



Given the complexity of many damages quantification processes, quantum expert with strong valuation, accounting and investigative skills can be instrumental in enabling disputing parties to gain a clear grasp of the nature and extent of damages.

# Quantification of Damages

## (Series 1)

### Introduction

Quantification of damages is a process to determine the amount that should be paid to the claimant to put it in the same position that it would have been but for the wrongful act.

Causes of action that result in damages claims include breach of contract and tort (e.g. infringement of intellectual property rights, business interruption).

To recover damages, a claimant needs to prove that the wrongful act of the defendant proximately caused the alleged harm (i.e. causation); and the damages can be calculated to a reasonable degree of certainty.

Internationally, many courts require that lost profits be proven with reasonable certainty. That is, the calculation of damages is based on facts, makes use of sound methodologies, and yields reasonable results. Consequently, expert opinions are often sought to address the reasonable certainty criteria.

According to Federal Rules of Evidence 702 – Testimony by Expert Witness, a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if

- a. the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b. the testimony is based on sufficient facts or data;
- c. the testimony is the product of reliable principles and methods; and
- d. the expert has reliably applied the principles and methods to the facts of the case.

To come up with a credible, defensible and admissible damage opinion, many factors need to be considered. Listed below are some of the key factors that practitioners need to pay attention to when assessing damages.



## Causation



Causation is primarily a legal issue. It is normally the plaintiff's responsibility (but not the damage expert's) to demonstrate causation, and many courts have accepted the opinions of experts who assume causation. Having said that, the damage expert's opinion would typically be strengthened if causation has been considered by the expert.

One aspect that needs to be considered is whether there is another obvious cause of damages. If so, a damage expert needs to consider how it is going to affect the quantification of damages due to the claim(s) of the plaintiff. If the damages have more than one causes, it is important to find a way to separately quantify the losses due to the different causes. For a public company, event study methodology is often employed to assess the impacts of a particular event on a company's stock price.

If the defendant later demonstrates that unaccounted-for issues influenced the amount of the loss, the credibility of the plaintiff's expert's damages analysis could be jeopardized.

Regression analysis is a technique commonly used to assess causation.

## Foreseeability



When considering damages for a breach of contract, the damages must be foreseeable.

The *Hardley v Baxendale* case established the rule that claimants may only recover losses which reasonably arise naturally from the breach or are within the parties' contemplation when contracting.

Foreseeability limits recoverable damages to those losses that are possible and reasonably predictable.

## Due Diligence



When performing analysis, it is normal for experts to rely on information provided by the client. However, the expert should take steps to assess the relevance and reliability of the information.

Case law suggests that courts will consider the following issues when determining the admissibility and weight of an expert's testimony that relies on information provided by a client, including:

**01**

expert acceptance of client information, with and without testing

**02**

the reliability of projections provided by the client, and the reliability and reasonableness of the underlying assumptions

**03**

the context within which the projections were prepared and the motives of the personnel preparing the projections

**04**

the qualifications of client personnel supplying information

In general, long-term projections prepared by a capable and qualified management team that has track record of preparing similar projections during normal course of business is more relevant than projections prepared specifically for the dispute and by a staff member not experienced in developing such projections.

## Measurement Period



A commonly encountered question in assessing quantum of damages is the assessment date and the measurement period.

The determination for the date of assessment is a matter of law. It should normally be the date when the alleged wrongful act occurred, and the end date of the measurement period should be a date that the affected party no longer earn less profits than would have been earned but for the wrongful act.

For breach of contract damages claim, the loss period could be a period less than or longer than the contract's term (e.g. with consideration of contract renewal terms).

Determination of the measurement period seems to be straightforward, but there are various issues that need to be considered. Some information that may be relevant in determining the start date and the end date include, inter alia, the following:

### Start Date:

01

The date of any breach or wrongful act

02

The date that the alleged injury was sustained

03

The start date of a contract

04

The delivery date specified in a relevant contract

05

Rulings by the court

06

Case law specific to the case's jurisdiction

07

Discussions with the client and counsel

### End Date:

01

The date that the injured party is made whole

02

The date when the wrongful act ended

03

The date at which the but-for sales are back to a level originally forecasted

04

The date of a termination provision in a contract

05

The required notice period in a contract

06

The date of trial

07

Rulings by the court

08

The date when the business is expected to fully recover

09

Case law specific to the case's jurisdiction

10

Discussions with the client and counsel

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## Alleged Loss Caused by Multiple Claims



In some situations, there might be damages due to multiple wrongful acts of the defendant, and the plaintiff might consolidate these into a single claim (e.g. breach of contract).

Under this situation, and if feasible to do so, a quantum expert should discuss with counsel the need to quantify damage by each act rather than coming up with an overall damage amount. Otherwise, the rejection of a single claim for one act may result in rendering the whole analysis useless.

