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FINANCIAL LOSSES:
FACTORS TO
CONSIDER, THE
EXPERT'S ROLE
AND REFLECTING
THE IMPACT OF
UNRELATED FACTORS
(COVID-19)

CAUSATION AND FINANCIAL LOSSES: FACTORS TO CONSIDER, THE EXPERT’S ROLE, AND REFLECTING THE IMPACT OF UNRELATED FACTORS (COVID-19)

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“The hard truths are the ones to hold tight.”

Jeor Mormont (Lord Commander of the Night’s Watch), in *A Game of Thrones*

“It’s easy to confuse what is with what ought to be.....”

Tyrion Lannister, in *A Game of Thrones*

“A wise man once said that you should never believe a thing simply because you want to believe it.”

Tyrion Lannister (probably quoting himself), in *A Game of Thrones*

1.0 INTRODUCTION

The issue of causation is a key consideration in framing the circumstances in which financial losses suffered by a plaintiff are recoverable. Proving that a wrongful act/breach occurred and that the said act/breach is causally connected to the financial loss suffered is often a legal/factual determination, while proving the quantum of financial loss arising from a wrongful act/breach is usually the realm of loss quantification experts (hereinafter, “expert” or “experts”). The question that sometimes arises for experts is whether, or to what extent, an expert has to either comment on or establish a link between the wrongful act/breach and the resulting financial loss (i.e., causation). When is it appropriate for an expert to assume that a calculated quantum of financial loss was caused by a wrongful act/breach? When does an expert have to show that a calculated quantum of loss was directly caused by a wrongful act/breach versus merely correlated with the occurrence of such? To what extent does an expert have to consider and eliminate from the calculated loss that portion relating to other causes? How does an expert go about doing so? These are all important questions.

The first part of this paper will address some of the overarching legal frameworks that have developed over time relating to the issue of causation and the quantification of financial loss. The second part of this paper will attempt to address some of the responsibilities of loss quantification experts with respect to the scope of review relating to the causation of financial losses.

Rather than a “be all end all” piece to address causation in all loss quantification contexts, the purpose of this paper is to provide food for thought with respect to the topic of causation. Note that all loss quantification contexts are unique and what is appropriate may depend on the specific facts and circumstances of each context.

¹ For my part, this paper is dedicated to my son Tyler. One Khalasar always, riding over the Great Grass Sea.

Part I: The Legal Perspective with Respect to Causation and Financial Loss

“The Law is the Law.”

Daenerys Targaryen, in *A Game of Thrones*

In order to understand the role of loss quantification experts with respect to causation and financial losses, it is helpful to first understand some of the overarching legal principles and considerations that have developed over time relating to the issue of causation and the quantification of financial loss.

2.0 AN INTRODUCTION TO CAUSATION

Litigation involving financial loss claims occurs in a variety of circumstances. The associated causes of action also vary widely and include tort claims (such as negligence), breaches of contract, regulatory infractions, other statutory compensation entitlements and/or criminal matters. Although no two cases are the same, the legal elements for financial loss claims typically have several areas of commonality:

- a) The existence of a duty, relationship or obligation (collectively, the “Duty”);
- b) Conduct, action or inaction by the defendant in the context of the said duty, relationship or obligation which does not meet the required standard of care or conduct (collectively, the “wrongful conduct”); and
- c) The manifestation of an actual business loss or financial damage (collectively, the “financial loss”).

A number of other requirements must be satisfied in order to for a financial loss to be legally compensable including the establishment of “factual” causation. Reference to “causation” is an expression of the relationship that must be found to exist between the impugned conduct of one party and the damage suffered by the other in order to justify the payment of compensation.

Causation is assessed through the application of specific causation tests and/or considerations that vary depending on the type of action and/or area of law that is involved. There is, for example, a long line of jurisprudence that governs the necessary elements of causation where damage in the form of consequential financial loss has been suffered due to negligence.

3.0 LESSONS FROM JURISPRUDENCE

Due to the scope limitations of this paper, not all areas of law can be covered. The cases summarized below illustrate the causation test(s) applicable to negligence claims. They also highlight other relevant considerations such as “proximity” requirements, alternative causation tests, as well as, special difficulties in either identifying or articulating the correct causation standard.

3.1 *Bond Reproductions Inc. and Revolution Resource Recovery Inc.* (“*Bond Reproductions Inc.*”)²

Bond Reproductions Inc. provides a good illustration of the test for causation as well as the interface between causation and proximity considerations. In this case, the plaintiff was the operator of a digital printing business which suffered a power outage following an accident where a truck owned by the defendant struck a nearby power hydro pole. At the time of the accident, the plaintiff was experiencing a high volume of work and was operating “around the clock” production lines. Although no property owned by the plaintiff was directly damaged by the accident, the ensuing power outage caused the plaintiff to halt production for a substantial period of time. Time sensitive work had to be contracted out by the plaintiff to a third party. Other jobs had to be postponed or were lost altogether. This led to a loss of revenue for the plaintiff. The plaintiff sought recovery for its financial losses from the operator of the truck.

² 2018 BCPC 241.

The decision in this case focused on causation which included a two prong analysis:

- a) assessment of factual causation being whether the truck accident caused “as a matter of fact” the business interruption suffered by the plaintiff; and,
- b) review of “proximity” considerations (“proximity”).

As with most “negligence” claims, causation in this case was determined using the “but for” test which is satisfied if the plaintiff can provide, on a balance of probabilities, that “but for” the defendant’s wrongful conduct, the financial loss would not have occurred. Alternatively, if the loss would have occurred with or without the impugned conduct, the “but for” test would not be met.

