



Editor-in-Charge: Jorge Katsumi Niyama
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Evaluation Process: Double Blind Review by SEER/OJS

Analysis of the Calculation of Loss of profits damage: A Perspective of the São Paulo Judiciary

ABSTRACT

Objective: To investigate the judicial approach adopted in determining lost profits damages, as well as the use of the expertise of State Court expert accountants to damages evaluation.

Method: Exploratory, documentary, primary source research, through the analysis of judgments that cited "lost profits" from the 1st and 2nd Business Courts of the Central Court of the Capital, São Paulo, from December 2017 to April 2021, totaling 203 cases.

Originality/Relevance: The bibliographic research revealed a lack of published studies on the topic and highlights the need for further research.


Results: The results indicate that, despite the accounting complexity of lost profits, the courts do not appear to utilize the technical and scientific expertise of accountants to ensure accuracy in quantifying the losses of the creditor (legal entity).

Theoretical/Methodological contributions: The study reveals a contradiction between the theory of forensic accounting and the reality of judicial practice. The lack of a more specialized approach in accounting can affect the accuracy of determining lost profits damages.

Management Contributions: The study opens the possibility of reflecting on the incorporation of accounting expertise into the judicial process, aiming to improve analyses and decisions in cases of this type, to the benefit of the parties involved.

Keywords: Lost Profits damages, Expertise, Forensic Accountant.

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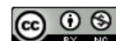
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Received: April 06, 2024

Revised: March 07 2025

Accepted: June 18, 2025

Published: July 30, 2025



How to Cite (APA)

Oliveira Filho, F. V. O., Galegale, N. V., Santos, F.A., Gomes, M. A. C. (2025). Analysis of the Calculation of Loss of profits damage: A Perspective of the São Paulo Judiciary. *Revista Contabilidade, Gestão e Governança*, 28 (1), 01-28. <http://dx.doi.org/10.51341/cgg.v28i1.3245>

1 INTRODUCTION

Loss of profits damage is a type of property damage in Civil Law, whose estimate requires a thorough evaluation of the accounting records prior to the occurrence of the harmful event.

Given that such records represent the essential starting point for determining this damage, the accountant is the most suitable professional to conduct this analysis, as he has technical capabilities in the domain in question.

Loss of profits damage are provided for in the Brazilian Civil Code (Brasil, 2015), in which the Law establishes that the indemnity must cover the creditor for the actual damage and what the creditor has lost in a fair manner; Even if the failure to comply has been intentional, compensation can only include the direct and immediate damage caused, always respecting the rules of the procedure.

From the perspective of Ulhoa Coelho (2023), loss of profit damage represents what the creditor has reasonably failed to earn. The payment of lost profits should only compensate the creditor for what he has ceased to earn, without, however, giving rise to undue enrichment at the debtor's expense.

The importance of the rules that deal with the rights and obligations related to industrial property is equivalent to the relevance of the Civil Code. This legal provision provides that the indemnity must be calculated based on the benefits that the injured party would have obtained if the violation had not occurred.

In this scenario, the criteria established for the calculation of compensation for loss of profits damage are also highlighted, ensuring that the calculation is fair and demonstrates actual losses. To this end, the investigation can consider three possibilities: the benefits that the person would have obtained if the infraction had not occurred; the gain that the other party

has made from the violation of the right or the amount that would have been paid if there had been a legal agreement for the use of the good.

Fichtner (2016) points out that discussions on loss of profits damage also occupy an international scope. Compensation for loss of profits damage is recognized in the 1980 UN Convention, held in Vienna, which deals with contracts for the international purchase and sale of goods. This convention establishes that, when there is a breach of contract, the injured party is entitled to be compensated, on account of the breach, both for the damage suffered and for the benefits he or she no longer received.

Even so, this indemnity cannot exceed the loss that was expected or foreseen at the time of the contract, considering what the responsible party knew or should know. Brazil adhered to these principles in 2014 by ratifying the Convention through a decree. (Brasil, 2014).

According to Nogueira Jr. (2013), loss of profits damage are included in the study of Civil Liability, a branch of Civil Law, and are classified as property damages, the author points out that one of the requirements for claims for loss of profits damage is that the injured party proves, objectively, the levels of activity that he would have achieved, if the damage had not occurred.

Returning to the litigious context, Sá (2002) asserts that legal issues involving compensation for profits that a person fails to obtain, due to obstacles imposed by others, demand expertise of high technical quality.

