witness is not permitted to give opinion on the legal or the general merits of the case. The evidence of the opinion of the expert should not be proffered on the ultimate issue.’

It is in the court’s discretion to determine whether an expert’s opinion should be relied on and, if so, to determine what weight should be afforded to it.

It has been held that, even in situations where a proper conclusion cannot be reached without the assistance of an expert because of the technical nature of the evidence, a court is still obliged to make an evaluation as to whether it is safe to accept the opinion.66

Admissibility of expert evidence

The opinion of a witness ordinarily constitutes inadmissible evidence under South African law. However, the exception to the rule is that the opinion of an expert will be allowed in certain circumstances; namely, where the expert has specific knowledge in a particular field that is usually outside the knowledge or experience of the court.

It has been held that it is not the mere opinion of the witness that is decisive, but his or her ability to satisfy the court that, because of their special skill, training or experience, the reasons for the opinions he or she expresses are acceptable.67

From a substantive point of view, there is no closed list of situations where expert evidence would be admissible, and this is dependent on the facts of each case. The general point of departure, however, is:

a whether the court is incapable of forming an opinion without the assistance of the expert; and

b whether the expert’s evidence is relevant and reliable, in that it will assist the court in (1) understanding a scientific or technical issue or (2) establishing a fact by using inferential, as opposed to speculative reasoning (i.e., if the court is able to come to its own conclusions from the proven facts, the experts opinion should be disallowed).68

South African courts have held that the admission of expert evidence should be guarded, as it is open to abuse.69 By way of example, the South African Supreme Court of Appeal has disapproved of the practice of allowing expert witnesses to testify as to the meaning of a contract.70

There are, however, also instances where expert evidence that is useful (but not necessarily essential) may also be admitted. Whether or not the expert evidence is admissible is therefore at the discretion of the court.71

Procedurally, admissible expert evidence may not be led in a South African court unless the relevant provisions of the High Court or Magistrates Court Rules (depending on which court the trial has been instituted in) are complied with.

67 Menday v. Protea Assurance Co Ltd 1976 (1) SA 565 (E) at 569B. See also Gentiruco AG v. Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 616–17.
69 Twine and Another v. Naidoo and Another [2018] 1 All SA 297 (GJ).
70 KPMG Chartered Accountants (SA) v. Securefin 2009 (4) SA 399 (SCA) at 410F–G. See also Maisaures (Pty) Ltd v. Pick ‘n Pay Retailers (Pty) Ltd 2016 (2) SA 586 (SCA) at 593A–B.
71 Ruto Flour Mills Ltd v. Adelson (1) 1958 4 All SA 198 (T).
In this regard, both sets of Rules state that no person shall, save with the leave of the court or the consent of all parties, be entitled to call an expert witness unless:

- notice of an intention to call an expert witness has been given within a certain amount of days from the close of pleadings (this time period depends on whether the plaintiff or defendant intends to call the expert); and
- a summary of the expert’s opinion and reasons therefor have been given, within a certain amount of days from the close of pleadings (this time period also depends on whether the plaintiff or defendant intends to call the expert).

Practically speaking, the different divisions of the High Court also have their own independent procedural practises pertaining to the calling of expert witnesses, which differ throughout the country.

**Evaluation of expert evidence**

It is an established principle that a South African court is not bound by, nor obliged to accept the evidence of an expert witness and it is require to actively evaluate the expert’s evidence ‘in the contextual matrix of the case with which [the Court] is seized’.\(^{72}\) This is the case whether or not there are conflicting expert opinions that have been provided.

Certain principles pertaining to the manner in which our courts will evaluate expert evidence have been formulated over time through various decisions that have been handed down by the South African courts. Examples of these principles include the following:

- **Reasonableness of the expert evidence.** When a court analyses the evidence of conflicting factual witnesses, it is required to make a determination on the reasonableness\(^ {73}\) of the expert’s evidence. A trial judge will therefore determine to what extent the opinions advanced by the experts are founded on logical reasoning and how the competing sets of evidence stand in relation to one another, viewed in the light of the probabilities.\(^ {74}\)

- **Independence of the expert.** An expert is required to assist the court and is not supposed to be the advocate of the party who has briefed him or her. It has recently been held that the evidence of an expert witness is of little value where he or she is biased. This will be taken into account when it comes to assessing his or her credibility.\(^ {75}\)

- **Bald statements by experts.** An expert’s bald statement of his or her opinion is not of any real assistance to the court. In this regard, the expert must inform the court of all facts and assumptions upon which they base their opinions. This is because of the fact that the court can only properly evaluate the opinion if the court is made aware of the process of reasoning that led to the conclusion, including the premises from which the reasoning ensues.\(^ {76}\)

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72 S v M 1991 SACR 91 (T) and Twine and Another v Naidoo and Another [2018] 1 All SA 297 (GJ).
73 That is to say, the ‘reasonableness of imposing liability’ – see Masstores (Pty) Ltd v Pick N Pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC) Paragraph 48.
74 Louwrens v Oldwage [2006] 1 All SA 197 (SCA) Paragraph 27.
75 Stock v Stock 1981 (3) SA 1280 (A) and Jacobs and Another v Transnet Ltd v/tu Metrorail and Another 2015 (1) SA 139 (SCA).
76 Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A) 371. R v Jacobs 1940 TPD 142; R v Barry 1940 NPD 130.
Logical reasoning of the expert. The expert’s evidence must be verifiable and capable of being tested. The expert, in particular, must state the grounds upon which he or she bases his opinion, in order for the court to test its correctness.77 ‘Logical reasoning’ has been held to be extremely important when evaluating expert evidence.78

Facts relied upon by the expert. Because of the fact that the expert’s opinion is generally based on certain facts, it is essential for the court to know what facts have been relied on by the expert as the basis of the opinion. The court must therefore be made aware of the expert’s assumed premises. Bald statements of opinion generally have little to no value.79 In addition, it has been held that a court should always bear in mind the fact that an expert has to rely on calculations that are based on imperfect human observation.80

iv Independence of experts

Although an expert is hired by a party to prove (or refute) the losses that have been suffered by the plaintiff, an expert witness is, nonetheless, required to provide the court with an unbiased and objective opinion.

South African courts have been at pains to stress that an expert must not assume the role of the advocate for the party that it is representing.81 In fact, the independence of the expert will affect the manner in which the court views and evaluates that expert’s evidence.

Recently, the Supreme Court of Appeal, when determining how to approach conflicting expert opinions, held the following:

It is well established that an expert is required to assist the court, not the party for whom he or she testifies. Objectivity is the central prerequisite for his or her opinions. In assessing an expert’s credibility an appellate court can test his or her underlying reasoning and is in no worse a position than a trial court in that respect. Diemont JA put it thus in Stock v Stock: An expert . . . must be made to understand that he is there to assist the court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this court can test his reasoning and is accordingly to that extent in as good a position as the trial court was.82

v Challenging experts’ credentials

From a practical point of view, the experts’ expertise is generally challenged during the trial.

For the reasons set out above, an expert must satisfy the court that he or she has the requisite skill, training and experience to assist it in determining the disputed issue in order for his or her evidence to be admissible. This has been held to be the duty of the expert.83

As a result, a challenge to the credentials of the expert will generally constitute a challenge to the fundamental question as to whether the expert’s evidence is admissible.

77 R v. Jacobs 1940 TPD 142.
79 Barry v. R 1940 NPD 130; R v. Jacobs 1940 TPD 142; R v. Theunissen 1948 4 All SA 34 (C); S v. Ngomezulu 1972 1 All SA 707 (A); Mahomed v. Shaik 1978 4 All SA 370 (N).
80 Owners of the MV ‘Banglar Mookh’ v. Transnet Ltd 2012 3 All SA 632 (SCA).
81 Schneider v. Aspeling 2010 3 All SA 332 (WCC) and Stock v. Stock 1981 (3) SA 1280 (A).
82 Jacobs and Another v. Transnet Ltd t/a Metrorail and Another 2015 (1) SA 139 (SCA).
83 Menday v. Protea Assurance Co Ltd 1976 1 All SA 535 (E); Mahomed v. Shaik 1978 4 All SA 370 (N).
However, the aspect of what constitutes an ‘adequate’ qualification under South African law is a flexible one that is not only limited to practical experience or theoretical training, but also dependent on the facts of each matter. The expert’s qualifications are measured against the evidence that she or he has to give, to determine whether they are sufficient to deem his or her evidence ‘relevant’.\(^{84}\)

vi  Novel science and methods

As has been set out above, one of the important factors that is taken into account when evaluating expert evidence is that the evidence must be capable of being tested and must be verifiable. Although this question has not been dealt with extensively by South African courts, there is some case law that suggests that in order for a theory or an explanation to be accepted as scientific, it must be falsifiable.\(^{85}\)

Our courts have previously quoted the dicta in the US case of *Daubert v. Merrill Dow Pharmaceuticals Inc*\(^{86}\) (although acknowledging its controversial nature), which stated that:

> ordinarily a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested... Scientific methodology is what distinguishes science from other fields of human enquiry.

In addition, a court will usually look at whether the expert’s methods and reasoning enjoy general acceptance in the relevant scientific community.

As such, the manner in which novel science and methods will be treated in a particular case will be dependent on (1) whether it can be shown to be admissible (as described above) and (2) if it is held to be admissible, it will still need to be evaluated. In this regard, the weight given to the evidence will likely be less in circumstances where the method or science is so new that it cannot be tested.

vii  Oral and written submissions

South Africa follows an accusatorial-adversarial system of law. In such a system, it is generally the case that a party is not entitled to prior knowledge of the evidence that is to be led by its opponent at the trial. However, the exception to this general rule is expert evidence.

The rules of the South African High Court proceedings envisage that a party wishing to lead expert evidence must, prior to the hearing, deliver a notice of his or her intention to do so.\(^{87}\) In addition, the Rule requires the party to file a ‘summary’ of the expert’s opinion and his or her reasons therefor. The reason for this departure is that, because of the specialised nature of the expert evidence, fairness requires that the opposing party must be given an opportunity to familiarise themselves with the opinion, to properly prepare for trial, prepare evidence in rebuttal and conduct an informed cross-examination of the expert witness.

At the trial, after the expert report has been filed, the expert is also called to lead his or her oral evidence and in order for the other side to cross-examine him or her. The South African Supreme Court of Appeal has previously held that an expert may be tendered for

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84  *S v. Kimimbi* 1963 3 All SA 210 (C); *S v. Bertrand* 1975 4 All SA 288 (C); *Menday v. Protea Assurance Co Ltd* 1976 1 All SA 535 (E).
85  *Twine and Another v. Naidoo and Another* [2018] 1 All SA 297 (GJ).
87  Uniform Rules of the High Court of South Africa, Rule 36.
cross-examination upon his or her written report alone, without additional oral examination 
in chief, or after only limited questioning. As such, the report of an expert witness can 
be read as the evidence in chief, subject only to supplementary questions necessary for 
explanation or elaboration of the report. Ultimately, it remains for the court to evaluate the 
testimony that is presented as expert evidence.

IV RECENT CASE LAW

i Quasi-judicial proceedings between Families of Mental Health Care Users 
Affected by the Gauteng Mental Marathon Project v. National Minister of Health 
of the Republic of South Africa and Others (handed down in March 2018)

Facts

In September 2015, the Gauteng Health Department decided to terminate a long-standing 
contract with the Life Esidimeni Care Centre. The Esidimeni Care Centre was an 
establishment that housed mental healthcare patients. As a result, a mass transfer of over 
1,400 mental healthcare patients took place. The individuals in question were transferred to 
non-governmental organisations (NGOs). The majority of these organisations operated with 
invalid licences and lacked the experience and capacity to care for these patients. As a result, 
1,418 mental healthcare users were exposed to trauma and morbidity, while 144 patients 
died. The state was unable to confirm the whereabouts of another 44 patients. The matter was 
referred for determination to a public arbitration.

Decision

Section 38 of the Constitution of the Republic of South Africa 1996 provides that a court is 
empowered to award ‘appropriate relief’ where a right in the Bill of Rights has been violated. 
South African courts have accepted that this relief may include a form of compensatory 
damages known as ‘constitutional damages’.

In this case, the claimants alleged that there had been severe infringements of the 
constitutional rights of the deceased patients, the survivors and the families of the patients. 
Their claims for damages were based on the breaches of constitutional law rights by the 
government of South Africa (i.e., they were constitutional damages); however, they had 
already been awarded common law damages for pain and suffering.

The government argued that once someone has been compensated under the common 
law, they may not rely on the Constitution to obtain additional compensation.

The arbitrator held that Section 38 of the Constitution provides that a person whose 
rights have been infringed or threatened may approach the Constitutional Court for 
an appropriate remedy, but this does not mean that a party is barred from relying on the 
Constitution where the breaches defy common law formulation.

The arbitrator found that several constitutional rights had been violated by the state’s 
actions and that the claims for compensation due to the ‘invasive and pervasive violation 
of constitutional guarantees by the government cannot readily be couched in common law

88 See PricewaterhouseCoopers Incorporated and others v. National Potato Co-operative Ltd and another, 
Paragraph 161 and sources cited there.
terms’. In addition, it was held that the only way to vindicate the claimants’ constitutional rights was to grant an order awarding constitutional damages over and above the amount already awarded for emotional shock and trauma.

Relevance

The current matter is of relevance owing to the fact that, while South African courts generally accept that punitive damages are not recognised under South African law, constitutional damages (which are similar to punitive damages to an extent) have been deemed to constitute appropriate relief as envisaged under the Constitution.

In this arbitration, the amounts claimed for emotional shock and trauma far exceeded the limit that one can claim under the common law, and as a result the arbitrator awarded constitutional damages to compensate for the deficit. As a result, the arbitrator awarded constitutional damages over and above the amount already awarded for emotional shock and trauma under the common law. This had not been done in the past.

In essence, it was held that a party is not barred from relying on the Constitution where the breaches that have been committed defy common law formulation.

However, owing to the fact that the proceedings were not formal court proceedings, the award has not set a binding precedent. With that being said, the arbitrator in this matter was the former Deputy Chief Justice of the Constitutional Court of South Africa. Considering this fact and that the award was handed down, publicly, in 2018, it is anticipated that courts in future may refer to this arbitration in support of awarding constitutional damages as appropriate relief, when the circumstances warrant.

ii Komape and Others v. Minister of Basic Education (1416/2015) [2018] ZALMPPHC 18

Facts

Michael Komape, a five-year-old child, drowned in a pit toilet on his school’s premises in 2014. The Komape family sought constitutional damages, a delictual claim of damages for emotional trauma and shock, and other relief, such as medical expenses, against the Department of Basic Education in South Africa.