In *Bond Reproductions Inc.*, the “but for” test was satisfied on the basis that the defendant’s damage to the hydro pole resulted in power loss that was directly related to the business interruption suffered by the plaintiff. Put differently, there was general agreement that the business interruption would not have happened if the defendant had not damaged the power pole.

However, the establishment of causation, although necessary for the claim to succeed, was insufficient in itself to render the defendant liable for the financial losses claimed without also satisfying proximity considerations. The proximity analysis applied in this case requires that there be a close enough nexus between the wrongful conduct and the financial loss to justify a finding of liability on the part of the defendant (notwithstanding that factual causation has been established).

Specifically, the plaintiff had to show that the financial loss suffered was reasonably foreseeable and/or a probable consequence of the wrongful conduct. Since the defendant had no specific knowledge of the plaintiff’s business operations and/or its specific reliance on the hydro pole in question, it could not be expected to know or anticipate that damage to the said pole would affect the energization of the plaintiff’s business and/or result in business interruption. The claim, therefore, failed on the basis that the required proximity was lacking.

3.2 Segway Hotels Ltd. v Consumer’s Gas Co.³ (“Segway Hotels Ltd.”)

A different result was reached in the case of *Segway Hotels Ltd.* notwithstanding similar circumstances to *Bond Reproductions Inc.* This case involved alleged negligence by a gas company and its contractors who caused an interruption to the supply of electric power to the plaintiff during the construction of a gas pipe line along Queen Street in Toronto, Ontario.

The plaintiff operated a hotel requiring electric power for the provision of its accommodation/services and for the operation of various appliances. The required power was supplied by Toronto Hydro through a feeder line (the “Feeder Line”) in an underground duct previously installed by Toronto Hydro. A copy of the plan for the Feeder Line showing the exact location of the line had been forwarded to the gas company and/or its general contractor (the “first defendant”) when utility “locates” were completed.

In providing the necessary permissions and approvals for the gas pipe line works, Toronto Hydro stated that there would be no objection to the gas pipe work provided that proper care was taken when crossing the Feeder Line that had been installed to provide electric power to the plaintiff’s hotel. This warning was given to the general contractor before construction/work was commenced.

³ 1959 CanLii 159 (ON CA).

As it turned out, the Feeder Line was broken by a subcontractor in the course of construction/work. This resulted in the electrical power to the hotel being cut off which caused damage to the hotel. At trial, the defendants were found liable for the financial losses suffered by the plaintiff. The matter was appealed by the defendant to the Ontario Court of Appeal where causation was carefully considered. According to the Court of Appeal, there was no doubt that the defendants actually severed the Feeder Line. It was also accepted that the financial losses suffered by the plaintiff directly followed from the defendants' interference with the Feeder Line thereby establishing the necessary "but for" causation.

However, unlike in the *Bond Reproductions Inc.* case, the Court of Appeal further determined that the injury suffered by the hotel was sufficiently proximate to the wrongdoing to justify liability since the defendants ought to have been able to reasonably foresee the damage. A distinguishing factor was that the defendants had been put on notice of the presence of the Feeder Line and its function. In fact, the general contractor had been specifically cautioned to ensure that no damage is caused to the Feeder Line in the course of the gas pipe construction/work. As a result, the finding of liability on the part of the defendants was upheld.

3.3 Resurfire Corp. v Hanke⁴ ("Resurfire")

Although the test for causation commonly involves a "but for" analysis, this will not necessarily be the correct or appropriate approach in every case. Care should be given to recognize circumstances where a different test is required or warranted. This would include, for example, circumstances where there are multiple defendants who engaged in wrongful conduct but it cannot be demonstrated on a balance of probabilities who specifically caused the damage/loss. Alternatives to the "but for" test are often advanced where there is a concern that the "but for" test may lead to an undesired (unjust or unreasonable) result.

An example of circumstances where this was considered is the *Resurfire* case. In this case, the operator of an ice-resurfacing machine was injured when the operator mistakenly placed hot water into the gasoline tank of the machine. This caused the release of vaporized gasoline which was then ignited by an overhead heater causing an explosion/fire. The plaintiff sued the manufacturer and distributor of the machine on a multi-party basis for damages alleging that the gasoline and water tanks were similar in appearance and placed too close together on the machine making it easy to confuse the two.

The matter was dismissed at trial on the basis that the "but for" test did not establish that the accident was caused by the negligence of the manufacturer or distributor. Specifically, the apparent intervening negligence of the machine operator made it impossible to satisfy the "but for" test. The plaintiff appealed to the Alberta Court of Appeal who set aside the judgment and ordered a new trial on the grounds that the judge erred in both his causation and proximity analyses.

On the issue of causation, the Court of Appeal indicated that where there is more than one potential cause of damage, the "but for" test may be unworkable which would then be substituted with the "material contribution" test as an alternative. Applied to this case, the existence of multiple defendants and the contributory actions of the plaintiff favoured the application of the "material contribution" test over the "but for" test which was considered unworkable.

The Court of Appeal also found that the trial judge failed to undertake a proper proximity analysis in concluding that the design of the gasoline and water tanks was not the proximate cause of the injuries and that the risk was not foreseeable. The Court of Appeal determined that the trial judge failed to place sufficient emphasis on the fact that the tanks were located side by side with the same colour markings and also failed to account for evidence that other machine operators had made the same mistake. The Court of Appeal noted that the proximity analysis must include case specific policy considerations including the potential seriousness of the injury, relative financial positions of the parties etc.

4 [2007] 1 S.C.R. 333.