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## Mitigation



The plaintiff has an obligation, in many cases, to make reasonable efforts to minimize losses.

Therefore, when performing damage analysis, a quantum expert needs to consider if the plaintiff has taken any action to minimize losses due to the action/in-action of the defendant, and its corresponding impacts on the damages assessment.

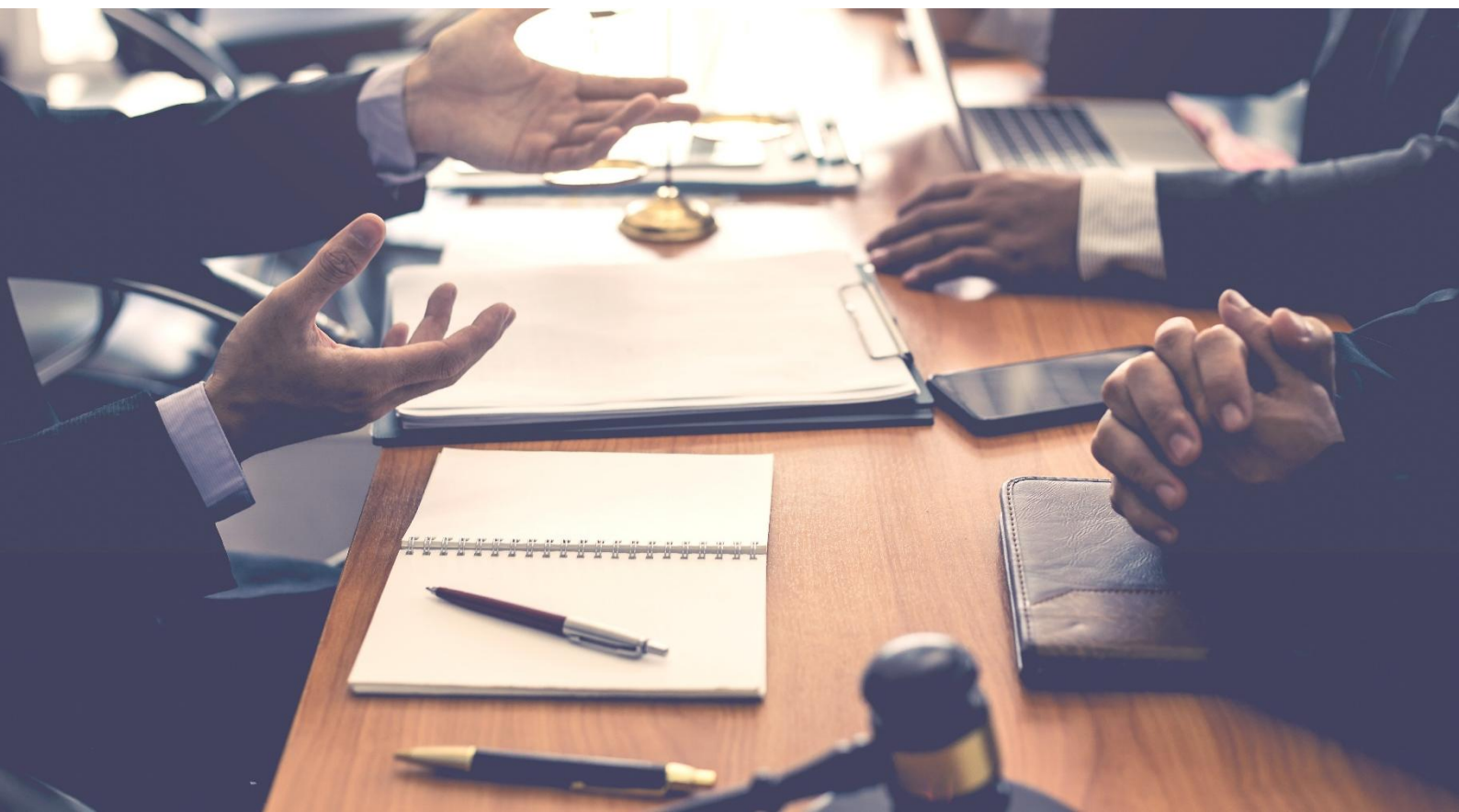
In general, failure to mitigate does not necessarily forbid recovery of damages. However, it would likely affect the quantum of damages recoverable.