Decision

The claimants contended that the nature of the violations, as well as the failure of the government to provide proper sanitation facilities in rural schools, meant that an award for constitutional damages was the most appropriate way to vindicate the violation of constitutional rights.

The court found that many constitutional rights had been violated but that a claim for constitutional damages was punitive (which is not allowed under South African law) and would result in over-compensation of the Komape family. Under South African law, the aim of a claim for damages is to compensate for the loss suffered and not to enrich a party. The court held that the punitive nature of such an award in itself would not serve to enforce any of the violated rights. The award of constitutional damages, as a result, would not have served the interests of society, nor would it be a deterrent that would prevent the future violation of rights. The court, instead, decided on an award of a ‘structural interdict’. In this regard the Minister of Education and the Limpopo Department of Education was ordered to supply and instal toilets at each rural school currently equipped with pit latrines.
The judge also dismissed the Komape’s family claim for emotional shock and trauma and awarded 6,000 rand to each of the Komape’s siblings for medical expenses.

Relevance
This matter has since been appealed to the Supreme Court of Appeal. The appeal was heard on 2 September 2019 and judgment is presently awaited.

Constitutional damages have previously been awarded in South Africa, for example in the case of President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd 2005 (5) SA 3 (CC), where the court awarded damages to the owners of land due to an infringement of their constitutional right to property in circumstances where unlawful occupiers had refused to vacate the premises.

The Komape matter differs, however, in that the family has claimed constitutional damages in circumstances where there was an infringement of a constitutional right, but no direct financial loss was suffered.

As the matter has been appealed, it will be interesting to see if the Supreme Court of Appeal overturns the High Court order and awards constitutional damages to the Komape family; if so, this will set a new precedent.

Masstores (Pty) Limited v. Pick n Pay Retailers (Pty) Limited (CCT242/15)
[2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC)

Facts
The matter concerned an alleged interference by Masstores with the trade of Pick n Pay, owing to the fact that Masstores was expanding its store, offering to include the sale of perishable and non-perishable groceries and foodstuffs. Pick n Pay sought to protect an exclusive contractual right to trade as a supermarket in a shopping centre, granted to Pick n Pay by Hyprop (the lessor and owner of the shopping centre) in a lease agreement.

Pick n Pay sought relief against Masstores under the delict of ‘interference with contractual relations’.

Decision
The decision is relevant insofar as it pertains to the manner in which South African courts approach the cause of action known as ‘damages due to interference in contractual relations’.

The High Court in this matter had previously interdicted Masstores from operating the supermarket in breach of its own lease agreement with Hyprop. The Supreme Court of Appeal confirmed this finding by relying on the Constitutional Court judgment of Country Cloud Trading CC v. MEC, Department of Infrastructure Development, Gauteng (CCT 185/13) [2014] ZACC 28 as authority that this kind of prevention of contractual performance constituted wrongful conduct, actionable in delict under South African law.

However, on appeal, the majority of the Constitutional Court held otherwise. In particular, the Constitutional Court stated that there is no authority for the argument that the deprivation of contractual rights (in delictual claims for interference with contractual relations) is prima facie unlawful. The Constitutional Court also clarified that the Country Cloud case did not lay down that, in inducement cases, the wrongfulness inquiry need not be concerned with the duty not to cause harm or the infringement of rights. It confirmed that the degree or intensity of fault may indeed play an important role in the wrongfulness inquiry in these kinds of claims.
In addition, the Constitutional Court held that there is no legal duty on third parties not to infringe contractually derived exclusive rights to trade, because exclusive trading rights make the competitive field uneven.

Relevance
This matter involved the assessment of wrongfulness in delict, which raises matters of policy, infused by constitutional values. The court in this case made it clear that there is no general right not to be caused pure economic loss and there is no legal duty on third parties not to infringe contractually derived exclusive rights to trade. However, this does not mean that unlawful competition cases are not actionable in South Africa. In such an instance, South African courts have recognised that the loss may lie in the infringement of a right to goodwill or in the legal duty.

iv Children’s Resource Centre Trust and Others v. Pioneer Food (Pty) Ltd and Others (050/2012)

Facts
An application was brought by a number of NGOs and five individual consumers for the certification of a class action against three of the major bread producers arising out of anticompetitive conduct which had increased the price of bread. The class action proposed was to be brought ‘on behalf of the consumers for compensation and related relief’ as a result of the anticompetitive conduct.

It should be noted that a class action had never been brought before in South Africa and there is no legislation that allows for such proceedings. The question before the Supreme Court of Appeal was therefore whether a class action could be brought at all and, if so, what procedural requirements needed to be satisfied before it was instituted.

Decision
The Supreme Court of Appeal held that when it comes to defining the ‘class’ in the class action, it is not necessary to identify the individual members of the class, ‘but that the class must be defined with sufficient precision that a particular individual’s membership can be objectively determined by examining their situation in the light of the class definition’. Further, foreign members of a class will be bound to the proceedings if they are regarded as members of the class in accordance with South African law.

The Supreme Court of Appeal provided elements to guide a court in determining a certification application, which are as follows:

a  the existence of a class identifiable by objective criteria;

b  there is a cause of action raising a triable issue;

c  the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class;

d  the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination;

e  where the claim is for damages, there is an appropriate procedure for allocating the damages to the members of the class;

f  the proposed representative is suitable and is permitted to conduct the action and represent the class; and

|^|g  whether, given the composition of the class and the nature of the proposed action, a class action is the most appropriate means of determining the claims of the class members.
Relevance
Since class actions in South Africa are not regulated by statute, as such, this decision is vital in that it provides a common law mechanism by which groups of individuals can bring class action proceedings. The Court made it clear that, procedurally, a class action must be certified by the court, before summons can be issued – a preliminary application must be made to court for the authority to do so and the court in the certification application will give directions as to the procedure of the class action.

It is important to note that a class action does not constitute a separate cause of action. Therefore, the elements of a delict, as discussed above, will need to be proved separately once the class has been certified.
I OVERVIEW

Proving the existence and the amount of actual damages resulting from somebody else’s acts or behaviour is an essential requirement for any compensatory claim that is filed with the Spanish courts. Thus, Spanish tort law is based on the principle that no legal action for compensation can be brought in the absence of actual damage.

Therefore, the standard of proof on the (1) existence of the claimed damages, (2) their exact calculation and (3) their causal relationship with the wrongdoing or act that caused the damages is high. The claimant is expected to provide the court with documentary evidence that supports the existence of direct damages and expert witness evidence on the calculation of their monetary value and on the existence and calculation of loss of profit. Punitive damages are not available under Spanish law, but only compensation for damages (aimed at restoring the aggrieved party to the financial position he or she was in before the act that caused the damages took place) is awarded.

Damages that can be claimed include both pure financial damages, and pain and suffering (which are referred to as moral damages under Spanish law).

Claiming damages normally involves requesting monetary compensation. Nevertheless, nothing in Spanish tort law prevents a claimant from requesting an in natura restoration instead of monetary compensation. Thus, for example, a claimant who claims pain and suffering (in the form of anxiety) as a consequence of his or her fear of suffering future personal injuries as a result of his or her exposure to a defective product that is proven to potentially cause such injuries may be entitled to request the manufacturer of the defective product to pay for periodic medical checks for him or her to alleviate such anxiety. Restoration in natura, though, is very exceptionally applied, and monetary compensation is more common.

As to the scope of damages that the claimant can claim, there is no specific regulation on remoteness under Spanish law. However, though this is limited to contract liability, the Spanish Civil Code sets out that a good faith debtor will only be liable for damages that he or she could have reasonably expected the counterparty would suffer as a consequence of the debtor not fulfilling his or her obligations. Bad faith debtors (which under Spanish case law includes both debtors who willingly breach the contract and debtors who when the contract was executed should have considered the possibility that they would not be able to honour their contractual obligations) are responsible for all the damages – both direct and indirect – that derive from their acts or behaviour, without limitation.

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There is no equivalent rule for non-contractual liability, but according to most scholars and case law, a mere negligent tortfeasor is equivalent to a good faith debtor, while a grossly negligent and intentional tortfeasor is equivalent to a bad faith debtor. The obligation of the aggrieved party is to mitigate the damages suffered, thus he or she must make reasonable efforts to limit additional losses.

Compensation rights are subject to a five-year limitation period in the case of contractual damages and to a one-year limitation period for non-contractual damages. However, in relation to non-contractual damages, some laws state otherwise (e.g., the Spanish product liability regulation provides a three-year limitation period).

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

As mentioned above, quantifying financial loss (which entails both proving that the financial damages claimed actually exist and have already accrued) is critical to be able to claim damages.

As regards contractual liability, the high standard of proof on the existence and amount of damages has led to a widespread inclusion of penalty clauses in contracts. Thus, through the penalty clauses, parties establish the monetary value of the damages that a breach of contract by either party will cause the other party. In the event of a breach of contract, the non-breaching party can directly claim the amount established in the penalty cause, without having to prove causation and the monetary value of the damages actually suffered.

Penalty clauses are mainly used in contracts to relieve the aggrieved party from the burden of having to prove the loss of profits resulting from the breach of contract. The Spanish Supreme Court has recently confirmed the validity of penalty clauses included in contracts and the inability of courts to not apply or to only partially apply these clauses when the breach of contract established in the clause has occurred. Only very exceptionally, in the cases in which the defendant proves – on the basis of hardship theories – that the penalty clause greatly exceeds the actual damages suffered, can the court possibly reduce the amount of the penalty.

Finally, it is worth noting that when the financial loss to be calculated arises from personal injury, courts tend to apply by analogy the compensation schedules set out in Law 35/2015 for the calculation of damages in motor vehicle accidents. As a result, court-awarded compensation in Spain is lower than in other jurisdictions.

ii Evidence

The claimant must provide evidence of the existence and amount of the claimed damages. The means of evidence available to the aggrieved party to prove the existence and the amount of damages are:

a inspection of the damaged assets or the personal injuries by the court; this is an important means of evidence in very limited cases where it is used as a source of evidence that supplements expert witness evidence on the damages;

b documentary evidence; it is relevant in connection with direct damages that involve costs incurred by the aggrieved party. Documentary evidence is also relevant in connection with medical history when damages arising from personal injuries are claimed. Furthermore, documentary evidence may be relevant as supporting expert witness assumptions when calculating loss of profits;
expert witness; expert reports are specifically relevant for the calculation of damages, particularly for the calculation of loss of profits. Calculating loss of profits requires expertise in economics, and company finance and accounting; and factual witnesses; this means of evidence is often not sufficient to prove damages.

iii Date of assessment

Direct damages are calculated as per their monetary value from the moment they begin to accrue. When direct damages are projected into the future (e.g., when costs for future medical checks or third-party assistance for people with disabilities are to be considered) or loss of profits are to be calculated, their monetary value is assessed as from the date on which they are presumed to have begun to accrue. For instance, if the aggrieved party who has suffered serious personal injuries is expected to need permanent assistance by a third party or to renew his or her prosthetics from time to time in the future, their monetary value will be assessed taking into account their estimated future cost.

iv Financial projections

Financial projections are made by expert witnesses when calculating loss of profits.

Financial projections involve the application of assumptions related to circumstances such as (1) the evolution of prices or interest rates, (2) life expectancy, (3) the expected length of working life, (4) the expected evolution of a specific market, or (5) the expected evolution of the aggrieved party’s future income. The correct choice by the expert witness of the source of information to base his or her assumptions on the financial projections is critical.

v Assumptions

With regard to contractual liability, Spanish case law has set a presumption that a breach of contract causes actual damage to the aggrieved party (i.e., it is thus the defendant’s burden to prove that the breach of contract did not result in any actual damage to the aggrieved party). Such presumption is not applicable to non-contractual liability.

As regards calculating damages, assumptions by expert witnesses are sometimes inevitable to calculate loss of profits, as mentioned above. The Spanish Supreme Court has traditionally required that those assumptions be based on very probable hypotheses (thus certainty is not a requirement).

vi Discount rates

Spanish expert witnesses who calculate loss of profit are familiar with the need to take into account discount rates in connection with future profits that would have been obtained but for the third party’s breach of contract or tortious behaviour. However, when acting before the judiciary, Spanish expert witnesses normally limit the scope of the discount rates to those that relate to the time value of money (i.e., the fact that the claimant should not benefit from the fact that he or she will dispose as from the decision of monetary compensation for profits that he or she would otherwise have obtained in the future).

However, experts do not apply additional discount rates related to the residual amount of risk of the future expected profits not finally accrued because Spanish courts have traditionally been very reluctant to award any loss of profit if the claimant cannot clearly prove the more than likely (most probable) accrual of profits had the breach of contract or detrimental action not occurred.
Spanish arbitration courts, however, are more familiar with the application of discount rates related to residual amount of risk of the future expected profits and more frequently accept them, thereby lessening the claimant's burden to prove that the profits would have most probably been made.

**vii Currency conversion**

Spanish law requires that compensation be paid in national currency (in euros). Any amounts related to the calculation of compensation in a foreign currency must be converted into euros. When the amount to be considered relates to a cost incurred by the aggrieved party as a consequence of the event causing damage, the currency conversion must be carried out applying the exchange rates at the time the direct damage accrues (e.g., when the invoice related to a cost caused by the harmful action is settled).

Because of the uncertainty of future currency conversion rates, courts do not take into account the risk of devaluation or the benefit of revaluation of currency as regards compensation for loss of profits (i.e., for profits that would have been made in the future had the action that caused the damage not occurred) when the conversion is made.

**viii Interest on damages**

In relation to contractual liability, claimants are entitled to claim interest on damages.

In the absence of an agreement between the parties on the interest rate to be applied to a breach of contract, legal interest rates apply. Interest rates accrue as from the moment the obligation becomes due (if so stated in the contract) or as from the moment the claimant formally requests payment from the debtor.

Once the claim for damages is filed with the courts, the claimant is awarded 2 per cent interest on the legal interest on the amount awarded by the court until the defendant pays in full.

In non-contractual liability cases, the aggrieved party is entitled to request interest on damages as from the moment the damages begin to accrue. As with contractual liability, once the claim is filed with the courts, a 2 per cent rate on the legal interest applies.

**ix Costs**

The aggrieved party can claim costs incurred as a consequence of the act that caused the damage or behaviour of the counterparty or tortfeasor. The costs include direct and indirect costs. As regards indirect costs, however, theories such as remoteness are available to defendants in Spain to try to limit the scope of the indirect damages to be compensated.