The matter was then further appealed to the Supreme Court of Canada who dialed back the “material contribution” test applied by the Court of Appeal. The Supreme Court affirmed that the basic test for determining causation remains the “but for” test. This test applies to all cases including, without limitation, multi-cause injury cases including where there is contributory conduct which can be apportioned, as permitted by statute. It is, therefore, incorrect to depart from the “but for” test and apply the “material contribution” test whenever there is more than one potential cause of damage. The “but for” test remains the applicable default standard. However, the Supreme Court recognized there may be special circumstances where the “but for” test should be set aside in favour of the “material contribution” test:

- a) It must be impossible for the plaintiff to provide that the defendant’s negligence caused the plaintiff’s injury using the “but for” test and the impossibility must be due to factors that are outside of the plaintiff’s control; and,
- b) It must be clear that the defendant breached a duty of care owed to the plaintiff thereby exposing the plaintiff to an unreasonable risk of injury and the plaintiff must have suffered that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by the defendant’s breach.

The Supreme Court provided examples of where it might be appropriate to depart from the “but for” test using the above criteria. One example is where two gunshots are independently fired carelessly by two separate individuals with the result that one of the two shots injures an individual and it is impossible to say which of two tortious actions was the cause of the injury. In this situation, it would be appropriate to apply the “material contribution” test provided that it is established that each of the defendants acted carelessly or negligently which resulted in creating an unreasonable risk of the same specific type of injury that the plaintiff then, in fact, suffered.

3.4 Lyness v. Wang⁵ (“Lyness”)

It is not always clear in what circumstances the “but for” test should be set aside in favour of the “material contribution” test, which is an evolving area of law. Once the correct test is identified, it is important to refer to the correct terminology in applying the test and avoid confounding the mechanics of the different tests. An example of the confusion that can arise between the two tests can be found in the *Lyness* case.

This case involved a motor vehicle accident claim appealed due to the trial judge’s apparent erroneous direction to the jury on causation considerations. The trial judge instructed the jury with respect to both the “but for” and the “material contribution” tests. There was a misapprehension on the trial judge’s part as to the difference between the two tests including by providing direction to the jury that both tests can apply in a given case. The trial judge directed the jury that the “material contribution” test is another way of framing the “but for” test which was found to be incorrect. This case underscores the requirement to ensure that only one (correct) test is applied in any given case and that there be no combination of the elements of one test with another.

⁵ 2010 ONCA 741.

3.5 Donleavy v Ultramar Ltd.⁶ (“Donleavy”)

The recent *Donleavy* case is another example of where confusion arose at trial in connection with the correct causation test to be applied. This case also highlights the importance of avoiding combining or overlapping the “but for” and “material contribution” tests.

The matter went to trial over an oil leak at a residential property associated with an outdoor fuel oil tank. The plaintiffs’ oil tank leaked over a lengthy period of time thereby resulting in significant environmental cleanup costs, as well as certain rental income losses. The defendants in this case were the parties responsible for supplying oil to the plaintiffs’ property. The defendants had filled the oil tank on over 20 occasions over the course of a number of years. In the course of doing so, the defendants were required (under applicable regulations) to inspect the oil tank but failed to tag the tank for removal due to corrosion. As it turned out, the tank was corroded at the bottom and leaked oil on a consistent basis over the years.

At the same time, a contributing factor to the oil leak was that the plaintiffs improperly installed an oil tank intended for indoor use within an outdoor space. Over time, water that pooled at the base of the oil tank caused it to corrode, therefore, resulting in oil leakage.

The trial judge held that the “material contribution” test was the appropriate causation test to use because of the involvement of multiple parties in the outcome. The Ontario Court of Appeal followed *Resurface* in finding this to be an incorrect approach maintaining that the “but for” test applies even where a defendant’s negligence is not the sole cause of the plaintiff’s injury.

According to the Court of Appeal, the critical threshold for the application of the “material contribution” test is the impossibility of proving which of two or more possible tortious causes, in fact, resulted in the damage. In this case, there was no reason why the actions of the defendants who failed to properly tag the leaking oil tank for removal made the “but for” test unworkable. The Court of Appeal, further, noted that where the “material contribution” test is applicable, it needs to be considered less through the lens of determining the actual cause of the loss or damage suffered and more through the lens of whether the tortfeasor materially contributed to the risk of the loss or damage suffered.

A further issue taken up was that, although the trial judge preferred the use of the “material contribution” test, she actually applied the “but for” test in her analysis. Specifically, the conclusions were more focused on actual causation (being a “but for” exercise) than on material contribution to risk (being a “material contribution” exercise). The judge found that the oil leakage would have been completely avoided if the defendants had properly tagged the tank for removal feeding directly into a “but for” conclusion. The end result was that although there was an error by the trial judge in identifying the correct causation test to be applied, the proper analysis was undertaken and consequently, the judgment was upheld.

As the foregoing cases demonstrate, although the jurisprudence articulates clear tests for establishing causation in negligence claims (including cases that involve a financial loss component), the applicability of the tests is far from straightforward. The causation theory and correct test to be applied to any given set of circumstances are important factors for the loss quantification expert to be aware of and consider, as appropriate.

6 2019 ONCA 687.

Part II: The Loss Quantification Perspective with Respect to Causation and Financial Loss

“We look up at the same stars and see such different things.”

Jon Snow, in *A Game of Thrones*

This part of the paper will attempt to address some of the responsibilities of loss quantification experts with respect to the scope of review relating to the causation of financial losses. Some of the questions that may arise for loss quantification experts can best be demonstrated by the simplified loss quantification example set out below (a brief contextual set up for now, to be discussed in more detail later).

4.0 AN EXAMPLE

Assume that Mr. Bronn, an executive of Company A, which manufactures and sells protective wraps for transportation of industrial goods, resigns and commences employment at Company B, a competitor. Over time, Mr. Bronn was instrumental in developing and expanding the customer base for Company A's protective wraps. He attended many trade conferences to meet potential customers, organized pitch meetings and helped close significant customer deals. He was well liked by customers and many addressed issues, questions and concerns directly with him. Unfortunately things soured between Mr. Bronn and senior management at Company A. Company B, seeking to expand its presence in the market for protective wraps, saw an opportunity, and made Mr. Bronn a lucrative employment offer he could not refuse.