The need for rigorous technical expertise is evident, especially in business cases, such as those judged in the business courts and in the arbitration of the João Mendes Jr. Manzi Forum. Sá (2002) also highlights that the expert assists the judge with technical knowledge when clarifying facts, identifying causes and evaluating consequences.

Strassburg et al. (2019), state that the Brazilian legislation on forensic accounting follows the Brazilian Accounting Standards, in addition to the Code of Civil Procedure of 2015, which defines the accounting expertise as the exclusive competence of the accountant duly registered with the State Accounting Council.

Article 156 of the Code of Civil Procedure (CPC) (2015) emphasizes the importance of judicial expertise in litigation that requires expert evidence, indicating that "the judge will be assisted by an expert when the evidence in fact depends on technical or scientific knowledge" (Brasil, 2015).

The term "loss of profit", which is predominant in the legal sphere, is not directly in accounting standards. On the other hand, Santos et al. (2020) point out that the academic and professional literature presents several conceptual formulations for accounting profit, relevant in studies on loss of profits damage.

Considering that accounting records are the basis for calculating loss of profit damage, the accountants, due to his technical capacity, is the most appropriate professional to perform this task in the business environment.

The central issue that guides this investigation is: The Court of Justice of the State of São Paulo, in the Business and Conflict Courts related to Arbitration in the João Mendes Júnior Forum, in the first instance, between December 2017 and April 2021. The focus of this study is to determine whether the aforementioned Court uses accounting expertise to assess damages and calculate loss of profits damage in lawsuits involving companies.

To achieve the objective of the research, it is essential to understand the concept of loss of profits damage and how it is interpreted by the Judiciary, which usually uses expert accountants for the technical investigation. This study aims to investigate whether the judiciary, when requesting the calculation of loss of profits damage, effectively considers the speed of the judicial assistants, accountants, to measure the losses.

2. THEORETICAL BACKGROUND

2.1 Forensic Accounting and Auxiliary Judicial Expertise

Forensic accounting, governed by the Brazilian Accounting Standards (NBC), especially in the NBC, and by the Code of Civil Procedure, is to play a crucial role in providing the decision-making body with fundamental evidentiary elements.

As established in Article 464 of the Code of Civil Procedure (Brasil, 2015), expert evidence encompasses examination, inspection and evaluation, and it is essential that the expert report includes elements such as the exposition of the object of the expertise, technical or scientific analysis, indication of the method used, and conclusive answer to the questions presented. The expert must clearly answer the questions of the case, using simple and objective language, without going beyond his or her role.

Sá (2002) defines forensic accounting as a resource to collect opinions that serve as evidence in judicial decisions. Ornelas (2014) considers it a type of evidence applied to financial issues in dispute. Alberto (2015) states that forensic accounting analyzes equity, including its elements and impacts.

Like forensic accounting, the role of the expert accountant is based on the Brazilian Accounting Standards (NBC). It is the Code of Civil Procedure (Brasil, 2015), which establishes the accountant as an expert, holder of technical and scientific knowledge, duly registered with the competent bodies.

Strassburg, Ortolan and Borsoi (n.d.), explain that the new CPC, in its section II, states that experts must prove their expertise in the matter on which they must give an opinion, by means of a certificate from the professional body in which they are registered.

Crepaldi (2019) shows that an accounting expert registered with the Regional Accounting Council (CRC), who performs expert activities, must have knowledge about the activity and the subject.

Decree-Law No. 9,295 of May 27, 1946 (Brazil, 1946), known as the Accounting Law, defines the functions of the accounting profession in Brazil. It considers as technical works of Accounting: the organization and execution of accounting services, the entry of mandatory books and others necessary for accounting organization, in addition to the preparation of balance sheets and statements. The aforementioned Decree-Law describes the responsibilities of accountants, including the performance of judicial proceedings and out of the court expertise, the review of balance sheets and accounts, the verification of assets, periodic audits, assistance to the Audit Committee (“Conselho Fiscal”) of corporations, among other technical tasks provided by Law.

Decree-Law No. 9,295, of May 27, 1946 (Brasil, 1946), together with Law No. 14,039, of August 17, 2020 (Brasil, 2020), added two paragraphs to Article 25 to highlight the importance of accounting professionals.

These paragraphs emphasize that accounting services are technical and specific, especially when the professional's specialization is proven. They also point out that the work of accountants is recognized for experience, studies, publications and other qualifications, making their role even more relevant.