According to the duty to mitigate rule, the aggrieved party must try to find the most economical way in the market to restore the situation or mitigate the damage.

When the costs incurred by the aggrieved party include variable costs (in particular, the costs of producing assets), expert evidence by a specialist accountant may be effective.

**x Tax**

The tax that the aggrieved party would have paid as a result of the profits that he or she would have obtained but for the other party’s breach of contract or the tortfeasor’s act or activity are not taken into account for the purposes of calculating compensation. In the same vein,
taxes that the aggrieved party would not have paid had the action that caused the damage not occurred is a direct damage that is taken into account for the purposes of calculating compensation.

### III EXPERT EVIDENCE

#### i Introduction

Expert evidence is expressly allowed in declarative proceedings under the Spanish Procedure Law.

Spain has two basic declarative proceedings to seek the payment of compensation for damages: verbal proceedings and ordinary proceedings. Which proceedings apply in each case depends on the amount claimed: (1) verbal proceedings apply in cases involving compensation up to €6,000; and (2) ordinary proceedings apply in cases involving compensation exceeding €6,000.

In both cases, the proceedings begin with the filing of the claim, which must include the facts of the case and the legal grounds on which the claim is based. In both cases, any documentary evidence and expert reports available on the facts or events on which the allegations are based should be attached to the briefs filed with the court. Note that no other documents will be accepted at a later stage, except in exceptional circumstances, as explained below.

If verbal proceedings are initiated, once the claim is filed and given leave to proceed, the defendant is notified so that he or she may present a defence within 10 working days (which include every day of the year except Saturdays, Sundays, national holidays, non-working days in the autonomous region in question or city where the proceedings are held, and the month of August). This period cannot be extended unless the parties agree to stay the proceedings.

Subsequently, the court will call the parties to a hearing in which the parties propose evidence, it is examined and the final conclusions are presented.

If ordinary proceedings are initiated, once the lawsuit is notified, the defendant will have 20 working days to file the brief of response. This period cannot be extended unless the parties agree to stay the proceedings.

Subsequently, the court will call the parties to a preliminary hearing in which they will propose evidence and, finally, the court will call the parties to the trial where the evidence and final conclusions are presented.

#### ii The role of expert evidence in calculating damages

No particularities exist in the Spanish Procedure Law regarding experts that lead with the calculation of damages. However, according to standard practice, the following differences can be highlighted:

- **a** in cases involving insurance coverage, an expert to investigate the cause of the accident other than the one who calculates the damages caused as a result of the accident may be proposed;
- **b** in cases involving construction defects, the same expert usually handles both tasks; and
- **c** finally, in cases involving breaches of contract, normally no expert is proposed to investigate the cause of the breach, as this point requires a legal analysis. Thus, in these cases, expert opinion is normally limited to calculating the damages caused by the breach.
iii The court’s role excluding and managing expert evidence

In principle, expert reports should be filed together with the initial briefs of claim and of defence. This means that, as a general rule, the experts are usually appointed by the parties themselves. However, there are a number of exceptions in extraordinary circumstances.

In particular, when there is a risk that the action could expire and, therefore, it is proven that the claimant could not delay filing the claim to protect his or her rights, the claimant may submit an expert report at a later stage provided that this is declared in the brief of claim and the report is filed prior to the preliminary hearing.

In turn, given that the defendant only has 20 working days to file the brief of response, the Spanish Procedure Law allows the defendant to file an expert report five days prior to the preliminary hearing, provided that the defendant justifies that the report could not be obtained before the expiry of the term provided by law to file the defence brief and it declares this in his or her brief of response.

Moreover, if the need for expert witness evidence becomes clear in view of the pleadings contained in the defendant’s brief of defence, or in view of the additional pleadings made by any of the parties prior to or at the preliminary hearing, the parties may submit any such expert witness report up until five days before the start of the trial.

On the other hand, the parties may prefer to request the court to appoint an expert rather than appoint one themselves. In this case, they should request so expressly in their initial briefs.

Moreover, the appointment of an expert by the court can also be requested when the need for expert testimony becomes evident either in view of the pleadings contained in the writ of defence (in which case it may only be requested by the claimant) or in view of any additional pleadings made by any of the parties before or at the preliminary hearing.

As in the cases where an expert is proposed by the parties, the cost of issuing a court-appointed expert report is assumed by the party that requested such appointment.

iv Independence of experts

Regardless of whether the experts are proposed by the parties or appointed by the court, pursuant to the Spanish Procedure Law, all experts must state under oath or affirmation and act as objectively as possible, taking into consideration both what may favour or what may harm the parties, that they are aware of the penalties they could face for failing to do so.

v Challenging experts’ credentials

When the expert is proposed by one of the parties, and the report is attached to the brief of allegations, the expert is expected to have specific knowledge of the matter of the opinion.

If the expert is appointed by the court, he or she should have an official title corresponding to the matter and nature of the opinion or report. If there is no official professional title for the matter, the experts appointed must have good knowledge of the matter.

Pursuant to the Spanish Procedure Law, the opinions of academics, cultural and scientific institutions that study the subject matter of the expert opinion or of duly qualified legal persons are also valid.

Taking into consideration that the general rule is that experts be appointed by the parties, pursuant to the Spanish Procedure Law, only court-appointed experts can be objected to and disqualified.

In turn, the experts proposed by the parties can be challenged in any of the following circumstances:
if they are a spouse or a relation up to the fourth degree of consanguinity or affinity of one of the parties, their lawyers or court agents;

b if they have a direct or indirect interest in the matter or in another similar matter;

c if they are or have been in a situation of dependency or conflict of interest with either of the parties, their lawyers or court agents;

d if they are close friends or hostile towards either of the parties, their lawyers or court agents; or

e if there is any other duly evidenced circumstance that makes them professionally unsuitable.

Moreover, and unless otherwise agreed by the parties, the opinion of an expert who has been involved in mediation or arbitration proceedings concerning the matter at hand is not valid.

vi Novel science and methods

Whenever novel science is involved and no personal expert is available, as mentioned above, the opinions of academics, cultural and scientific institutions that study the subject matter of the expert opinion or of duly qualified legal persons are also valid.

vii Oral and written submissions

As explained above, expert reports must be proposed and submitted by parties in their respective briefs of allegations. Only in the following exceptional circumstances can they be submitted later:

a Owing to reasons of lack of time, the parties may announce in their briefs of allegations (claim and defence) that the report will be attached at a later stage. In this case, the report must be submitted five days prior to the preliminary hearing.

b As a consequence of the allegations made by the defendant in his or her defence brief, or if new facts arise, or as a result of additional allegations made by the parties before or during the preliminary hearing.

c When a request that the expert report be expanded on is made (during the hearing).

d Moreover, a party can request the court to appoint an expert:
  • when a party waives its right to appoint an expert in the brief of allegations and requests the court to do so; and
  • as a consequence of the allegations made by the defendant in its brief of defence, if new facts arise or as a result of additional allegations made by the parties before or during the preliminary hearing.

Either upon attaching the expert report to the initial brief of allegations or to the additional allegations, or during the preliminary hearing, the parties (and occasionally the court, when this is deemed necessary) must state whether they wish their expert or the one proposed by the opposing party or the one appointed by the court to appear in the trial and the purpose of having him or her appear is (1) to expand on the report, (2) to answer questions, (3) to be cross-examined by the opposing party, and (4) to challenge the other party’s expert witness report.

Expert witnesses, together with regular witnesses, parties’ declarations and judicial recognition, will normally be examined at trial.
IV RECENT CASE LAW

The Spanish case law on damages arising from civil liability related to antitrust conducts is evolving as a consequence of the recent entering into force of the national regulation that transposed the Directive 2014/104/EU into Spanish law. Specifically, hundreds of cases are currently pending in Spain as follow-on actions arising from the EU Commission’s 19 July 2016 decision in the Truck cartel. The Directive includes some provisions setting forth rebuttable presumptions on the existence of damages under certain circumstances and provides plaintiffs and courts with some procedural tools to facilitate the calculation of damages under certain circumstances. The mentioned provisions are still subject to certain restrictions in their application and it will be interesting to see how Spanish courts apply those to ensure that they are not abused.

Additionally, the Spanish Supreme Court issued a relevant decision on 27 May 2019 deciding on a case of a car accident in which it had not been possible to prove which of the two drivers whose cars collided negligently drove through a red light. In a prior 2012 decision, the Spanish Supreme Court had decided that personal injury caused to each driver as a consequence of such a collision (i.e., in which the negligence of either of two drivers cannot be proven) must be compensated by the other driver. Thus, each driver had to compensate each other for 100 per cent of the personal injury caused. In its 27 May 2019 decision, the Spanish Supreme Court has further decided that in the above-mentioned cases, material damages (i.e., any damage other than personal injury and the pain and suffering arising from the car accident) suffered by each of the drivers must be afforded by 50 per cent by each of the two drivers involved in the accident. The different approach by the Spanish Supreme Court to the compensation for material damages is based on the principle that those must be governed by the general fault-based civil liability regulation set forth in Article 1902 of the Spanish Civil Code, while compensation for personal injury arising from car accidents is governed by the principle of social solidarity, which provides for full indemnity for personal injuries regardless of whether or not the driver causing the injury has been negligent. The case law issued by the Spanish Supreme Court in cases related to car accidents is relevant, as it is often applied by analogy to other sorts of cases.

On 21 September 2018, the Provincial Court of Appeal of Madrid rendered a relevant decision in a collective action filed by a consumer association against the largest Spanish telecoms company. In its lawsuit, the consumer association sought both injunctive relief and compensation for the damage allegedly caused to the represented consumers by the use by the telecoms company of alleged unfair contractual terms. In its decision, the Court of Appeal confirms that prior personal communication of the commencement of the collective actions to each and all the members of the class is a prerequisite for any compensation action filed on behalf of a consumer class. As a consequence, only the injunction action was accepted to be tried, while the compensation claim that had been attached to the former was rejected. The basis for the Court decision is that compensation claims inevitably involve the assessment of individual issues that may be predominant when deciding on the merits of the claim.

Finally, in its decision dated 17 October 2018, the Spanish Constitutional Court decided that the public administrations were civilly liable for the damage suffered by drivers as a consequence of a collision with game species and rendered a legal provision aimed at limiting said civil liability as unconstitutional, it being inconsistent with the constitutional principle of the government’s strict liability for the damage arising from the normal rendering of public services.
Chapter 15

UNITED KINGDOM

Clare Connellan

I  OVERVIEW

Under English law, the basic principle for breach of contract is that a party is entitled to be put in the same position as they would have been had they not sustained the wrong.\(^2\) As the name suggests, compensatory damages are intended to compensate a claimant for losses suffered as a result of the other party’s (wrongful) conduct.

While the concept of compensatory damages is common to several jurisdictions, a distinctive feature of English law is the emphasis on mitigation of loss. The claimant is expected to take all reasonable steps to minimise its loss resulting from the defendant’s breach of its obligations. Loss that could have been avoided through reasonable action or inaction by the claimant will not be recoverable. By corollary, if the injured party takes reasonable steps to minimise the loss incurred, the cost of these steps is recoverable and the damages owed by the defendant are reduced by the amount of the reduction of loss.\(^3\)

There are three main categories of recoverable damages under English law: (1) expectation damages; (2) performance damages; and (3) reliance or ‘wasted expenditures’ damages. Other categories of damages include moral damages, punitive or exemplary damages and non-monetary damages such as specific performance,\(^4\) but this chapter’s focus is on compensatory damages.

Expectation damages are awarded to put the claimant in the position it would have been in but for the breach. The ability of a claimant to recover lost profits will depend on the subject of the breach.\(^5\) There are two types of ‘expectation damages’: normal or direct damages (also known as general damages), and consequential damages (also known as special damages).\(^6\) Normal or general damages follow as a natural and probable consequence of a

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5 H McGregor, McGregor on Damages (20th ed Sweet & Maxwell, London 2017), Sections 4-0018–19. See also the series of cases concerned with breach of restrictive covenants and damages to account for profits, e.g., Wrotham Park Estate Co v. Parkside Homes Ltd [1974] 1 WLR 798, giving rise to Wrotham Park damages.

breech, whereas consequential damages are those that do not flow directly from the breach and are particular to the injured party and can therefore be difficult to calculate in financial terms.

Performance damages compensate the cost of curing the defective performance and ‘wasted expenditures’ or ‘reliance damages’ compensate the losses or expenditures incurred by the claimant in reliance on the contract. These damages are aimed at putting the claimant in as good a position as he or she was in prior to the promise.

II QUANTIFICATION OF FINANCIAL LOSS

In English law, the purpose of an award of damages for breach of contract is to compensate the injured party for loss, rather than to punish the wrongdoer. The general rule is that damages should (so far as a monetary award can) place the claimant in the same position as if the contract had been performed. Therefore, damages are usually measured by the difference in value between the contemplated and actual performance of the contract.

To establish entitlement to damages, the claimant is also required to show that adequate steps have been taken to mitigate the damage resulting from the defendant’s actions. Failure to take mitigating steps will likely result in the claimant’s entitlement to damages being reduced.

In addition to mitigating factors, damages awarded under English law are also influenced by methods of calculation, application discount and interest rates and income tax or capital gains tax.

i Evidence

If a claimant has suffered a loss, there are four key elements that are relevant to establishing a party’s entitlement to damages and determining the amount of damages to be awarded: (1) the existence of a wrong; (2) reasonable foreseeability; (3) failure to mitigate the impact of the breach; and (4) chain of causation.

The first and most basic requirement is that, to establish an entitlement to damages, one must prove the existence of a ‘wrong’ – that is, a breach of contract. Second, a claimant must
establish that the damage is not too remote and that the losses were reasonably foreseeable at the time the parties entered into the contract. The test of reasonable foreseeability was first outlined in *Hadley v. Baxendale* as:

> Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

For loss to have been foreseen, it must have been contemplated by the parties and ‘not unlikely’ at the date of entering into the contract. Loss is said to have been in contemplation of the parties (and therefore assumed) if, objectively assessed, it could be said to occur in the ordinary course of events, or, if subjectively assessed, there are special circumstances or knowledge attributable to the parties.

Third, any damages awarded are subject to deductions for any failure to mitigate (or contributory negligence in the case of breaches of duty of care). The defendant carries the burden of proof in relation to establishing the claimant’s actions (or lack thereof) to mitigate damage as a result of the defendant’s breach. Provided the steps taken by the claimant to minimise the loss incurred are reasonable, the cost of such steps is recoverable even if the steps taken have increased the loss. However, any profit accrued as a result of the claimant’s mitigating actions is also credited to the defendant if causation is established, with the latter having the burden of proving the existence and amount of such profit.