After joining Company B, Company A's sales and profits are observed to decline, irking Company A's senior management. They accuse Mr. Bronn of improperly enticing customers to conduct business with Company B. They further allege that Mr. Bronn made defamatory statements about the quality of Company A's products, causing customers to switch to Company B.

The matter proceeds to litigation, and experts are retained by both parties to quantify the potential financial losses arising from Mr. Bronn's alleged actions, assuming that Mr. Bronn is found to be liable for improper actions.

One of the questions that arises in this case is whether it enough for an expert to assume that Mr. Bronn is liable for the alleged improper actions based on facts to be adduced into evidence and proven, and quantify the decline in Company A's average profit after his resignation versus before his resignation, and assume that such decline was entirely the result of the alleged improper actions of the executive.

Does the expert have to go further by showing that the decline in profits after Mr. Bronn's departure was directly attributable to his actions after departure? Does the expert have to show that there were no other unrelated factors, such as an increase in competition in the market, or an expiry of a patent, or poor customer service etc. that could have caused the decline in profits after departure?

Does the loss quantification expert have to show that the decline in profits after Mr. Bronn's departure was not merely correlated with his departure, but directly caused by his departure and alleged actions after?

We will shortly explore these questions in more detail. However, the above provides a helpful segue into the topic of correlation versus causation.

5.0 CORRELATION VERSUS CAUSATION

Correlation in statistics is a measure that indicates how two or more variables move (or do not move) together in relation with each other. In statistics, correlation is measured between 0 and 1, and can be positive or negative. 0 would indicate that two variables do not move in relation to each other. 1 would indicate that two variables move at the exact rate in the same direction in relation to each other.

A negative correlation implies that two variables move in opposite direction with each other (an inverse relationship), such that when one is observed to increase the other is observed to decrease and vice versa. A correlation of -1 would indicate that two variables move at exactly the same rate in opposite directions in relation to each other.

Meanwhile, the term causation indicates that one event directly causes another event to occur.

It is important to remember that because two variables are correlated, it does not mean that one necessarily causes the other to happen.

For example, assume that it is summertime. Based on data gathered on ice cream sales and bicycles accidents, both are found to have a highly positive correlation. When ice cream sales are observed to increase, bicycle accidents are also observed to increase. This does not mean that ice cream consumption causes bicycle accidents. While there may be instances of bike riders carrying an ice cream while riding and getting into an accident, what likely causes an increase in both is the warm summer weather, which results in more ice cream consumption and also results in more bike riding, which results in more reported accidents.

The question that arises is whether loss quantification experts need to carry out a statistical analysis to identify correlation between an action/variable and loss? Canadian courts have not usually required loss quantification experts to carry out a statistical analysis of correlation. In any case, from a practical perspective, sufficient data required to do so would probably not be easily available.

The other question that arises is whether experts need to “prove” causation? Again, Canadian courts have not usually required experts to “prove” causation. This is a factual and legal determination made by the courts based on the preponderance of facts and evidence adduced at trial.

So, do experts need to analyze causation, if so, when, and to what extent?

6.0 DO LOSS EXPERTS NEED TO ANALYZE CAUSATION?

As noted by the Supreme Court in *Snell v. Farrell*:⁷

“causation is an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former”

Proving causation is usually a factual or legal determination. However, depending on the circumstances and facts of specific cases, loss experts may have to do analyses to establish that a reasonable, proximate link between the alleged harmful act and the ensuing financial losses does exist, or that they have eliminated the impact of unrelated factors.

Depending on the facts and circumstances of some loss quantification contexts, further analyses may not be necessary, as the reasonable, proximate link between the alleged harmful act and ensuing financial losses may be reasonably apparent.

⁷ 1990 2 S.C.R. 311.

For example in a class action proceeding whereby alleged undisclosed fees were charged by a financial institution to credit card holders, the link between the fees charged and the alleged lack of disclosure may be reasonably apparent.

Similarly in a wrongful death case or a personal injury matter, there may be a reasonably apparent link between the losses and the alleged harm.

In other cases, there may be other experts such as economists or industry/market experts that are opining on the reasonable, proximate link between the alleged harmful act and ensuing financial losses.

For instance, take a securities litigation where there is an allegation that a company did not disclose material information to the market on a timely basis, causing investors to purchase equities at a higher price. When the disclosure was eventually made, there appears to be a decline in the share price, causing investors to allege that they have suffered financial losses.

An economist might be retained to establish whether there is a relationship between the observed decline noted in the share price and the alleged late disclosure, or to what extent the decline may have resulted from other market factors impacting similar companies in the industry.

Meanwhile, depending on the facts and circumstances of specific cases, Courts have required that loss experts:

- a) Consider and eliminate from the calculations unrelated factors that could have contributed to a financial loss/observed decline in profits. For instance, actions of competitors, changes in technology, departures of important employees;
- b) Seek/source/refer to factual information (to be adduced into evidence) with respect to the impact of alleged harmful actions on a plaintiff. For instance, interviews with the plaintiff's personnel to discuss the impact of highway construction activities by a municipality leading to disruptions in business operations, or examinations for discovery; and,
- c) Consider the time that has elapsed between the alleged harmful actions and the occurrence of the calculated financial losses.

Note that, overall, experts are not expected to consider/eliminate every possible unrelated factor or explanation for an observed decline profit/calculated financial loss. However, depending on the facts and circumstances, more obvious impacts may need to be considered/eliminated.