The choice of the judicial expert is a requirement of the Code of Civil Procedure (2015), which establishes that the judge must be assisted by an expert when the evidence depends on technical or scientific knowledge. In addition, experts must be chosen from among legally qualified professionals, and the judge must appoint an expert in the subject of expertise, setting a deadline for the delivery of the report.

The National Council of Justice (CNJ) establishes, by Resolution No. 233 of July 13, 2016 (Brasil, 2016), the creation of a registry of professionals and technical bodies in the Justice of the first and second degrees, according to the rules of the Code of Civil Procedure. This Resolution also requires the courts to create the Electronic Register of Experts and

Technical or Scientific Bodies (CPTEC) to organize the experts, and these professionals are responsible for keeping the register updated at the Court of Justice.

Even before the CNJ Resolution, the Superior Council of Magistracy of the Court of Justice of the State of São Paulo published a Provision that determines that experts must be appointed from among the legally qualified professionals, registered in the registry made by the Court of Justice.

In the case of forensic accounting, the Federal Council of Accountants (CFC, 2020) regulated through a Resolution the creation of the National Register of Accounting Experts (CNPC), and the entry is now maintained for approval in a specific examination.

The resolution establishes that the permanence of the professional in the CNPC is conditioned to several issues, among them the obligation to comply with the Continuing Professional Education Program, regulated by the CFC itself.

However, the presence or absence of the professional in the CNPC does not prevent him from exercising the activity of accounting expertise, but demonstrates how much the accounting class is committed to professional updating, which certainly contributes to the presentation of reports of high technical and scientific rigor in the accounting field.

2.2 Legal considerations of material damage

The Federal Constitution of 1988 (Brasil, 1988) brought an important advance to Brazilian law by establishing rules on compensation for property damages. Later, the Civil Code of 2002 reinforced this idea by defining the reparation of these damages, especially losses and damages.

It is necessary to define damages and civil liability as legal institutes applied in the analysis of loss of profits damage. Civil liability is a legal attitude that places as an obligation to those who cause the damage, whether by their own conduct, that of third parties or objects

in their custody. Article 186 of the Civil Code of 2002 (Brasil, 2002) defines an unlawful act as a voluntary, reckless or negligent action or omission, violating rights and causing damage, even in cases of moral exclusion (Brasil, 2002).

According to Nader (2018), Civil Liability occurs when someone fails to comply with a legal duty and causes moral or material damage to another person. Whoever causes damage, directly or indirectly, must repair the damage and assume the legal consequences of the act.

In this sense, the definition of liability is linked to the origin of an obligation arising from a legal duty of succession, due to the occurrence of a legal fact in the broad sense, the basis of this obligation lies in the principle of the prohibition of offending. Therefore, no one should be harmed, according to what *Neminem Laedere* says, representing a limit to the individual freedom of a human being in society.

The Law understands commitment as the obligation to assume the legal consequences of an act, which may include reparation of damages or punishment, according to the interest of the offended party. Civil Liability is interdisciplinary, present in Civil Law and in several other areas of knowledge. In one of the categories, strict civil liability does not require the characterization of fault on the part of the offender, and it is irrelevant to the legal system whether the agent caused the damage in a culpable or intentional manner.

According to Diniz (2010), the Objectivist doctrine understands that the obligation to indemnify does not depend on fault, that is, if a person causes damage to another, even without intent or error, he must repair the damage, as the liability is linked to the risk of the activity.

Liability to compensate the harm arises from the Law, according to Article 927 of the Civil Code (Brasil, 2015), which discusses the obligation to repair the damage, without considering fault, in the cases provided for by law or when the activity of the plaintiff causes damage, providing risk to individual rights, according to its nature.

Examples of strict civil liability are expressed in the items of Articles 932 and 933 of the same Codex. In strict civil liability, the obligation to indemnify depends only on the damage and the causal link, without the need for fault or willful misconduct. In subjective liability, on the other hand, it is necessary to prove that the damage was caused by the fault or intent of the plaintiff, according to Article 186 of the Civil Code (Brasil, 2015).

According to this legal provision, the obligation to repair the damage is evident as a legal consequence of the harmful act. Diniz (2010) points out that the unlawful act, under subjective liability, is the taxable event, and even if the agent does not fit into the concept of "good father of the family", he must compensate for the damage if the fault or intent in his action is proven. Liability can be direct, when the plaintiff is liable for his or her own act, or indirect, provided for by law, when there is presumed fault and reversal of the burden, resulting in strict civil liability, according to Article 933 of the Civil Code (Brasil, 2015).