Fourth, any damages awarded are also subject to any breaks in the chain of causation. Irrespective of factual causation, English law can treat some losses as not having been legally caused by the breach, on the basis that it is not fair to hold the defendant responsible for them.

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17 *Hadley v. Baxendale* (1854) 9 Exch 341.
21 *Lombard North Central plc v. Automobile World (UK) Ltd* [2010] EWCA Civ 20. A claimant should nevertheless consider whether to take steps to show how it has mitigated its loss, as failure to do so can be risky. *Bulkhaul Ltd v. Rhodia Organique Fine Ltd* [2008] EWCA Civ 1452.
23 *Thai Airways International Public Co Ltd v. KI Holdings Co Ltd (formerly Koito Industries Ltd)* [2015] EWHC 1250 (Comm). See also *Globalia Business Travel SAU (formerly TravelPlan SAU) of Spain v. Fulton Shipping Inc of Panama* [2017] UKSC 43, in which the Supreme Court confirmed that the issue turns on causation: where the claimant has obtained a benefit following a breach of contract and this benefit was caused either by the breach or by the claimant’s act of mitigation, the recoverable loss will be reduced by the benefit.
because of a ‘break in the chain’ or novus actus interveniens. If the breach of contract was the ‘effective’ or ‘dominant’ cause of the loss, damages may be recoverable even if the breach was not the sole cause of the loss. Where there are competing causes, a balance of probabilities test applies.

ii Date of assessment
Under English law, damages are normally assessed at the date of breach of contract unless to do so would not be in the interests of justice. However, the date of breach may not be appropriate as the starting point for calculation of damages. For example, a claimant’s steps to mitigate the loss may impact the evaluation of the damages. Similarly, where the claimant has not in fact suffered any loss at the date that the actual breach occurred, but only began to suffer loss subsequently, the latter date may be the more appropriate starting point for calculation.

iii Financial projections
Under English law, a claimant must prove the fact of loss and the amount of the loss on the balance of probabilities, that is, ‘If the evidence shows a balance in favour of it having happened, then it is proved that it did in fact happen.’ However, different principles apply for future or projected loss.

Where it is difficult to prove the amount of loss with certainty, the wrongdoer should not be relieved of his or her responsibility to pay. Damages can be recovered for ‘loss of a chance’. However, this is an inherently uncertain head of loss, and can raise difficult issues of causation and quantification.

The doctrine of ‘loss of chance’ was introduced in English law by the decision in Chaplin v. Hicks, but has since evolved considerably. In Mallett v. McMonagle, Lord Diplock opined:

Anything that is more probably than not [the court] treats as certain. But in assessing damages which depend on its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the changes that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards.
Establishing a loss of chance requires that there be both a real and a substantial chance – a chance that is negligible is not likely to support recovery of projected damages.\textsuperscript{34} Similarly, a chance to which only a speculative money value can be assigned is unlikely to succeed.\textsuperscript{35} However, where the realisation of a chance appears to be virtually certain, the court will consider it appropriate to award what would have been awarded against the defendant originally.\textsuperscript{36} The court recently held that where a claimant’s recovery is dependent on the actions of a third party, then loss of chance principles must apply, rather than an assessment of the actions of the third party having taken place by reference to the balance of probabilities. If causation depends at least in part on the action of one or more third party, the claimant must demonstrate that there would have been a real or substantial chance that the third party would have acted in the respect relied upon by the claimant.\textsuperscript{37}

iv Liquidated damages and penalties

Parties to a contract can agree between them the amount of damages payable for any breaches (stipulating different sums for different breaches).\textsuperscript{38} The long-standing common law rule is that a term in a contract, which constitutes a penalty, is unenforceable. Therefore, the court will have to determine whether the payment stipulated is a liquidated damage or a penalty. A penalty is a payment of money stipulated as \textit{in terrorem} of the offending party and the liquidated damages are a genuine pre-estimate of damage.\textsuperscript{39} The Supreme Court in the 2016 conjoined appeals in \textit{Cavendish Square Holdings v. Makdessi} and \textit{ParkingEye Ltd v. Beavis}\textsuperscript{40} revisited and reinstated the above law on penalties and liquidated damages.

The court held that the penalties doctrine is applicable only when there is a breach of contract and no matter how extreme a party is penalised, it will amount to a penalty only when it is a result of breach. The courts have no power to regulate parties’ primary regulations and the rule is applicable only in the case of secondary obligations. In this judgment, Lords Neuberger and Sumption stated that ‘the true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation’.\textsuperscript{41} The court further observed that whether a clause operates as a primary obligation or secondary obligation is a question of substance and not form.\textsuperscript{42} More recently, the court considered the application of liquidated damages clauses and reiterated the importance of the precise wording of the clause in determining its application.\textsuperscript{43}

\textsuperscript{34} H McGregor, \textit{McGregor on Damages} (20th ed Sweet & Maxwell, London 2017), Section 10-051.


\textsuperscript{37} \textit{Assetco Plc v. Grant Thornton UK} [2019] EWHC (150) Comm.


\textsuperscript{39} \textit{Dunlop Pneumatic Tyre Co Ltd v. New Garage and Motor Co Ltd} [1915] AC 79.

\textsuperscript{40} [2016] AC 1172.

\textsuperscript{41} [2016] AC 1172 at [32].

\textsuperscript{42} H McGregor, \textit{McGregor on Damages} (20th ed Sweet & Maxwell, London 2017), Section 16-001.

\textsuperscript{43} \textit{Triple Point Technology, Inc v. PTT Public Company Limited} [2019] EWCA Civ 230; see further explanation of the case in Section IV.
v Discount rates
The calculation of compensatory damages often involves the determination of future losses or 'loss of chance'. When calculating future losses, the application of an appropriate discount rate is required to estimate the expected rate of return had the loss not occurred.

In a consultation by the Ministry of Justice in relation to the Damages Act 1996, the overriding aim behind discount rates was described as to set the rate as accurately as possible so that under-compensation or over-compensation by reason of the accelerated payment of the future losses is avoided as far as possible.44

While this principle was articulated in the specific context of personal injury claims, the general presumption is helpful when considering the general application of discount rates to the calculation of compensatory damages. In the discounted cash flow analysis (discussed further below), if a breach of contract results in loss of profits over time, a discount rate is applied to estimate the current value of the cash flow. The discount rate in such instances would typically depend on the asset being valued. For example, while valuing equity, the relevant discount rate would be that most appropriately reflecting the cost of the equity. Discount rates are influenced by a variety of factors including political changes, future inflation, currency devaluation and fluctuating interest rates.

Experts use a variety of discount rate calculation methods when valuing assets including, for example, the capital asset pricing model (which considers a stock’s rate of return, the market’s rate of return and a risk-free rate) and the weighted average cost of capital (which is usually used to assess a company’s value as a whole by estimating the weighted average of new debt and equity needed to operate the company).

vi Currency conversion
The currency contemplated by the contract generally determines the currency for damages to be awarded.45 Where the contract does not provide for a specific currency for the awarding of damages, the damages will be awarded in the currency in which the claimant suffered the loss.46

In Miliangos Respondent v. George Frank (Textiles) Ltd,47 the House of Lords found that the English courts had the authority to give judgment in foreign currency where under a contract, payment obligations are in a foreign currency and the proper law is that of the foreign country, with payment to be made outside the United Kingdom.48 The courts will take into account commercial considerations and give judgments in foreign currency or its sterling

47 [1975] 3 WLR 758.
equivalent at the date when the court authorises the claimant to enforce the judgment.\textsuperscript{49} This protects the claimants against any decrease in the external value of sterling in relation to their own currency, save for in instances where the value of sterling is rising.\textsuperscript{50}

The courts have also considered the issue of whether a court has the power to make a cost award to compensate for any exchange rate losses incurred in paying costs. In \textit{Elkamet Kunststofftechnik GmbH v. Saint-Gobain Glass France SA},\textsuperscript{51} the court held that 'order for costs is designed to compensate the successful party for its expenditure so that exchange rate losses can be compensated in the same way as it is entitled to be compensated by way of interest for being kept out of the money'.\textsuperscript{52}

\textbf{vii \quad Interest on damages}

The court has the authority to award interest on damages for any period between the date when the cause of action arose and the date of judgment.\textsuperscript{53} If the claimant caused unwarrantable delay, interest on damages for such period will be reduced accordingly. A damages claim (including a claim for interest) should therefore be clearly particularised and supported by the necessary written and oral evidence required to prove the claimant’s case.

The court has the discretion to award interest at different rates in respect of different periods; in contractual claims, the interest rate should reflect the current commercial rate. The Commercial Court and the Court of Appeal generally award 1 per cent above the base rate. However, if such calculation would put either party in an unfair position (smaller business pays higher interest rate, etc.), the court can adopt an appropriate interest rate to suit the parties.\textsuperscript{54}

Where the damages are calculated in a foreign currency, the commercial borrowing rate in the foreign currency in the relevant country is considered as the relevant interest rate.\textsuperscript{55}

\textbf{viii \quad Costs}

As a general principle, legal costs incurred as a result of breach of contract can be recovered as damages, where they were incurred in actions against third parties or previous actions against the defendant. The costs of the dispute over the breach of contract itself, although caused by the breach usually cannot be claimed as damages as they fall within the exclusive jurisdiction of the courts’ costs regime.\textsuperscript{56}

As a result of the mitigation principle, legal costs recoverable as contract damages are assessed in the same way as ‘indemnity basis’ of costs. That is, ‘unreasonable’ costs are not recoverable under common law principles, nor is proportionality always taken into account.\textsuperscript{57}

\begin{itemize}
  \item \textsuperscript{49} H McGregor, \textit{McGregor on Damages} (20th ed Sweet & Maxwell, London 2017), Section 20-029.
  \item \textsuperscript{50} H McGregor, \textit{McGregor on Damages} (20th ed Sweet & Maxwell, London 2017), Section 20-053.
  \item \textsuperscript{51} [2016] EWHC 3421 (Pat).
  \item \textsuperscript{52} H McGregor, \textit{McGregor on Damages} (20th ed Sweet & Maxwell, London 2017), Section 20-054.
  \item \textsuperscript{53} Section 35A of the Senior Courts Act 1981.
  \item \textsuperscript{54} J Chitty, H Beale, \textit{Chitty on Contracts} (33rd ed Sweet & Maxwell, London 2018), Section 26-272.
  \item \textsuperscript{55} Miliangos \textit{v. George Frank (Textiles)} (No. 2) [1977] QB 489, 497; Helmsing Schiffahrts \textit{v. Malta Drydocks Corp} [1977] 2 Lloyd’s Rep 444, 449.
  \item \textsuperscript{56} Hutchinson \textit{v. Harris} [1978] 10 BLR 19.
\end{itemize}
**Tax**

There are two types of taxation that may apply in relation to an award for damages: income tax and capital gains tax.

Prior to 1956, the English courts did not reduce awards of damages to account for income tax. However, in *British Transport Commission v. Gourley*, the House of Lords ruled that when calculating damages for personal injuries resulting from a tort, the court will take into account the tax liability in respect of his loss of earnings (both past and prospective). This rule has been modified over the years in instances where the damages sought would have been taxed.

Capital gains tax differs from income tax in that it does not cause damages to be reduced. However, the impact of capital gains tax would need to be considered on a case-by-case basis where the application of capital gains tax affects the value of the asset that is said to have suffered the loss.

### III EXPERT EVIDENCE

#### i Introduction

The Civil Procedural Rules 1998 as amended (the Rules) and accompanying Practice Directions deal extensively with the appointment of experts and assessors. At a primary level, the aim of these Rules and Practice Directions is to regulate the use of expert evidence in civil proceedings, in particular to address concerns relating to independence of experts, excessive expenditure and increasing complexity.

#### ii The role of expert evidence in calculation of damages

Experts can play an important role in assessing damages, particularly where damages are influenced by a range of factors occurring both at and after the date of breach or the application of rates of interest are in dispute.

For example, in *Vasiliou v. Hajigeorgiou* the trial judge found the claimant to be an accomplished restaurateur whose restaurant would have been successful and assessed his loss of profits on that basis. The expected turnover, together with gross and net profit, was calculated with expert evidence and the ultimate decision not to apply a discount was upheld by the Court of Appeal.

#### iii The court’s role excluding and managing expert evidence

English law provides that expert evidence shall be restricted to that which is reasonably required to resolve the proceedings. The court may therefore control the evidence by giving directions in relation to the issues on which it requires evidence, the nature of the evidence

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required and the way in which the evidence is to be placed before the court. For instance, in *Dudding v. Royal Bank of Scotland Plc*, the court held that the claimants were entitled to rely on the expert evidence concerning the sale of derivatives by the defendant banks as the evidence was reasonably required to resolve the issues.

Courts are required to seek to restrict the excessive or inappropriate use of expert evidence. Under English law, parties are required to seek the court’s permission prior to filing an expert report, and their application for permission must include an estimate of the costs of the proposed expert evidence. In *British Airways plc v. Spencer*, the court held that when assessing whether to admit expert evidence, the court will consider whether the evidence is necessary (i.e., whether a decision could be made without it) or if it is of marginal relevance. The courts will strike a balance if it is of marginal relevance by taking into account the value of the claim, the effect of a judgment on the parties, how the commissioning of the evidence would be paid for, and any delay likely to be entailed by the production of such evidence.

Permission given by the court is limited to the expert or field specifically identified in the parties’ application, and the court can limit the amount of the expert’s fees and expenses that can be recovered from the other party. In *Darby Properties Ltd and Darby Investments Ltd v. Lloyds Bank plc*, the Master reviewed several authorities on expert evidence in interest rate swap cases together with case law. On finding that there was not a consistent approach, he concluded that while a judge would benefit from evidence explaining the specific financial products, this could be done by way of factual evidence and therefore expert evidence was not required.

Judges are required to give reasons for preferring the evidence of one expert over another and failure to provide such reasoning may be considered valid grounds for appeal.