An example of when it may have been beneficial for an expert to further explore the link between causation and financial losses comes from a US case, *MapInfo Corp. v. Spatial Re-Engineering Consultants*.⁸ MapInfo and SRC, both computer software companies, had entered into a software partnership agreement which authorized SRC to distribute MapInfo's products to end-users, as well as a development and distribution agreement to create a joint product that would be marketed under MapInfo's trademark. The relationship between the parties deteriorated and both parties entered into a Termination Agreement. Subsequently, MapInfo commenced an action alleging a breach by SRC of the Termination Agreement, while SRC responded by counterclaiming against MapInfo. Among various other allegations, SRC alleged that it had suffered financial losses as a result of disparaging comments made by MapInfo.

8 No. 02-CV-1008 (DRH) (N.D.N.Y. Sep. 28, 2006).

MapInfo moved to preclude the reports and testimony of SRC's loss expert concerning SRC's damages from MapInfo's alleged disparagement on the grounds that the expert's reports did not satisfy the requirements for reliance or reliability, failed to use proper methodology and assumed the effect of a "campaign of disparagement" that was not supported by the evidence.⁹ SRC's loss expert assumed that MapInfo engaged in a campaign of disparagement against SRC and that this campaign was effective in preventing SRC from acquiring business they would have obtained absent the disparagement. The expert's reports contained opinions regarding SRC's lost sales as a result of MapInfo's alleged disparagement. To calculate these lost sales, the expert constructed a financial model to estimate what portion of MapInfo's predictive analytics income would have shifted to SRC had MapInfo not disparaged the products and reputation of SRC.¹⁰

MapInfo contended that its alleged statements had no effect on either resellers or customers of SRC. In support of its contention, MapInfo offered declarations from thirty-two separate partners or resellers and five customers that either they never heard the alleged statements or, if they did, the statements had no effect on their view of SRC.¹¹

The Court noted that SRC proffered no evidence to demonstrate the effect MapInfo's alleged disparagement had on SRC in the marketplace.¹² During his deposition testimony, SRC's President admitted that the only proof he had that twelve customers alleged to have been affected by the alleged disparagement, and thus "lost or potentially lost customers," was that SRC was sometimes given the "cold shoulder" when they attempted to sell to these customers.¹³

The Court concluded that SRC did not convincingly prove a causal connection between MapInfo's alleged disparagement and any losses by SRC. As such, the Court concluded that testimony from SRC's loss expert would be irrelevant and precluded such testimony.¹⁴

Some implications that could be drawn from the specific circumstances of the above case are that SRC, as a plaintiff by counter claim, could have attempted to put forth evidence as to causation, and/or the loss expert could have done more work to establish which specific losses of sales/customers and financial losses were reasonably caused by the alleged statements of MapInfo, rather than assuming that all calculated losses were caused by these. In this case, it was not manifestly obvious that all the calculated financial losses were caused by the alleged statements (in contrast to, say, in the class action or personal injury cases described above). Further information could have been available or obtained (for instance, by speaking to customers, such as what MapInfo did) to further refine/adjust the calculated losses to include only those attributable to the alleged statements. Therefore, in the specific facts and circumstances of this case, it was not sufficient for SRC's expert to assume that the alleged disparagement caused all the financial losses calculated.

In summary, while loss experts are not required to prove statistical correlation or prove causation, depending on the facts and circumstances of each case, experts may need to obtain a sufficient degree of comfort that there is a reasonable, proximate link between the alleged harmful act and ensuing financial losses.

9 No. 02-CV-1008 (DRH), 8 (N.D.N.Y. Sep. 28, 2006).

10 No. 02-CV-1008 (DRH), 9 (N.D.N.Y. Sep. 28, 2006).

11 No. 02-CV-1008 (DRH), 10 (N.D.N.Y. Sep. 28, 2006).

12 No. 02-CV-1008 (DRH), 11 (N.D.N.Y. Sep. 28, 2006).

13 No. 02-CV-1008 (DRH), 12 (N.D.N.Y. Sep. 28, 2006).

14 No. 02-CV-1008 (DRH), 13 (N.D.N.Y. Sep. 28, 2006).

7.0 HOW CAN LOSS EXPERTS ANALYZE CAUSATION (WHERE RELEVANT)?

In those circumstances where loss experts may need to further analyze the link between causation and financial losses, the overarching question for an expert to ask is whether there is a reasonable, proximate link between the alleged harmful act and the ensuing financial losses being calculated. It is important to know that there is no magic solution/road-map for every fact situation.

Where factual data exists and accounting/forensic-type analyses are possible (for example, in the *MapInfo v. SRC* case described above), experts should consider making an attempt to obtain and glean information from such data.

For instance, consider the fact scenario introduced above of the executive, Mr. Bronn, who leaves Company A to join its competitor, Company B. Mr. Bronn is alleged by Company A to have improperly enticed customers to conduct business with Company B. It is further alleged that Mr. Bronn made defamatory statements about the quality of Company A's products, causing customers to switch to Company B. After joining Company B, Company A's sales and profits are observed to decline.

Assume the following simplified operating results for Company A, before and after Mr. Bronn's departure.