In subjective liability, reparation depends on the fault or intent of the plaintiff. If the damage is caused only by the injured party, by force majeure or fortuitous event, there is no obligation to indemnify, making the injured party responsible for proving the requirements of the damage.

For the configuration of civil liability, it is necessary to have an action on the part of the agent, which can be omissive or commissive, and that this action results in moral or material damage, also creating a causal link between both types.

In this sense, there is no correlation between the damage suffered and the agent's omissive or commissive conduct. In summary, in order to be characterized as civil liability, it is necessary to demonstrate the following requirements: conduct — commissive or omissive; damage; causation is the fault of the agent.

According to Rodrigues (2014), liability can be commissive, for an action, or omissive, for not acting when necessary. For example, a driver may be exempt from fault if

they prove that the pedestrian was reckless, but they will be liable if they fail to render aid to the victim.

Human conduct, whether commissive or omissive, must be carried out according to the will of the agent, his freedom of choice, in view of his responsibility and the discernment of his actions.

Diniz (2010) explains that action constitutes freedom, configuring the human act, whether omissive or commissive, licit or illicit, voluntary or objectively imputable, by the agent or by a third party, resulting in damage to another individual and generating the duty to satisfy the rights of the offended party.

Thus, voluntariness is essential to configure liability in the reparation of damages, assuming that the triggering event of liability is voluntary action. It is not possible to point to civil liability when the damage was generated by natural forces without human control.

The understanding of harm is associated with harm, although there is not always a relationship between a violation of a norm and a damage. For possible reparation and compensation, the harmful act must have caused injury to a right or interest. Damage is an essential requirement for the configuration of liability and the duty of reparation.

According to Cavalieri Filho (2015), damage is essential for civil liability, because without it there is no compensation. There can be liability without fault, but never without harm. In strict liability, regardless of the type of risk involved, damage is the main factor for the obligation to repair.

In this sense, civil liability will occur with damage to be repaired; Compensation for moral damage aims to compensate the victim and discourage the perpetrator, preventing recidivism.

The causal link is essential for liability, as it links the perpetrator's action to the damage. If there is no relationship between the agent's conduct and the damage, there is no

liability. The injured party must prove the damage and its origin. Even if it is not the immediate cause, the causal link may be necessary for the damage to occur, and the plaintiff must repair the damage resulting from his acts.

According to Dias (2016), the fault is the lack of care in following the rules, resulting in foreseeable damage. Venosa (2019) explains that guilt does not depend on the emotional state of the agent, but on error or misconduct, and that there is an objective concept of guilt in line with the principle of the "paterfamilias" bonus of Roman Law.

The analysis of misconduct involves comparing the agent's behavior with what is considered acceptable by society. As for the loss of profits damage, Nery (2022) states that the condemnatory decision aims only to restore the situation prior to the breach of contract, without enriching those who suffered the damage.

2.3 Concept of profit in terms of wealth preservation

Hendriksen and Van Breda (2018) point out that Adam Smith, the Scottish economist, was the pioneer in defining profit as the consumable amount without reducing capital.

The same authors cite Sir John Hicks, an English economist who won the Nobel Prize, who deepened this idea, explaining that profit corresponds to the amount that can be spent without compromising one's financial position at the end of the period.

Iudícibus (2018) reinforces that, in Accounting, the key concept influenced by Hicks defines profit as what can be consumed in a given period without reducing initial satisfaction. He argues that Hicks' definition was initially naively interpreted by accountants as a statistical concept of wealth maintenance.

Hicks' proposition, however, had to be adapted to the needs of objectivity and to the mechanisms of accounting calculation. Thus, it can be said that profit, in

Accounting, is the amount that can be distributed over a period, keeping the potential of the initial net worth intact [...]. (Iudícibus, 2017, p. 67 - 68).

Fuji (2004) states that economic science is concerned with the efficient application of limited resources, aiming to maximize the utility of wealth. Profit, in this context, is an important indicator to guide the economic decisions of agents and measure success, finally, he concludes:

It is up to Accounting Science, in turn, to quantify economic events in a logical, objective and systematic way, that is, to identify, recognize, measure and record transactions in physical and monetary terms, with information aimed at users. The profit element is important for both Economic Science and Accounting Science, which, despite different approaches, are correlated and, to some extent, complementary areas, insofar as there are relevant contributions from both sciences. (Fuji, 2004, p. 76).