### iv Independence of experts

English law provides that experts must provide opinions that are independent and uninfluenced by the pressures of litigation. Experts are required to assist the court by providing objective, unbiased opinions on matters within their expertise by considering all material facts (including those that might detract from their opinions) and should avoid assuming the role of an advocate. If a question or issue falls outside their expertise or they are unable to reach a definite opinion, they should make this clear to the court and any change of view should be communicated to all the parties without any delay (and when appropriate, to the court). In the case of *Arroyo and others v. Equion Energia Ltd* (formerly known as BP Exploration Co (Colombia) Ltd), the court held that the ‘deliberate and serious breach’ of the expert was highly relevant in the court’s assessment of order of costs paid on an indemnity basis. Similarly, in the case of *Iglo Regeneration (General Partner) Ltd v. Powell Williams*

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62 CPR 35.1 and White Book commentary Paragraph 35.1.1 at page 1127.
63 [2017] EWHC 2207 (Ch).
64 [2015] EWHC 2477 (Ch).
65 CPR 35.4.
67 See also White Book commentary Paragraph 35.1.1 at page 1127.
69 CPR 35 Paragraphs 2.1–2.5 and White Book commentary Paragraph 35.18 at page 1160.
70 [2016] EWHC 3348 (TCC).
Partnership, a partial indemnity costs award was made against the claimant related to the conduct of its inexperienced expert engineer who made concessions in his joint statement, which undermined the claimant’s case on liability.

The courts have reiterated the importance of experts’ independence and impartiality in recent cases including Watts v. The Secretary of State for Health and Bank of Ireland v. Watts Group. In the former, the court went so far as to criticise the expert for choosing to ‘ignore or play down matters that were inconvenient to her assessment of the case’. In a recent judgment where the impartiality of experts was criticised, the court emphasised the need for all experts to read Practice Direction 35 to CPR Part 35. The judge also re-stated the principles laid down in The Ikarian Reefer case. Such principles include that issues of fact in a case that are relevant to the expert must be determined by the court and that experts of like discipline should have access to exactly the same materials.

v Novel science and methods

Expert evidence is typically helpful in the calculation of damages under two methods: the discounted cash flow method and the comparable transactions and comparable trading multiples method.

The discounted cash flow method projects future cash flows and uses a discount rate to estimate the current value of the projected cash flows. This method is best used in instances where the parties are trying to calculate the earning potential of an asset in the future and require expert evidence in the accurate forecasting of such cash flows. Among other things, expert evidence is used to determine the time period in the future that should be used to assess the cash flows, and the appropriate discount rates to be applied in the calculation of the asset value. As explained above, discount rates such as the capital asset pricing model and weighted average cost of capital are two such methods.

Comparable transactions or comparable trading multiples primarily use publicly reported transactions and share prices to arrive at an estimated value of the asset in question, provided that sufficiently comparable transactions and prices exist in the market. Expert evidence can be crucial in determining the comparability of prices in the public domain, and the relevance of the proposed comparisons.

The EU General Data Protection Regulation ((EU) 2016/679) (GDPR) became effective on 25 May 2018. The GDPR is aimed at addressing the collection of data and the way it is processed and used by both individuals and organisations, including in the communication and sharing of information. The full impact of the GDPR on evidence in litigation or arbitration remains to be seen.

71 [2013] EWHC 1718 (TCC).
74 Watts v. The Secretary of State for Health [2016] EWHC 2835 (QB) at Paragraph 64.
75 Imperial Chemical Industries Ltd v. Merit Merrell Technology Ltd (No. 2 Quantum) [2018] EWHC 1577 (TCC).
77 Imperial Chemical Industries Ltd v Merit. Merrell Technology Ltd (No. 2 Quantum) [2018] EWHC 1577 (TCC).
IV RECENT CASE LAW

i Triple Point Technology Inc v. PTT Public Co Ltd [2019] EWCA Civ 230

Facts

In a contract for commodities trading software, an issue of principle arose in this appeal as to how to apply a clause imposing liquidated damages for delay in circumstances where the contractor never achieved completion.

Triple Point Technology Inc (Triple Point) designs, develops and implements software for use in commodities trading. PTT Public Co Ltd (PTT) undertakes commodities trading. Both companies entered into a Contract for Commodity Trading and Risk Management System (Contract) for the provision of relevant commodities software within 460 calendar days. Under Article 5 of the Contract, Triple Point would pay damages for delay at the rate of 0.1 per cent of undelivered work per day. The Contract provided for payment in three phases and Triple Point completed Phase I of the Contract 149 days late. When Triple Point requested further payment, PTT refused because Triple Point had not completed the next phase of work. Unwilling to continue work until further payment, Triple Point suspended work and left the site. PTT then terminated the Contract for wrongful suspension of work. Triple Point commenced an action to recover the outstanding sums claimed in its invoices. In response, PTT claimed damages for delay and damages due upon termination of the Contract. The court dismissed Triple Point’s claims and awarded PTT liquidated damages for the delay in completing Phase I of the work and on all other phases until the termination of the Contract pursuant to Article 5.3 of the Contract. On appeal, Triple Point contended that Article 5.3 of the Contract does not apply and PTT cannot recover damages at the rate of 0.1 per cent per day until termination. Triple Point argued that Article 5.3 applies only when work is delayed, but subsequently completed and then accepted; it does not apply in respect of work that the employer never accepted.

Decision

After a review of the authorities, the court identified three approaches that have emerged in cases where a contract provides for liquidated damages for delay, the contractor fails to complete the task and a second contractor steps in. In such cases, the courts have held in different circumstances that: (1) the clause for liquidated damages does not apply at all; (2) the clause for liquidated damages applies only until termination of the first contract; or (3) the clause for liquidated damages continues to apply until the second contractor achieves completion of the work of the first contractor. The court found that there is no strict rule that a provision for liquidated damages must be used as a formula to compensate the defendant and in all cases, the court’s approach will depend on the wording used in the contract. Here, the clause focused specifically on delay between the contractual completion date and the date when the work was actually completed. Accordingly, it had no application in a situation where the contractor never handed over completed work to the employer. In such circumstances, the remedy would be general damages for delay. PTT was therefore only entitled to liquidated damages according to Article 5.3 of the Contract for the 149 days’ delay to completion of Phase I by Triple Point but not the delay in completion of the remaining two phases. For these two phases, PTT could claim only damages in accordance with ordinary principles.
Significance of the decision
This decision offers some clarity on the interpretation of contractual provisions for liquidated damages. The case demonstrates that all three different approaches are potential options for interpreting a liquidated damages clause in an agreement. This decision once again emphasises the importance of the parties’ contractual agreement and the continuing readiness of the court to give effect to liquidated damages clauses in commercial contracts, provided it is not a penalty. It is therefore crucial for parties to set out in clear terms what the desired outcomes would be where there is delay in completion of works. One practical use would be to make clear that the liquidated damages clause would continue to apply up until termination of the contract and no further, or that the clause continues to apply even after the termination of the contract up until the completion of all outstanding works by a second contractor. This decision has not restricted the construction of liquidated damages clause to one of the three identified approaches, and means that parties can decide on the effects of their contract by clear drafting of such clauses.

ii  Oversea-Chinese Banking Corporation Ltd v. ING Bank NV [2019] EWHC 676 (Comm)

Facts
A key issue in this case was whether the measure of damages sought by the claimant was recoverable as a matter of law.

The claimant sued the defendant for breach of warranty under a sale and purchase agreement (SPA) for the shares in a target company (IAPBL). Under the SPA, the defendant warranted that IAPBL's accounts were properly drawn up and gave a true and fair state of affairs as at the end of 2008. The claimant alleged breach of the warranty because the accounts failed to disclose a liability to Lehman Brothers Finance SA (LBF), which was later settled after the completion of the purchase of IAPBL. This resulted in payment of US$14.5 million to LBF, which the claimant sought to recover in this action. If the substantial liabilities had been disclosed, the claimant argued the SPA would have contained a specific warranty or indemnity in the claimant’s favour in respect of the true liability to LBF. The claimant contended that on a claim for breach of warranty of quality on a share sale, the measure of damages claimed could be a hypothetical indemnity and the amount that could have been claimed under that hypothetical indemnity. On the other hand, the defendant argued such measure of loss is not available and the claimant can only recover the difference between the true value of the shares and the value of the shares as warranted.

Decision
The court held that the established measure of loss for breach of warranty on a share sale is the difference between the value of the shares as warranted and their true value (diminution in value). It is a basic principle in awarding damages that the claimant is entitled to be put in the position he or she would have been in if the contract had never been broken. The court therefore rejected the claimant’s contention that its loss was referable to a hypothetical indemnity, which it would have negotiated and obtained had the warranted accounts been properly drawn up. It found that such measure of damages suggested by the claimant is unsustainable in law. It upheld that the measure of damages for breach of warranty of quality
on a share sale was the diminution in value of the company. The diminution in value is the only appropriate measure of damages, although it may be possible to adjust the valuation methodology as appropriate to arrive at the value of the diminution.

**Significance of the decision**

This decision highlights the certainty for which English jurisprudence has proved attractive. The diminution in value is the settled measure of damages as it reflects the loss suffered on a breach of warranty in a share sale. A rejection of a hypothetical indemnity means that in future cases claimants must formulate their claim for damages to accord with the extant principle for assessment of damages. The court is unlikely to award any claim on an untested principle, even where a defendant has breached the warranty.

**iii One Step (Support) Ltd v. Morris-Garner [2018] UKSC 20**

**Facts**

This case considered when negotiation damages (known as *Wrotham Park* damages) can be awarded and the legal basis that should guide such an award.

One Step (Support) Limited (One Step) had purchased from the appellants a business providing support for young people leaving care. An important part of this agreement was that the appellants were bound by restrictive covenants preventing them from competing with One Step or from soliciting business from One Step’s clients for at least three years. The appellants breached this restrictive covenant by setting up a company that provided competing services to those of One Step. One Step sought an account of profits or alternatively ‘negotiation damages’ under the principles of *Wrotham Park Estate Co Ltd v. Parkside Homes Ltd.*  

One of the reasons given by One Step for seeking negotiation damages was the difficulty in establishing the loss the business suffered as a result of the employees’ conduct. The trial court held that One Step was entitled to judgment for damages assessed on a *Wrotham Park* basis or, alternatively, ordinary compensatory damages. One Step elected for damages on the *Wrotham Park* basis. The Court of Appeal confirmed this decision and the appellants appealed to the Supreme Court.

**Decision**

Allowing the appeal, the Supreme Court held that the lower court wrongly applied the *Wrotham Park* principle, and provided clarification on the correct application of the *Wrotham Park* principle and granting ‘negotiation damages’.

The Court observed that the hypothetical fees that the parties would have agreed for release of contractual damages for breach of contract under the *Wrotham Park* principle were not compensatory damages. It clarified that common law damages for breach of contract were not a matter of discretion for the judge, but claimed as of right, and awarded on the basis of legal principles.  

The courts are not justified in granting negotiation damages just because it was difficult to quantify the financial loss, and negotiation of damages was considered to be a just response. Accepting that financial loss in the present case scenario was

78 [1974] 1 WLR 798.

79 One Step (Support) Ltd v. Morris-Garner [2018] UKSC 20, at Paragraph 95:

* Negotiating damages can be awarded for breach of contract where the loss suffered by the claimant is appropriately measured by reference to the economic value of the right which has been breached, considered as an asset…. The
difficult to quantify, the Court held that it was still a ‘familiar type of loss for which damages were frequently awarded and could be quantified in a conventional manner’. Therefore, the hypothetical release fee is not itself the measure of the claimant’s loss in this case. The Supreme Court remitted the case back to the High Court to assess the damages actually suffered by One Stop.

**Significance of the decision**

This is the first decision by the UK’s highest court to review extensively the grant of negotiation damages, with an examination of previous cases on this point. The Supreme Court emphasised the traditional rationale for the award of damages, which is that damages are intended to compensate a claimant for loss or damage resulting in the breach of an obligation and negotiation damages are no different. By emphasising the compensatory purpose for an award of damages, including negotiation damages, the Court has provided some level of clarity to the award of this head of damages. Negotiation damages would no longer be awarded by reference to a hypothetical negotiation damages and would going forward, as with other damages, be assessed and awarded based on the actual financial loss suffered by a claimant for the breach of contract. There would likely be less scope for litigants to rely on the lack of clarity in previous cases to claim damages that do not correspond with actual loss suffered because of the breach of contract. A claimant cannot elect how its damages should be assessed and in that way receive a windfall. However, the decision does not take away the difficulty of quantifying the actual loss, a fact that the Court recognised.

**iv Axa Insurance UK Plc v. Financial Claims Solutions Ltd [2018] EWCA Civ 1330**

**Facts**

This case considered when it would be appropriate to award exemplary damages, especially in situations where the defendant has made no profit and there are alternative avenues for sanctioning the defendant’s wrongful conduct.

The defendants committed serious fraud by issuing two sets of fictitious personal injury claims based on fake documents to the insurance companies. The claimant insurance company conducted an investigation, discovered the claimant’s fraudulent conduct and brought claims against the defendants seeking both compensatory and exemplary damages. The lower court awarded compensatory damages to cover the cost incurred in unravelling the fraud, but rejected the defendant’s claim for exemplary damages. The reasoning of the court was that the fraud was discovered before the defendants made any profits and, therefore, the second category of *Rookes v. Barnard* did not apply. The court also suggested that because of the availability of other avenues, such as the criminal courts and the contempt of court jurisdiction as punishment for the conduct of the defendants, exemplary damages could not be awarded. The defendant appealed.

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81 (No. 1) [1964] AC 1129, at Paragraph 1,226:

*Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.*
**Decision**

On appeal, the Court of Appeal held that the lower court wrongly applied the decision in the *Rookes* case. The Court explained that the second category of *Rookes* applies to cases where ‘the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the claimant’. In the present case, the compensatory damages granted were limited to the cost of investigation, which was a much lesser sum compared to the profit the defendants would have made had the fraud been successfully executed. The Court observed that exemplary damages are ‘available for the case where compensatory damages are inadequate to remove the wrongful gain achieved by the tort’ and they are punitive in nature. The Court further observed, ‘the second category requires the Court to analyse the position prospectively when the tort is committed, at which time the tortfeasor may or may not ultimately achieve the profit it seeks to achieve’. Given the seriousness of the claim and the need to deter and punish the outrageous conduct and abusive behaviour, the Court awarded exemplary damages. The possibility of criminal or contempt proceedings against the defendants is irrelevant to the question of whether or not exemplary damages is to be awarded.

**Significance of the decision**

The Court considered that this case was a ‘paradigm’ for the award of exemplary damages. Exemplary damages would rarely be awarded, but would always be available as a measure of the court’s disapproval of outrageous conduct and abusive behaviour, and to deter and punish such conduct. When the wrongdoer has calculated that the benefit to be derived from the wrongful conduct may well exceed any compensation he or she has to pay the claimant, it would not matter whether the profit was, in fact, made. The Court also affirmed that, in deserving cases, exemplary damages can still be awarded even if other alternatives exist for the sanction of the wrongful conduct.