Table 1

Company A

| \$000s | I | | | | | | II | | | | I-II | |
|--------------|------------------------------|--------|-------------|--------|-------------|-------------------|-----------------------------|-------------|--------|-------------|--------|-------------------|
| | Before Mr. Bronn's Departure | | | | | Annual Average | After Mr. Bronn's Departure | | | | | |
| | 2015 | 2016 | % change | 2017 | % change | | 2018 | % change | 2019 | % change | | Annual Average |
| | \$ | \$ | | \$ | | \$ | | \$ | | | | |
| Sales | 50,000 | 60,000 | 20% | 55,000 | -8% | 55,000 | 40,000 | -27% | 35,000 | -13% | 37,500 | 17,500 |
| COGS | 32,500 | 39,000 | | 35,750 | | 35,750 | 26,000 | | 22,750 | | 24,375 | 11,375 |
| Gross Profit | 17,500 | 21,000 | | 19,250 | | 19,250 | 14,000 | | 12,250 | | 13,125 | 6,125 |
| Expenses | 10,000 | 12,000 | | 10,000 | | 10,667 | 9,000 | | 9,000 | | 9,000 | 1,667 |
| Profit | 7,500 | 9,000 | 20% | 9,250 | 3% | 8,583 | 5,000 | -46% | 3,250 | -35% | 4,125 | 4,458 |

Based only on a "before versus after" comparison, average annual sales revenue has declined by \$17.5 million, and average annual profit has declined by \$4.46 million.

However, in this case, it may be possible to delve down further into the potential reasons for the decline in Company A's sales revenue and profits. It may be possible to obtain, via examinations for discovery or other means, information on the customers of Company B. One may then be able to compare the customers and sales made by Company A in the years prior to and after Mr. Bronn's departure with those of Company B.

If some customers are found to have left Company A (or decreased their level of annual purchases) and gone to Company B (or increased their level of annual purchases), this can be used to get a first/preliminary indication that Company A's customers went to Company B.

Then, attempting to contact such customers to ask them their reasons for the switch, or obtaining this information from other means (surveys for example) may shed further light on why customers left Company A — i.e., whether the switch was to some degree made as a result of Mr. Bronn's actions/statements, or whether the switch was for other, unrelated reasons.

For instance, after obtaining and delving into available details, a summary of Company A and Company B's sales revenue prior to and after Mr. Bronn's departure might reveal the following:

Table 2

Company A

| | I | | | | | II | | | | | I-II | |
|-------|------------------------------|--------|----------|--------|----------|-----------------------------|--------|----------|--------|----------|--------|----------------|
| | Before Mr. Bronn's Departure | | | | | After Mr. Bronn's Departure | | | | | | |
| | 2015 | 2016 | % change | 2017 | % change | Annual Average | 2018 | % change | 2019 | % change | | Annual Average |
| | \$ | \$ | | \$ | | \$ | | \$ | | | | |
| Sales | 50,000 | 60,000 | 20% | 55,000 | -8% | 55,000 | 40,000 | -27% | 35,000 | -13% | 37,500 | 17,500 |

Company A Customers

| | | | | | | | | | | | | |
|---|--------|--------|--|--------|--|--------|--------|--|--------|--|--------|--------|
| 1 | 10,000 | 15,000 | | 15,000 | | 13,333 | 12,000 | | 3,000 | | 7,500 | 5,833 |
| 2 | 14,000 | 14,000 | | 14,000 | | 14,000 | 12,000 | | 12,000 | | 12,000 | 2,000 |
| 3 | 6,000 | 11,000 | | 6,000 | | 7,667 | - | | - | | - | 7,667 |
| 4 | 12,000 | 12,000 | | 12,000 | | 12,000 | 11,000 | | 10,000 | | 10,500 | 1,500 |
| 5 | 8,000 | 8,000 | | 8,000 | | 8,000 | 5,000 | | 10,000 | | 7,500 | 500 |
| | 50,000 | 60,000 | | 55,000 | | 55,000 | 40,000 | | 35,000 | | 37,500 | 17,500 |

Company B Customers

| | | | | | | | | | | | | |
|-------|--------|--------|--|--------|--|--------|--------|--|--------|--|--------|---------|
| 1 | - | | | | | | - | | - | | - | - |
| 2 | 5,000 | 5,000 | | 5,000 | | 5,000 | 5,000 | | 5,000 | | 5,000 | - |
| 3 | - | - | | - | | - | 8,000 | | 8,000 | | 8,000 | (8,000) |
| 4 | - | - | | - | | - | - | | - | | - | - |
| 5 | 10,000 | 8,000 | | 12,000 | | 10,000 | 10,000 | | 10,000 | | 10,000 | - |
| Other | 15,000 | 15,000 | | 15,000 | | 15,000 | 15,000 | | 15,000 | | 15,000 | - |
| | 30,000 | 28,000 | | 32,000 | | 30,000 | 38,000 | | 38,000 | | 38,000 | (8,000) |

From the above, the following observations could be made:

- a) Customers 1 and 4 were pre-existing customers of Company A and both had decreased sales/purchases from Company A after Mr. Bronn's departure in 2017. However, neither customer appears to have started doing business with or increased sales/purchases from Company B after Mr. Bronn employment there. Potential inquires with these customers and/or Company A management could indicate why they may have decreased business with Company A after 2017. For instance, did they switch to a different supplier than Company A or B? Did they reduce purchases due to their own requirements for protective wraps being different or lower? Did they reduce business with Company A due to poor customer service or quality issues? Was any part of their lower level of business due to the alleged actions/statements of Mr. Bronn? Depending on what such inquires indicate, the potential loss associated with these customers may be nil;
- b) Customer 3 was a pre-existing customer of Company A and ceased doing business with Company A after Mr. Bronn's departure in 2017. This customer started doing business with Company B after Mr. Bronn employment there, and this level of average annual sales was almost the same as what it previously transacted with Company A. Potential inquires with this customer and/or Company A or B management could indicate why it may have ceased business with Company A after 2017. For instance, did it cease doing business for some of the other/unrelated business reasons noted above, or did they cease doing business due to the alleged actions/statements of Mr. Bronn? Depending on what such inquires indicate, there may be some potential loss associated with this customer; and,
- c) Customers 2 and 5 were pre-existing customers of Company A and both had decreased sales/purchases from Company A after Mr. Bronn's departure in 2017. However both were also pre-existing customers of Company B, and neither appear to have increased their average annual sales after Mr. Bronn's employment there. Potential inquires with these customers and/or management could indicate why they may have decreased business with Company A after 2017. For instance, did they decrease doing business for some of the other/unrelated business reasons noted above, or did they decrease doing business due to the alleged actions/statements of Mr. Bronn? Given that they were already pre-existing customers of Company B and their level of sales/purchases from Company B did not increase after Mr. Bronn's arrival, unless other facts indicate to suggest that "but for" Mr. Bronn's actions Company A's sales to these customers would have been higher, there may be no potential loss associated with these customers.