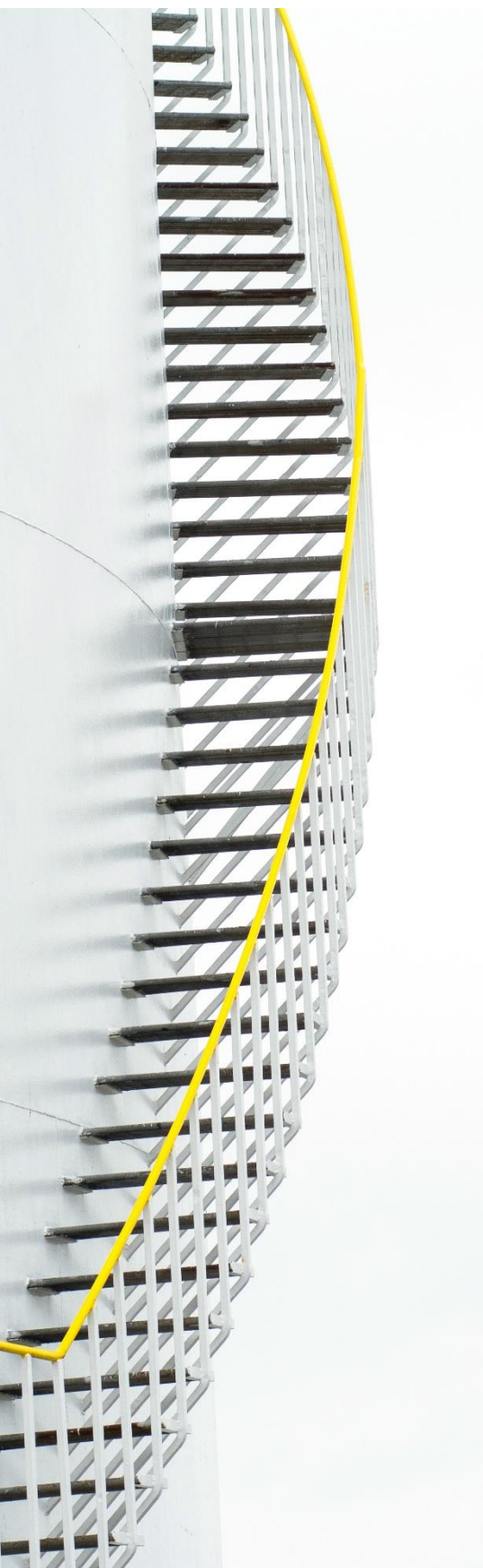
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## Scenario Analysis



It is common for an expert to perform analysis based on different scenarios and to come up with a range of damages. Caution should be exercised when the scenarios result in a wide range of values. The expert should prepare to address the likelihood of each scenario' occurring to give an opinion with reasonable certainty.





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## Use of Hindsight



In general, when assessing damages at the date of the wrongful act, it is not appropriate to consider hindsight. However, this is case specific and will depend on the jurisdiction of the claim.

Therefore, it is important for expert to discuss with the instructing legal counsel on whether the use of hindsight is appropriate.

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## Quantifying Damages for New Businesses



New businesses or start-ups normally lack operational history and are often loss-making at the initial stage of development. This presents a significant challenge for experts in quantifying loss for a new business.

Historically, under the “new business rule”, if a business did not have a history of profitable operations, it would have been denied recovery for lost profits.

Nowadays, the prevailing wisdom recognizes the fact that a business is new does not prohibit lost profits from being recovered. Courts recognize that “reasonable evidence” is what is required to quantify losses.

In *Schwartz v. Means*, the New Jersey Supreme Court held that a new business is not automatically precluded from recovering lost profits. Instead, the key question is whether the damages can be proven with “reasonable certainty”. The Supreme Court directed the trial judge to carefully scrutinize the plaintiffs' evidence to determine if it met the “reasonable certainty” standard.

This ruling effectively transformed the New Business Rule from a legal barrier into an evidentiary hurdle, shifting the focus from if a new business can claim damages to how it can prove them.

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## Double-counting of Damages



For breach of contract, common measurement of damages include liquidated damages, expectation damages and reliance damages.

Liquidated damages is the amount stipulated in the contract, which the parties agree to as a reasonable estimation of the damages owing to one in the event of a breach by the other. This is common type of claims in construction projects.

Expectation damages is a damage intended to enable a plaintiff to be in a position it would have been if there had not been a breach of contract. It could be the difference between the amount the plaintiff could be expected to have received and the amount the plaintiff received, or the cost to rectify the situation.

Reliance damages are intended to compensate the affected party for losses (e.g. expenses incurred) in reliance on the contract.

Please note that one cannot claim both expectation damages and reliance damages, as they are mutually exclusive and this would result in double-counting.



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## Conclusion



As discussed above, there are many challenges in quantifying damages. Regardless of the type of damages suffered, the issues that need to be considered are often similar.

To produce a robust quantification of damages, a quantum expert typically requires sound knowledge in valuation, accounting, and investigation, coupled with strong business acumen and the ability to extract key information from voluminous documentation, as well as evidence provided by factual witnesses and other experts.

The involvement of a quantum expert in dispute resolution proceedings enables the parties to gain a clear understanding of both the nature and quantum of damages.

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