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83 *id.*, at Paragraph 19.
84 *id.*, Paragraph 35; *Ramzan v. Brookwide Ltd* [2011] EWCA Civ 985, [2012] 1 All ER 903. Exemplary damages should be principled and proportionate, and the principled basis is to make a punitive award.
86 *id.*, at Paragraphs 23 and 34.

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Chapter 16

UNITED STATES

Gary J Mennitt, Ryan M Moore and Nicholas A Passaro

I OVERVIEW

The US legal system is made up of a network of at least 50 different state jurisdictions and a complex federal court system, itself with numerous different jurisdictions. As a result, approaches to compensatory damages will vary from jurisdiction to jurisdiction (and sometimes from court to court). Nevertheless, certain core principles arise across jurisdictions, which apply generally across cases.

Very generally, the goal of compensatory damages is to ‘compensate’ the plaintiff for a legally recognised loss caused by the defendant. Key to that compensation is that although the law will make best efforts to compensate the plaintiff entirely for his or her loss, the plaintiff should not be permitted to recover a windfall. In determining the scope and amount of a proper compensatory damages award, courts take into consideration evidence submitted by the parties, including expert evidence in more complicated cases. And in many cases, if a plaintiff fails to clearly establish a definable injury, his or her cause of action will be dismissed in its entirety.

Other types of damages are available in US courts, such as restitution damages, equitable damages or punitive damages, dependent upon the given case. For the purposes of this chapter we have focused our discussion on general principles of law applied across the United States federal court system regarding compensatory damages. Where we have referenced law or principles arising from other jurisdictions – for example, certain noteworthy principles applied in specific state jurisdictions – we have indicated the distinction.

II QUANTIFICATION OF FINANCIAL LOSS

i Introduction

In the United States, the general goal of compensatory damages is ‘to restore the injured party, to the extent possible, to the position that would have been occupied had the wrong not occurred’. In aiming to achieve that goal, different sets of circumstances necessitate unique approaches. Calculations often need to be made about the value of property, medical expenses, lost sales and lost wages. Even more complicated are the calculations necessary to compensate a plaintiff for lost future earnings, either as wages for an individual or sales for a business, or for future pain and suffering caused by a tortious injury. These varying types of

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1 Gary J Mennitt is a partner, and Ryan M Moore and Nicholas A Passaro are associates at Dechert LLP.
2 In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 643 F Supp 2d 446, 455 (SDNY 2009).
damages can be demonstrated through a corresponding variety of evidence, with the court system striving to achieve the goal of placing a plaintiff in the position he or she was in or would have been in but for the defendant’s wrongful conduct.

ii Evidence
Evidence for proving damages in the United States can come in the form of records, documents and testimony from witnesses and experts.\(^3\) The law of evidence is complex but it is worth noting here that in business disputes, most reliable commercial records will be admissible. In some straightforward cases, damages are ‘within the common sense of the jury and do not require expert testimony’.\(^4\) For example, when assessing damages in a breach of contract case, accurate records could prove with reasonable certainty any financial loss resulting from the breach. Additionally, the plaintiff could testify about any expenses that were incurred because of the breach. In more complicated cases, however, experts may be necessary to testify about calculations derived from the evidence or other factors relevant to a damages evaluation, including, for example, relevant industry norms regarding lost wages, complicated financial projections and economics, or the value of damaged or destroyed property. These types of expert testimony evidence will be discussed further in Section III.

iii Date of assessment
The date from which damages are assessed can vary based on the type of case. In a contract case, damages are assessed from the date of breach.\(^5\) In a tort case, damages are assessed from the date of the incident giving rise to the claim (i.e., the date of the injury). That date of injury can often be different from the date of the defendant’s conduct giving rise to that injury.\(^6\) For example, if a defendant is found liable for a danger to his or her property, such as a dangerous hazard at their place of business, the date of assessment would not be when the defendant caused or allowed the hazard to exist, but when the plaintiff was injured by the hazard. These dates could be days, months or even many years apart.

iv Financial projections
Financial projections become relevant when calculating damages that have not yet been incurred, but with reasonable certainty will be incurred in the future as a result of the defendant’s conduct. For example, in contract cases, one category of damages can be the future loss of earnings or sales caused by the defendant’s breach of contract. Tort cases can also involve damages constituting future loss of earnings or future pain and suffering arising from a defendant’s tortious conduct. As previously discussed, these types of prospective damages typically would be demonstrated by expert witnesses who are familiar with typical sales of a business of that size in that industry, typical wage growth of someone of the plaintiff’s education and skill level in their industry and geographical location, or relevant medical

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\(^5\) First Federal Lincoln Bank v. US, 518 F3d 1308, 1316 (Fed Cir. 2008).

knowledge. These projections often are necessary to assist a jury in understanding the full scope of a plaintiff’s damages to put the plaintiff in the position they would have been in but for the defendant’s conduct. A significant limitation on projected damages is that they must be grounded in the facts and not speculative.

v Assumptions
Assumptions are rarely made in damages calculations in United States courts, regardless of the specific jurisdiction, because in most circumstances, damages must be proven as an essential element of the prima facie tort or breach of contract claim. That being said, sometimes assumptions have to be made in certain cases, such as where expert testimony is necessary to calculate future earnings. An example would be that if a plaintiff was physically injured and could no longer work in his or her prior employment, an assumption would be that he or she would have earned as much as someone of his or her education and skill in that area over an average-length career. This very well may not have been the case, but it is an assumption that courts and experts often make to try to put the plaintiff in the appropriate position as accurately as possible. Again, such assumptions must be grounded in statistics and reliable evidence and not speculative.

vi Discount rates
In cases involving future economic damages such as lost wages or profits, where the award will be given in a lump sum, calculations must discount the amounts to present value. The discount rate is typically some safe form of investment to properly account for the added time value of the award. For example, if a business proves it lost future profits over 10 years, its award will be worth its present value, plus its investment over 10 years in a low-risk income-producing bond, bank account or similar vehicle. Because the profits would have come slowly over those 10 years, the lump sum award would need to be discounted by the likely investment returns the plaintiff will (or could) make if awarded the entire lump sum immediately. This all follows from the goal of putting the plaintiff in the position he or she would have been in but for the defendant’s conduct — no better, no worse.

8 See Jones & Laughlin Steel Corp v. Pfeifer, 462 US 523, 533 (1983) (noting that ‘[i]n calculating damages, it is assumed that if the injured party had not been disabled, he would have continued to work, and to receive wages at periodic intervals until retirement’ (emphasis added)).
9 See Id. at 533–34. (‘The lost wage stream’s length cannot be known with certainty . . . Given the complexity of trying to make an exact calculation, litigants frequently follow the relatively simple course of assuming that the worker would have continued to work up until a specific date certain. In this case, for example, both parties agreed that the petitioner would have continued to work until age 65 (12.5 more years) if he had not been injured.’)
vii Currency conversion
Courts in the United States generally award judgments in US dollars and ignore fluctuations in the value of the dollar over the course of time from the injury until the judgment. When plaintiffs allege damages in a foreign currency, many jurisdictions (20 states) have adopted the provisions of the Uniform Foreign-Money Claims Act. For example, Chapter 2337 of the Ohio Revised Code details the definitions under the Uniform Foreign-Money Claims Act, as well as when it is to be applied. The Act provides that awards given in foreign currency will be converted at a bank-offered rate on the day the award is paid to the plaintiff or to the official designated to enforce the judgment.

viii Interest on damages
Pre-judgment and post-judgment interest on damages can vary greatly based on the cause of action and the forum. For example, under the Civil Rights Act of 1964, interest on backpay is statutorily excluded from being awarded. But under common law, pre-judgment interest was generally only allowed for liquidated damages or damages that were ‘relatively certain and ascertainable by reference to established market values’. Different local jurisdictions are also able to implement specific rules; for example, in the state of Pennsylvania, interest is not allowed to be a part of a damages award for personal injuries. In New York, pre- and post-judgment interest is awarded as-of-right in many cases.

ix Costs
Costs, or out-of-pocket damages, may be awarded along with other compensatory damages in certain circumstances. In breach of contract cases, awardable costs might include expenditure the plaintiff made in reliance on the defendant’s agreement under the contract. In tort cases, awardable costs might be expenditure the plaintiff had to make as a result of the defendant’s tortious conduct, such as the costs of medical bills or for replacing damaged or destroyed property. Costs might be discounted by mitigation principles, but they are awarded nevertheless. However, under the ‘American Rule’, attorneys’ fees are generally not awarded to the prevailing party in litigation absent an express statutory or contractual fee-shifting provision. This is a major distinction from many other jurisdictions.

11 23 Ohio Rev Code Section 2337.
13 42 USC Section 1981a(b)(2) (‘Compensatory damages awarded under this section shall not include backpay, interest on backpay . . .’).
17 See Energy Northwest v. US, 641 F3d 1300, 1309 (Fed Cir 2011) (noting that ‘[a] plaintiff is entitled to recover costs that were caused by the defendant’s breach . . . so long as the cumulative result is a reasonable certainty that the awarded costs were actually caused by the breach’).
In the United States, compensatory damages awarded for physical injury or physical sickness are not included as taxable income.\(^{18}\) Purely economic damages or those stemming from claims involving emotional distress, however, are included as ordinary taxable income.\(^{19}\) Additionally, interest on any award, awards for lost wages or profits, awards for emotional distress, and attorney fees and costs are all taxable as ordinary income.\(^{20}\) Generally, the US taxing authorities will ‘look through’ the litigation to determine whether the underlying claim relates to what would ordinarily be taxable income. To take a simple example, an award of lost income is generally taxable because, had the income been paid when due, it would have been taxable.

### III EXPERT EVIDENCE

#### i Introduction

In United States federal courts,\(^{21}\) the admission of expert evidence regarding all matters, including damages, is governed by the Federal Rules of Evidence. Only properly qualified experts may provide evidence on an issue in a case,\(^{22}\) and the rules specifically allow experts to give opinions on ultimate issues in a case, including damages.\(^{23}\) Very generally, courts act as gatekeepers and allow expert testimony where it is reliable and would assist the trier of fact (including a petit jury) in determining an issue in the case, including the calculation of appropriate damages.

#### ii The role of expert evidence in the calculation of damages

As discussed above, experts are often called upon in cases to evaluate and give opinions on the damages caused by a defendant’s wrongful conduct. Often, the evaluation of relevant economic, scientific or medical issues is required to project an individual’s lost future earnings, calculate a company’s lost profits, determine the diminished value of a business enterprise, or calculate future pain and suffering attendant to a past injury. Over the last few decades, United States courts have encouraged the presentation of expert testimony on these (and other) issues, principally in an effort to make the job of the fact-finder easier and more dependable.\(^{24}\)

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\(^{19}\) id. at 29; see infra note 54.

\(^{20}\) id.

\(^{21}\) Because of the variation of treatment of expert witnesses and their ability to testify as to damages in a given case among United States jurisdictions, we focus our discussion on the rules applicable to cases in United States federal courts. Note, however, that even within the federal system treatment may vary across federal courts in different jurisdictions. Nonetheless, as discussed in Section I, we have framed the discussion around core principles generally uniform across jurisdictions.

\(^{22}\) See Federal Rule of Evidence 702.

\(^{23}\) See Federal Rule of Evidence 704.

\(^{24}\) 4 J Weinstein & M Berger, Weinstein’s Federal Evidence, Section 703.03[1] (2d ed 2006) (economics experts may ‘assist the trier of fact to understand the facts already in the record, even if all it does is put those facts into context’).
iii The court’s role excluding and managing expert evidence

Prior to the introduction of expert evidence, the court must first make threshold determinations on the expert’s qualifications and the relevance of the expert’s testimony to the issues in the case. Federal Rule of Evidence 702, which governs expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Interpreting this Rule, a series of cases from the Supreme Court of the United States govern courts’ role as ‘gatekeepers’ to ensure that any and all expert testimony ‘is not only relevant, but reliable’.25

The seminal case, Daubert v. Merrel Dow Pharmaceuticals, Inc articulated a two-prong test to assist trial judges in evaluating the admissibility of expert testimony. Daubert held that, first, ‘[t]he subject of an expert’s testimony must be “scientific knowledge”’, which ensures ‘evidentiary reliability’, explaining:

> [t]he adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation. The term applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds. Of course, it would be unreasonable to conclude that the subject of scientific testimony must be ‘known’ to a certainty; arguably, there are no certainties in science. But, in order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., ‘good grounds,’ based on what is known.26

Daubert’s second prong requires that the expert evidence or testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue’, essentially a relevancy test.27 Expert evidence or testimony that ‘does not relate to any issue in the case is not relevant and, ergo, non-helpful’.28

Thus, under Daubert, a court faced with a proffer of expert evidence or testimony ‘must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue’.29 The Supreme Court identified several factors that ‘will bear on the inquiry’, including whether an expert’s methodology ‘can be (and has been tested)’ or ‘subjected to peer review and publication’; the known or potential rate of error; and the ‘general acceptance’ of the expert’s methodology.30 The Supreme Court cautioned, though, that the inquiry is a ‘flexible one’, focused ‘solely on principles and methodology, not on the conclusions that they generate’.31

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26 id. at 589–90.
27 id. at 591.
28 ibid.
29 id. at 592.
30 id. at 592–94.
31 id. at 594–95.
Since Daubert, the Supreme Court of the United States has stated clearly, in *Kumho Tire Co. v. Carmichael*[^32] that Daubert’s ‘general holding – setting forth the trial judge’s ‘gatekeeping’ obligation – applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge[^33]. This includes expert testimony on damages.