Overall, what may initially appear to be a decline in Company A's sales revenue and profit across all five customers may, upon analysis of sales trends by customer as between Company A and B and further inquiries with the relevant customers and/or company management, suggest that the total financial loss initially calculated may need to be adjusted/reduced for factors unrelated to the alleged actions of Mr. Bronn. In the example above, based on the results of the inquiries, the loss in average annual sales revenue (and related lost profits) may be limited to that associated with Customer 3.

8.0 REFLECTING/ADJUSTING FOR THE IMPACT OF UNRELATED FACTORS

Depending on the facts and circumstances of specific loss quantification contexts, it may be necessary to consider, adjust for and/or eliminate that portion of a calculated financial loss caused by identifiable and obvious factors which are unrelated to the alleged action or actions at issue.

Unrelated factors may include economic impacts (the impact of the 2008–2009 recession and the most fearsome of all, the impact of COVID-19), the actions of competitors, changes in technology, departures of important employees among others.

The importance adjusting for/eliminating unrelated factors is set out in a Canadian case, *Jorna & Craig Inc. v. Chiasson*.¹⁵ In this case, the dispute involved the alleged financial losses incurred by Mr. Jorna and Ms. Craig, the purchasers of a Scotia Drugs pharmacy located in Halifax, as a result of the alleged violation of the purchase and sale agreement and non-competition agreement by the seller of the pharmacy, Mr. Chiasson.

The Court noted that the applicants/plaintiffs' calculation of financial losses assumed that the alleged competing activities of the seller were the sole reason as to why certain of the purchased pharmacy's sales were not in line with historical and projected future growth rates.

The Court noted that:¹⁶

“Other possible causes would include Scotia’s location in an economically depressed neighbourhood, the presence of a nearby needle exchange and methadone clinic, competition from other local pharmacies, and so on. For instance, [one witness] testified that he switched pharmacies because he was afraid of being robbed of his medications upon exiting Scotia.”

The court noted a lack of consideration of potential alternative causes of the observed and calculated financial loss, coupled with the lack of other evidence from the plaintiffs on causation.

With respect to adjusting for unrelated economic factors, in the past year, the impact of COVID-19 has been catastrophic in many regards: the world wide death toll, illnesses, the health costs, restrictions on travel and socializing, disruptions to “normal life” and the tremendous economic toll.

Not surprisingly, the impact of COVID-19 has also been felt in terms of loss quantification. In short, “but for” an alleged harmful act, what profits or cash flows would a plaintiff have generated, FACTORING IN the impact of COVID-19?

The impact of COVID-19 has differed from complete shut downs for some businesses during certain periods (restaurants, social venues), to varying degrees of sales declines, to sales increases for other businesses (technology and health care companies, for instance). Since the onset of restrictions associated with COVID-19 in early 2020, and given the ongoing uncertainty associated with COVID-19 (the effectiveness of vaccines, the easing of public health restrictions, the impact this will have on the “new normal” etc.), many loss quantification engagements encompassing the period of time from 2020 on have to somehow, using the best available data and information, incorporate/forecast the impact of COVID-19 into loss calculations (i.e. adjust for/eliminate this impact from the loss otherwise attributable to an alleged harmful act).

¹⁵ 2018 NSSC 220.

¹⁶ 2018 NSSC 220. 77.

Notwithstanding the above-noted uncertainties, since loss quantifications still need to occur, the impact of COVID-19 may need to be considered in loss quantifications by one or a combination of:

- a) Adjusting past losses to account for COVID-19 impacts;
- b) Adjusting forecasted future losses for the same;
- c) Reflecting appropriate discount rates to present value future losses; and,
- d) Using a contingency factor to risk-adjust calculated losses.

For example, assume that Company A provides valet parking, auto detailing, luxury car rentals and related automobile services at a high-end hotel, where it has a dedicated office and operations space in the parking garage pursuant to a 10-year lease with the hotel. Both Company A and the hotel commenced operations in January 2019. Due to COVID-19, the hotel is temporarily closed. Company A struggles to pay its rent and is evicted by its landlord in June 2020. Company A alleges that it was improperly evicted and claims lost profits for the remainder of the 8.5 years of its lease term.

In legal terms, the lease agreement cannot be terminated for convenience by either party, and has specified terms for what comprises termination for cause. Given the uniqueness of its operation, it is not feasible for Company A to relocate elsewhere in order to mitigate its potential losses.

Given the relatively short operating history, there is not much in the way of historical operating results to rely on (i.e., only between January 2019 and June 2020).

However, in 2019, both the hotel and Company A collaboratively developed a set of forecasts for Company A's operations for the next 10 years ("the 2019 Forecasts"). The 2019 Forecasts were based on the hotel's expected operations, were extensively negotiated and amended a number of times, were based on market forecasts obtained from third parties, and were used as the basis to negotiate the operating arrangements between Company A and the hotel.

In 2019, Company A mostly achieved its forecasts for that year as set out in the 2019 Forecasts. The 2019 Forecasts set out a growth pattern for Company A from 2019 to 2022, at which point revenue and profit was expected to stabilize.