Two cases are demonstrative of how the Daubert standard applies to experts asked to proffer opinions on damages. In *Zenith Electronics Corp v. WH-TV Broadcasting Corp*[^34], WH-TV, a digital television company based in Puerto Rico, was sued by Zenith Electronics Company to collect unpaid bills for television set-top cable boxes Zenith sold to WH-TV. WH-TV filed a counterclaim, seeking to recover lost profits caused by certain alleged defects in the cable boxes it purchased from Zenith. In support of its counterclaim, WH-TV proposed to rely on the testimony of an expert that its business ‘would have grown rapidly, and its profits ballooned’, if Zenith’s boxes has been able to perform as promised[^35]. On appeal, the federal appellate court affirmed the trial court’s exclusion of the expert’s testimony, finding the expert had failed to gather all the relevant facts and had failed to apply reliable principles and methods. Specifically, the court took issue with the expert’s ‘failure to look outside San Juan, even for a reality check’, in collecting data for his projection; and found the expert’s reliance on his own ‘expertise’, ‘awareness’ and ‘industry expertise’, as opposed to a specific methodology, rendered his testimony unreliable.[^36] Key to the court’s decision was the recognition that even ‘social science has tools to isolate the effects of multiple variables’.[^37] Because WH-TV’s expert made no reference to such an ‘empirical toolkit’, his opinion on damages was unreliable and inadmissible at trial.[^38] In contrast, in *Synergetics, Inc v. Hurst*[^39], another federal appellate court acknowledged that although the relevant methodology for calculating damages may vary, ‘so long as the methods employed [by the expert] are scientifically valid’, the mere disagreement that another method should be used does not warrant exclusion of the expert testimony.[^40] Rather, the proper way to challenge the expert’s assumptions and methodologies is through cross-examination and the opposing party presenting its own expert witness as to damages.[^41]

[^33]: *Kumho Tire Co*, 526 US at 141.
[^34]: 395 F3d 416 (7th Cir 2005) (Easterbrook, J).
[^35]: *Zenith Elec Corp*, 395 F3d at 417–18.
[^36]: id. at 418–19.
[^37]: id. at 419.
[^38]: ibid. Note, however, that an opinion based on experience alone is not per se disqualifying. In certain fields, experience is the predominant basis for reliable expert testimony, as long as the expert is able to testify as to the methodology used to come to the relevant conclusion. See, e.g., *United States v. Jones*, 107 F3d 1147 (6th Cir 1997) (handwriting expert with years of practical experience and extensive training who explained methodology in detail); *Tassin v. Sears Roebuck*, 946 F Supp 1241, 1248 (MD La 1996) (engineer’s testimony can be admissible as expert opinion where ‘based on facts, a reasonable investigation, and traditional technical/mechanical expertise’, and the expert ‘provides a reasonable link between the information and procedures he uses and the conclusions he reaches’).
[^39]: 477 F3d 949 (8th Cir 2007).
[^40]: *Synergetics, Inc*, 477 F3d at 956.
[^41]: ibid.
iv Independence of experts

Owing to the adversarial nature of the legal process in the United States, experts are chosen, prepared and paid by the litigants whom their opinions support. As a result, a question of the independence of experts (most commonly focused on their financial interest for providing the relevant opinion) is common in most litigation in which an expert opinion is necessary. For example, Judge Posner (a well-respected US jurist) has observed that ‘[m]any experts are willing for a generous (and sometimes for a modest) fee to bend their science in the direction from which their fee is coming’.42

To address this issue, some scholars and judges have advocated for an increased use of Federal Rule of Evidence 706, which explicitly confers on federal judges the authority to appoint experts on their own.43

v Challenging experts’ credentials

Challenges to a party’s expert witness are done through motions to disqualify the expert or exclude his or her testimony. Experts must offer opinions only on those issues actually within their expertise.44 Mere exposure to an area does not make one a qualified expert, and courts have excluded experts where their testimony did not arise from the experts’ true areas of expertise.45 That said, standards for qualifying experts are liberal and depend on the relevant field.46

vi Novel science and methods

Prior to the Daubert decision, the admission of expert evidence regarding novel science and methods was governed by the ‘general acceptance’ test articulated seventy years prior in Frye v. United States.47 In determining the admissibility of evidence derived from a ‘crude precursor to the polygraph machine’,48 the Frye court explained:

>[j]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.49

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42 Indianapolis Colts, Inc v. Metro Balt Football Club Ltd P’ship, 34 F3d 410, 415 (7th Cir 1994).
44 See, e.g., Smith v. Hobart Mfg Co, 185 F Supp 751, 756 (ED Pa 1960) (‘something more than the self-serving statement of the expert should be required to qualify him’).
45 See, e.g., United States v. Kelly, 6 F Supp 2d 1168, 1184 (D Kan 1998) (disqualifying expert because, inter alia, ‘the court’s impression is that [the expert’s] qualifications are largely a matter provable only through his own opinion of himself’); Diaz v. Jonson Matthey, Inc, 893 F Supp 358, 363 (DNJ 1995) (excluding expert’s testimony where expert was not qualified in relevant subject area and based his ‘expertise’ on reading articles on the subject matter prior to giving opinion).
46 See, e.g., Santos v. Posadas de PR Asocs, Inc, 452 F3d 59, 63 (1st Cir 2006).
47 54 App DC 46, 472, 293 F 1013, 1014 (1923).
48 Daubert, 509 US at 585.
49 Frye, 54 App DC at 47, 293 F at 1014.
In *Frye*, because the technology at issue had 'not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made', the evidence was excluded.50

As recognised in *Daubert*, *Frye’s* 'general acceptance’ test for novel science or methods was superseded by the Federal Rules of Evidence governing expert evidence and *Daubert* itself.51 But many other jurisdictions within the United States still use some version of the *Frye* standard.

### Oral and written submissions

Expert evidence can be in the form of oral or written submissions to the court. Typically, an expert will submit evidence prior to trial in the form of a written expert opinion. That expert opinion will contain not only the articulation of the substance of the expert’s opinion, but also the expert’s qualifications to give that opinion and the facts referenced and methodology used to reach the conclusions contained in the expert’s substantive opinion. Should the case go to trial, the expert will then give oral testimony before the fact finder, and be subject to cross-examination by counsel for the opposing party.

### IV RECENT CASE LAW

#### i Rieger v. Giant Eagle, Inc

*The facts of the case*

In 2003, the Supreme Court offered some guidance by stating that ‘[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee’.52 This 1:1 ratio was reiterated by the Supreme Court in the 2008 *State Farm* case.53 However, in *Rieger v. Giant Eagle*, an Ohio appellate court resolved a challenge to an Ohio statute that limited punitive damages to a 2:1 ratio.54 The case involved a jury award of US$121,000 in compensatory damages and US$1,198,000 in punitive damages.55 The trial court initially applied the Ohio statute, limiting the award to the 2:1 ratio, and the plaintiff argued the Ohio statute was unconstitutional as applied.56 The trial court agreed with the plaintiff, saying that the original award was not excessive and was within the confines of the purpose of punitive damages – to deter and punish.57 On appeal, the court overruled that decision, stated that the statute was constitutional and reinstated the modified 2:1 ratio award.58

50 ibid.
51 *Daubert*, 509 US at 587.
55 id. at 854.
56 id. at 855–56.
57 id. at 856.
58 id. at 861.
The decision

Although the Ohio Court of Appeals cited State Farm, it nonetheless found that the Ohio statute’s 2:1 ratio fell within what was permitted.59 The lower court had found the 2:1 ratio too restrictive in ruling it was unconstitutional (per the Ohio state constitution), and the Supreme Court’s guidance in State Farm indicated that the Ohio 2:1 statutory ratio was too high. This area of the law will no doubt continue to develop.

The significance of the decision

In the United States, punitive damages go beyond mere compensation and are designed to punish the defendant for his or her tortious behaviour, and to discourage similar behaviour by others. The appropriate limiting ratio of punitive to compensatory damages is an area that has received much attention and continues to develop. This recent case suggests that lower courts are declining to follow, or working around, the Supreme Court’s previously stated guidance.

ii Tax Cuts and Jobs Act

The facts

Earlier this year, the United States significantly modified its tax code when Congress passed the Tax Cuts and Jobs Act (the Act). Part of the Act reduced the number of itemised deductions (i.e., certain expenditures that could be used to lower a person’s taxable income) available to taxpayers, including certain deductions taxpayers could take involving damages awards in litigation.

Since the Supreme Court’s decision in Commissioner of Internal Revenue v. Banks,60 taxpayers are required to pay federal income tax on 100 per cent of all taxable damages awards,61 regardless of any contingency fees those taxpayers had to pay to their attorneys. Nevertheless, prior to the passage of the Act, taxpayers could take as a miscellaneous deduction the full amount of that contingency fee, essentially rendering that percentage of the damages award non-taxable income.

The significance

Under the new law, taxpayers are no longer permitted to take this type of a deduction for contingency or other attorneys’ fees in 2018 and beyond.62 For example, if an individual is awarded, as compensatory damages, US$100,000 in taxable damages in an applicable case, and that same individual agreed to a contingency fee with his or her attorney, which granted the attorney 40 per cent of any damages award as compensation, the individual would walk away with US$60,000 from the damages award after paying his or her attorney US$40,000 of that same award. Prior to the Act taking effect, that individual could take a deduction for that US$40,000 contingency fee, and only pay federal income taxes on the US$60,000 he or she actually received from the damages award. But under the new Act, the individual likely will have to pay income tax on the full US$100,000 damages award, regardless of how much of that award he or she was required to pay to his or her attorney.

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59 id. at 859–60.
61 See supra at note 18, p. 19; 29 for discussion of taxable versus non-taxable damages awards.
Note, however, that the Act still is very new, and courts, regulators and businesses around the country are coping with the challenges associated with understanding, implementing and enforcing a major change in the tax code. This particular consequence for those recovering damages represents merely one way in which the law will be impacting plaintiffs in coming years.

iii  Aref v. Lynch

The facts of the case

Yassin Aref, Kifah Jayyousi and Daniel McGowan (appellants) were three federal prisoners who spent several years in specially designated communication management units (CMUs). Such a classification curtails family visits and communications with the outside world. Appellants argued that their designation to CMUs violated their due process rights and sought damages under the Prison Litigation Reform Act (PLRA) for a variety of injuries allegedly arising out of their confinement in CMUs, including ‘loss of educational opportunity in the form of release preparation programming, reputational harm, violation of their First Amendment rights, and lasting harm to their familial relationships’.

The decision

The court was faced with an issue of first impression for the DC Circuit: ‘whether injuries that are allegedly neither mental nor emotional are compensable under the PLRA without a prior showing of physical injury’. The PLRA’s ‘Limitation on Recovery’ provision states: ‘No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a proper showing of physical injury.’ The court addressed the circuit split over the applicability of Section 1997e(e) to claims, such as those at hand, which involve a constitutional violation but no physical injury. A majority of courts have held that Section 1997e(e) ‘precludes compensatory damages for any claim that does not include physical harm’. These courts focus on the type of injury asserted and imply that ‘a constitutional violation, absent physical harm, is necessarily a type of mental or emotional injury’. Other courts have taken the opposite approach, arguing that alleged constitutional violations are a type of intangible harm fully discernible from mental or emotional injury. The court concluded that the narrower reading of the PLRA, where a prisoner may recover compensatory damages under the PLRA if he or she can show an actual injury, separate from mental or emotional harm, was the

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proper one. Ultimately, although the court held that the appellants’ claims constituted claims for actual though intangible harms that are neither mental nor emotional, they failed because the prison official was entitled to qualified immunity.

The significance of the decision

Aref v. Lynch discusses the federal circuit split over the meaning of Section 1997e(e), specifically with regard to whether prisoners can sue for damages for constitutional violations absent a physical injury. Both sides of the circuit split have ultimately concluded that a prisoner’s claim must be divided, either by the injury alleged or relief sought. Prior to the passage of the PLRA, plaintiffs bringing Section 1983 claims were required to show ‘actual’ injuries to recover compensatory damages. The PLRA shifted the requirement from an actual injury to a physical injury. This is a more restrictive requirement than for litigants outside prison who are able to recover for actual damages resulting from constitutional violations. As a result: ‘Barring prisoners from compensatory damages means that prisoners . . . are not permitted to prove the actual harm that others are permitted to prove’.

iv Maverick Transportation v. US Dept of Labor

The facts of the case

In October 2003, Maverick, a trucking company, hired Albert Brian Canter as a commercial vehicle driver. Following his involvement in an accident, which resulted in the death of a motorist, Canter chose to resign from Maverick. Upon delivering his resignation, Canter was directed to drive the truck involved in the accident an additional 200 to 250 miles to Maverick’s yard to return it. Canter refused to drive the truck because it had defects in violation of various federal safety regulations as a result of the accident. The truck had a chaffing brake hose and leaked steering fluid, which are conditions that substantially increased the likelihood of a catastrophic failure of the service brakes. After Canter resigned, Maverick’s fleet manager, Robert Roberson, spoke with Maverick officials about placing an ‘abandonment notation’ in Canter’s Drive-A-Check (DAC) report. Such a designation negatively impacts a driver’s ability to be hired, with some employers outwardly refusing to hire drivers who have an abandonment notation. Soon after, Canter began experiencing difficulty finding work and discovered sometime in July or August 2008 the abandonment

72 id. at 263–66.
73 id. at 269.
74 833 F3d 242 (DC Cir 2016).
75 Eleanor M Levine, ‘Compensatory Damages Are Not for Everyone: Section 1997e(e) of the Prison Litigation Reform Act and the Overlooked Amendment’, 92 Notre Dame Law Review.
76 ibid.
77 ibid.
78 ibid.
79 ibid.
80 Maverick Transp, LLC v. US Dept of Labor, 739 F3d 1149, 1151 (8th Cir 2014).
81 ibid.
82 ibid.
83 ibid.
84 ibid.
85 id. at 1152.
86 ibid.

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notation in his DAC report. On 16 December 2008, Canter filed a Surface Transportation Assistance Act (STAA) complaint against Maverick, alleging retaliation. An administrative law judge (ALJ) held that Maverick had unlawfully retaliated against Canter. This decision was affirmed by the Department of Labor Administrative Review Board (ARB). Maverick petitioned for review, arguing that the ARB erred in, among other reasons, affirming the damages awarded by the ALJ. The ALJ awarded Canter US$75,000 as compensatory damages for his emotional distress. Maverick argued that the only evidence Canter offered of his depression was his own testimony, and most STAA cases without medical evidence result in modest awards.

The decision

The Eighth Circuit affirmed the ALJ’s award of US$75,000 as compensatory damages for Canter’s emotional distress. The Court held that: ‘A plaintiff’s own testimony can be sufficient for a finding of emotional distress, and medical evidence is not necessary.’ It also noted that the ARB makes compensatory damages awards based on the awards made in cases involving similar injuries. Finding that the ARB has made similar awards in other cases, the Court affirmed.

The significance of the decision

Most of the whistleblower retaliation statutes adjudicated at the US Department of Labor, including the Sarbanes-Oxley Act whistleblower provision, authorise compensatory damages. However, the Eighth Circuit’s decision, among other decisions, indicates that a whistleblower can obtain substantial compensatory damages based solely on his or her own testimony.
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**JOEL BOWERS**

*Kroll, a division of Duff & Phelps*

Joel Bowers is a managing director in the Cyber Risk practice of Kroll. Based in Toronto, Joel has overseen the Cyber Risk practice in Canada since 2012. Over the years, Joel has gained experience working on hundreds of cases involving digital evidence. These cases have ranged in size from single computer investigations through cases involving multinational companies where hundreds of electronic devices were involved. Joel has submitted dozens of computer forensic expert reports and affidavits to the Ontario Superior Court of Justice and has successfully defended them under cross-examination.

**SELBY P BROWN**

*Dechert LLP*

Selby Brown focuses her practice on complex commercial and international litigation. As a participant in the international and insolvency litigation group, Ms Brown has experience on matters involving sovereign litigation and enforcement of international arbitration awards. She also has diverse experience in financial and business disputes, including those involving securities fraud class actions, derivative claims against corporations, the Foreign Corrupt Practices Act, misappropriation of trade secrets, breach of contract and false advertising. Additionally, Ms Brown works on matters involving pharmaceutical products liability and employment issues.
MAY K CHIANG
*Dechert LLP*

May Chiang is a senior associate in Dechert’s trials, investigations and securities group. She represents clients in complex commercial disputes and multinational litigation before federal and state courts, and has litigated cases at both the trial and appellate levels. She has also assisted clients in internal investigations, government investigations and commercial arbitrations.

CLARE CONNELLAN
*White & Case LLP*

Clare Connellan is a partner based in White & Case’s London office and works with the international arbitration, and construction and engineering groups. Clare advises companies, state entities, contractors, owners and operators on the resolution of complex disputes, with a particular focus on disputes within the construction and engineering industry.

She has been involved in arbitrations under the ICC, LCIA and SCCICA rules, as well as ad hoc arbitrations, including under the UNCITRAL and LMAA rules. Clare also advises on alternative dispute resolution, including mediation, and is a CEDR-accredited mediator. She has spent time on secondment to the LCIA as counsel.

Clare also leads the firm’s business and human rights interest group and is consulted in relation to issues such as the UN Guiding Principles on Business and Human Rights and the Modern Slavery Act, as well as business and human rights training.

ALEX FERRERES COMELLA
*Uría Menéndez*

Alex Ferreres Comella is a partner and the head of the litigation and arbitration practice areas in the Barcelona office.

He is a practising litigator in the jurisdictions of Madrid and Barcelona, among others, and his practice focuses on contractual liability and tort. In particular, he has successfully defended the interests of car manufacturers, pharmaceutical companies, tobacco companies and the chemical industry in some of the most important product liability cases in Spain, including several collective claims.

He is considered a leading lawyer by the main international legal directories, such as *Chambers and Partners* and *Who’s Who Legal*.

NEIL DE GRAY
*Duff & Phelps*

Neil de Gray is a director at Duff & Phelps in the Toronto office.

Since 2010, Neil’s practice has focused exclusively on valuation, damages quantification and M&A advisory services. Neil has prepared and critiqued numerous expert reports in both litigious and non-litigious matters, including business valuations, shareholder disputes, tax disputes, damages quantification, and sell-side and buy-side M&A. Neil has been qualified and has testified as an expert in business valuation in the Tax Court of Canada.

Neil has experience in a wide variety of industries and has authored several articles and presentations on business valuation and corporate finance topics. Neil obtained his Bachelor
of Commerce (high distinction – director’s award) from the Rotman School of Management at the University of Toronto. He is a chartered professional accountant (CPA, CA) placing on the National Honour Roll in 2008, and a chartered business valuator (CBV).

Prior to joining Duff & Phelps, Neil spent several years with a global accounting firm providing assurance and advisory services to large public companies operating in the financial services and asset management sectors. In his spare time Neil enjoys golfing, ice hockey and travelling.

ALEXANDREOUTEDA JORGE
Pinheiro Neto Advogados
Alexandre Outeda Jorge is a partner at Pinheiro Neto Advogados, Brazil. He graduated from São Paulo Catholic University School of Law, Brazil. He has extensive experience in environmental law; occupational, health and safety law; environmental litigation; collective claims in environmental matters (public civil actions and class actions); asbestos cases; mercury cases; on-the-job accident and occupational disease cases; distributorship and agency litigation; and litigation in general.

ANDREW KALAMUT
McCarthy Tétrault LLP
Andrew Kalamut is a partner in McCarthy Tétrault’s litigation group in Toronto. He maintains a general civil and corporate/commercial litigation practice, with a focus on professional negligence, mining disputes and construction/infrastructure disputes.

Mr Kalamut has appeared at all levels of courts in Ontario, including the Court of Appeal, as well as various administrative tribunals. In addition, he has represented clients in both domestic and international arbitrations.

Mr Kalamut holds a Certificate in Mining Law from Osgoode Hall law School, and is a member of the global mining litigation practice group at McCarthy Tétrault, as well as the international arbitration practice group.

He is a regular contributor to the firm’s mining industry blog ‘Mining Prospects’ and annual Mining in the Courts publication. Mr Kalamut also contributes to and is the co-editor of the firm’s ‘International Arbitration’ blog. He has authored various articles and speaks at seminars on topics of advocacy. He is currently an instructor at the Faculty of Law at Queen’s University in Kingston, Ontario, where he teaches trial advocacy.

YAROSLAV KLIMOV
Norton Rose Fulbright (Central Europe) LLP
Yaroslav Klimov heads Norton Rose Fulbright’s dispute resolution practice in Russia and the Commonwealth of Independent States. He is highly regarded for dispute resolution with significant experience in domestic litigation, cross-border disputes and international arbitration. Yaroslav is often involved in high-profile disputes.

Yaroslav represents clients before the Russian state commercial courts and courts of general jurisdiction, as well as before international arbitral tribunals. He has particular expertise in general commercial, corporate, regulatory and product liability litigation.

Yaroslav has been a member of the Moscow Bar Association since 1997. In addition to his counsel work he sits as an arbitrator in both domestic and international arbitration
matters. He is included in the lists of arbitrators of various arbitral institutions: the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), Pacific International Arbitration Centre (PIAC) and Russian Arbitration Association (RAA). Yaroslav is a member of the ICC Commission on Arbitration and ADR.

Yaroslav is a graduate of the Moscow State Institute of International Relations (MGIMO) with honours and holds a Doctorate in Law from the Institute of State and Law of the Russian Academy of Sciences. A native Russian speaker, Yaroslav is fluent in English, German and French.

**GARY J MENNITT**

*Dechert LLP*

Gary J Mennitt is co-head of Dechert’s international and insolvency litigation group. He concentrates on complex multinational litigation and contentious cross-border matters. He has extensive experience leading creditors’ rights, insolvency and bondholder litigation. His practice is fully integrated with Dechert’s bankruptcy and reorganisation group. Mr Mennitt represents clients in state and federal trials and appeals throughout the United States in complex matters where much is at stake. Mr Mennitt has extensive first chair trial experience and has tried more than 25 cases. He has consistently been ranked as among the top litigators by multiple leading global publications, including *Chambers USA, The Legal 500 US* and the *New York Law Journal*, with *The Legal 500 US* also noting him as a leader of Dechert’s tier 1 international and insolvency litigation team.

**EKATERINA MERKULOVA**

*Norton Rose Fulbright (Central Europe) LLP*

Ekaterina Merkulova is a dispute resolution lawyer based in Moscow. She exclusively specialises in dispute resolution and has more than 10 years of experience in representing Russian and foreign companies before the Russian state arbitrazh (commercial) courts of all levels and courts of general jurisdiction.

Ekaterina has been mainly focused on corporate and regulatory disputes. She has also been involved in bankruptcy disputes, land disputes, contract disputes, as well as in general commercial disputes. Ekaterina graduated with honours from the law faculty of Moscow State University in 2002. Prior to joining Norton Rose Fulbright in 2012, she had worked in another international law firm for more than five years. Ekaterina is fluent in English.

**RYAN M MOORE**

*Dechert LLP*

Ryan M Moore is an associate in the firm’s litigation group. Mr Moore represents and advises corporate and individual clients in connection with contract, fiduciary duty, regulatory, and other complex commercial matters in state and federal court, with a focus on various Pennsylvania trial and appellate matters. Mr Moore has also represented and advised clients in SEC investigations and financial audits by state regulatory agencies.
SIMON MORRIS
*Piper Alderman*

Simon Morris is a partner in the dispute resolution division of Piper Alderman and head of the firm’s Sydney office. He has previously been the national head of Piper Alderman’s dispute resolution division.

Simon advises in large-scale commercial disputes. He has particular expertise in securities class actions, trustee and shareholder disputes.

FIORELLA NORIEGA DEL VALLE
*Herbert Smith Freehills*

Fiorella joined Herbert Smith Freehills as an associate in March 2018.

Fiorella was admitted as an attorney in 2015 and has experience in commercial litigation, including cross-border dispute resolution (specifically in Africa) and alternative dispute resolution, such as arbitrations and mediations.

Fiorella is fluent in English and Spanish and holds an Advanced Certificate in International Arbitration from the Chartered Institute of Arbitrators and is also a board member of the Young Members Group of the CIArb (Johannesburg branch).

She is part of a team that specialises in various aspects of commercial litigation.

WILLIAM ONG BOON HWEE
*Allen & Gledhill*

William Ong Boon Hwee’s areas of practice encompass international arbitration, banking litigation, corporate insolvency and restructuring as well as corporate litigation.

William has substantial experience in banking litigation, financial and securities-related disputes, and regularly represents banks and financial institutions in disputes involving structured products, margin trading, valuations, guarantees and enforcement of security. He is also actively involved in representing clients in corporate disputes such as shareholder and directors’ disputes as well as joint venture disputes.

William has a special interest in the field of assessment of damages and valuation methodology, as he believes that most disputes would be ultimately concerned with damages and its assessment – he is familiar with the technical and legal aspects of this area, which is valued by clients.

William is effectively bilingual in English and Mandarin and has rendered expert opinions before the English courts and the courts of the People’s Republic of China. *The Legal 500 Asia Pacific* (2019) noted that William ‘can zero in on the key issues of concern, map out strategic solutions and passionately deliver legal arguments’.

NICHOLAS A PASSARO
*Dechert LLP*

Nicholas A Passaro is an associate in the firm’s antitrust group and focuses his practice on antitrust and competition litigation. He has worked with clients in the healthcare, pharmaceutical, technology and travel industries. Mr Passaro joined Dechert as a summer associate in 2016. He was a teaching assistant in antitrust law at Cornell Law School, and
was a pro bono scholar for the Nassau County Legal Aid Society, where he provided over 500 hours of pro bono work focusing on criminal defence. Additionally, Mr Passaro worked as a legal intern at the US Attorney’s Office (EDNY).

THOMAS RIDDELL

Piper Alderman

Thomas Riddell is a lawyer at Piper Alderman. He works in Piper Alderman's dispute resolution team assisting in trustee and shareholder litigation as well as a range of general commercial disputes. Thomas is also a Masters of Research candidate at Macquarie University.

JONATHAN RIPLEY-EVANS

Herbert Smith Freehills

Jonathan Ripley-Evans is a director based in the Johannesburg office. Jonathan has extensive experience in alternative dispute resolution and general commercial litigation.

He has acted as mediator and as adviser in both mediations and arbitrations, domestic and international.

Jonathan is an accredited Fellow and board member of the Chartered Institute of Arbitrators, SA Branch, a committee member of both AFSA international and AFSA Construction. He is an AFSA accredited mediator and arbitrator.

Jonathan’s practice is geared towards alternative dispute resolution, in particular arbitration and mediation. He specialises in the resolution of commercial disputes in a wide range of sectors including energy, mining, tourism, hospitality, property and engineering.

EIDER AVELINO SILVA

Pinheiro Neto Advogados

Eider Avelino Silva is a partner at Pinheiro Neto Advogados within the litigation practice and focuses his practice in corporate, civil, commercial, insurance and reinsurance litigation, dealing with complex, leading domestic and international cases. He holds an LLB in law from the São Paulo Catholic University School of Law (PUC-SP), Brazil, in which he graduated with the highest grade point average of all graduating classes (Faculdade Paulista de Direito award), as well as with the highest grade point average in civil law (Professor Agostinho Neves de Arruda Alvim award) and criminal procedural law (Professor Doutor José Frederico Marques award). He also holds an LLM degree (stricto sensu) from the São Paulo Catholic University School of Law (PUC-SP), Brazil. He worked from 2015 to 2016 as foreign associate at Quinn Emanuel Urquhart & Sullivan, LLP (New York office).

JUNIOR SIRIVAR

McCarthy Tétrault LLP

Junior Sirivar is a partner in McCarthy Tétrault’s litigation group and the co-chair of the firm’s international arbitration group. Mr Sirivar advises domestic and international clients, including mining, banking and telecommunications companies in complex commercial disputes.

Mr Sirivar has acted as lead counsel in both domestic and international commercial arbitrations and as trial and appellant counsel in a variety of civil matters, appearing before all levels of court in Ontario.
Mr Sirivar is a member of the firm’s global mining litigation practice group and holds a certificate in mining law from Osgoode Hall Law School. He has assisted mining clients with commercial disputes arising from a variety of agreements, including shareholders’ agreements and royalty agreements.

He is also a member of McCarthy Tétrault’s national class actions group. He has defended high-profile class proceedings involving cross-border litigation, financial restatements and charitable tax shelters.

Mr Sirivar is listed in the 2018 edition of Lexpert’s *Canadian Legal Directory* and is noted as ‘repeatedly recommended’ for corporate commercial litigation matters. He is consistently ranked as a ‘litigation star’ by Benchmark Canada.

**ERROL SORIANO**

*Duff & Phelps*

Errol Soriano FCPA FCA FCBV CFF CFE is a managing director at Duff & Phelps’ disputes and investigations practice in Toronto. Since 1991, Errol’s practice has been dedicated exclusively to the areas of business valuation, the quantification of financial loss and forensic investigation.

Errol has received the honorary designation of Fellow from the Canadian Institute of Chartered Business Valuators and from the Canadian Institute of Chartered Accountants, both in recognition of his valued contributions and overall leadership in the profession. In both instances, approximately 2 per cent of the membership holds this title.

Errol has prepared in the range of 1,000 expert reports over his career in complex litigation matters involving patent infringement, international trade disputes (NAFTA and bilateral investment treaties), shareholder disputes, breach of contract, breach of fiduciary duty, post-acquisition disputes, product liability claims, negligence claims, fraud and misrepresentation claims and insurance claims.

Errol has testified as an expert witness over 50 times in various judicial and quasi-judicial forums in Canada and the United States and Asia. He has also acted as a court-appointed inspector.

Errol has lectured extensively to professional interest groups in Canada, the United States, Europe and the Middle East.
Appendix 2

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