It is now January 2022. The question for the loss expert is as follows: "but for" the alleged improper lease termination, what profits would Company A have earned during the remainder of the 8.5 years of the lease, taking into account that operations would have been impacted by COVID-19?

Assume that the 2019 Forecasts for Company A, as prepared in 2019, were as follows:

Table 3: Company A Forecasts

| | 2019 | 2020 | 2021 | 2022 | 2023 | 2024 | 2025 | 2026 | 2027 | 2028 |
|----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| | \$ | \$ | \$ | \$ | \$ | \$ | \$ | \$ | \$ | \$ |
| Revenue | 1,000,000 | 2,000,000 | 2,500,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 |
| Expenses | 400,000 | 800,000 | 1,000,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 |
| Profit | 600,000 | 1,200,000 | 1,500,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 |



How would one go about adjusting the above forecasts to reflect the impact of COVID-19 (assuming there are no other unrelated factors to adjust for)?

Potentially one way to do so may be to look at the best available current industry forecasts to benchmark where the industry is presently (with the impact of COVID-19), versus in the past (i.e. in 2019 before COVID-19), and what is forecasted in the future, and adjust Company A's forecasts consistent with what industry forecast trends indicate.

For instance, assume that:

- a) Industry forecasts indicate that Company A's industry (for high end car services) declined 75% in 2020, are expected to recover somewhat in 2021, and are expected to return back to full pre-COVID-19 (i.e. 2019) revenue levels by 2022;
- b) Government sources indicate that the population will be fully vaccinated by December 2021, with the economy having started reopening in September 2021, and fully reopened by January 2022; and,
- c) Uncertainties exist with respect to the future impacts of COVID-19 and related closures that this may entail. However, with the fully vaccinated population and enhanced public health measures, it is expected that such future impacts will have a far less significant impact on Company A and the hotel's ability to remain open and operate.

One way to reflect the level of revenue and profit for Company A "but for" the lease termination, and reflecting the impact of COVID-19 would be to take the 2019 Forecasts and adjust/push the 2020 forecasts back two years, to 2022 – i.e. a two year delay. In other words, revenues forecast for 2020 would be pushed back to 2022, 2021 to 2023, and 2022 to 2024.

Of course, this would effectively cause two years of the 8.5 remaining lease term and loss period to be lost. However, that would be the unfortunate and unavoidable consequence of COVID-19. A two year delay of this nature would be consistent with industry forecasts indicating a return to 2019 pre-COVID levels by 2022. Specifically, in the case of Company A, which was in a growth pattern based on the 2019 Forecasts, the resumption of its previously forecasted growth would be effectively delayed two years.

To adjust the figures for 2020 and 2021 in the 2019 Forecasts, one could either reduce the original figures for 2020 and 2021 by 75% to reflect what happened with the industry, or potentially further adjust 2020 to zero/nominal revenue and profits (or a loss) to reflect that, in Company A's context, it was not (and would not have been) able to operate for most of 2020 because the hotel in which it was located was shut down.

Given government sources indicating an economic reopening in September 2021, one way to reflect this would be to calculate a “ramp up” starting in 2021, until originally forecasted revenue and profits for 2020 would be achieved in 2022 (recall that the two year delay would mean that 2020 revenues would be pushed back to 2022).

The fact that the 2019 forecasts were jointly developed and based on the best available information suggests that they can be relied upon for forecasting the remainder of the lease term. However, if any additional information has, with the passage of time, become known with respect to the accuracy of the 2019 Forecasts, this should potentially be reflected as well.

Adjusting the 2019 Forecasts to reflect the impact of COVID-19, and the two year delay in resumption of its original growth trajectory (and assuming no other adjustments are relevant), might look like this:

Table 4: Company A Forecasts

| | 2019 | 2020 | 2021 | 2022 | 2023 | 2024 | 2025 | 2026 | 2027 | 2028 |
|----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| | \$ | \$ | \$ | \$ | \$ | \$ | \$ | \$ | \$ | \$ |
| Revenue | 1,000,000 | 2,000,000 | 2,500,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 |
| Expenses | 400,000 | 800,000 | 1,000,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 |
| Profit | 600,000 | 1,200,000 | 1,500,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 |

Termination

COVID-19

Company A Adjusted Forecasts – “But for” Scenario – Reflecting 2 Year Delay

| | | | | | | | | | | |
|----------|-----------|---|---------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| Revenue | 1,000,000 | - | 500,000 | 2,000,000 | 2,500,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 | 3,000,000 |
| Expenses | 400,000 | - | 200,000 | 800,000 | 1,000,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 | 1,200,000 |
| Profit | 600,000 | - | 300,000 | 1,200,000 | 1,500,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 | 1,800,000 |

However, notwithstanding the above, to account for future risks, including the potential re-emergence of COVID-19, an additional risk premium could be applied to the discount rate used to present value future losses as at a current date (i.e., January 2022). In addition, a further contingency factor could be applied to the calculated loss figures, if appropriate, to reflect additional risks and uncertainties.

9.0 CONCLUSION

“Never forget what you are. The rest of the world will not. Wear it like armour, and it can never be used to hurt you.” – Tyrion Lannister, in *A Game of Thrones*

In summary, while loss quantification experts are not required to prove statistical correlation or prove causation, depending on the facts and circumstances of each case, experts may need to obtain a sufficient degree of comfort that there is a reasonable, proximate link between the alleged harmful act and ensuing financial losses. Where the link between calculated financial losses and the alleged actions at issue is not manifestly obvious, and where factual data exists and accounting/forensic-type analyses are possible, experts should consider making an attempt to obtain and glean information from such data to obtain comfort with respect to such a reasonable, proximate link.

Note that all loss quantification contexts are unique and what is appropriate may depend on the specific facts and circumstances of each context.