Fuji (2004) points out that Solomons (1965) adapted Hicks' concept of profit to the business context, defining it as the increase in equity over a period, adjusted for capital contributions or distributions. Solomons (1965) also differentiates Hicksian profit (based on the capitalization of expected future receipts) from accounting profit (which is based on the unexpected costs of assets).

2.4 Concept of profit in accounting terms

Santos et al. (2020) point out that, in the academic and professional literature, there are several definitions for accounting profit. However, it considers the most common definition of profit as the difference between revenues and expenses in a given period.

Under the IFRS, revenues are increases in assets or decreases in liabilities that lead to an increase in equity, not including contributions from partners or shareholders. Expenses, on

the other hand, are decreases in assets or increases in liabilities that decrease equity, without considering distributions to holders of rights in equity.

Income and expenses are key to evaluating a company's financial performance. Information about these elements is just as important as that related to assets and liabilities. In addition, different transactions and events generate income and expenses with different characteristics, so presenting this information separately can help to better understand the entity's financial situation.

Hendriksen and Van Breda (2018) define revenues as the product generated by a company, which means that it is recognized at the time of sale. Expenses, in turn, are the costs incurred to generate these revenues.

Iudicibus (2018), in the same line of thought, defines revenue as the monetary expression conferred by the market on the production of goods and services of the entity, in a broad sense, in a given period. In relation to expenditure, it explains that, in a strict sense, it represents the use or consumption of goods and services in the process of producing revenues.

Notoriously, such definitions are important in this study, as they are the most important items for the formation of profit or result. The Technical Pronouncement defines the terminologies to be used in corporate accounting in Brazil, in line with the International Accounting Standards, especially with respect to the presentation of financial statements, which establish the following names:

Gross profit;

Profit before finance income (costs);

Profit (loss) before income taxes;

Profit (loss) for the period.

Considering the concept of profit in accounting terms with the concept of profit in terms of wealth preservation or economic, there is a clear conceptual difference, which was portrayed in Guerreiro's study (1969 in Fuji, 2004), in which he presents the differences as explained in Table 1.

Table 1

Differences Between Accounting Profit and Economic Profit

Book profit	Economic Profit
Greater objectivity	Increased subjectivity
Calculated by matching sales revenues to consumed costs (expired assets).	Calculated as the increase in the present value of equity.
Assets, with a few exceptions, are measured on the original cost basis.	Assets are stated at the present value of future benefit streams.
Equity increases by profit.	Profit derives from an increase in the entity's equity.
Emphasis on costs.	Emphasis on values.
It does not recognize unrealized gains.	Recognition of realized and unrealized gains.
No adjustments are made as a function of changes in the price levels of goods in the economy.	Adjustments are made due to changes in the price levels of goods in the economy.
Tying profit to the condition of dividend distribution.	"Tying" of profit to the condition of increased wealth, regardless of the condition of distribution of dividends.
Non-recognition of <i>goodwill</i> .	Recognition of <i>goodwill</i> .
Use of dogmatic rules and criteria.	Use of economic rules and criteria.

Source: Guerreiro (*) (1989 in Fuji, 2004)

Nota: (*) Guerreiro, R. (1989). *Modelo conceitual de sistema de informação de gestão econômica: Uma contribuição à teoria da comunicação da contabilidade* [Tese de doutorado, Universidade de São Paulo]. Faculdade de Economia, Administração e Contabilidade

The difference mentioned in the Table has decreased or is no longer so significant due to the adoption of international accounting standards in Brazil. This convergence became more significant after the changes brought about by the laws of 2007 and 2009, in addition to the technical pronouncements of the Committee of Accounting Pronouncements.

Santos et al. (2020) point out that Accounting seeks to prioritize essence over form, adopting metrics more aligned with the concept of economic profit. However, Assaf (2019) observes that, within a given timeframe, a company can add value even without making a profit in the period. The author states that genuine profit only exists when it exceeds the cost of capital, which is the minimum remuneration demanded by investors. Simply generating profit does not indicate value creation; The Company must consider all financing costs, including shareholder remuneration. Creating sustained economic value for shareholders is the company's primary social responsibility.

Therefore, economic profit is more related to the generation of business value which, according to Martins (2020), can be measured by the cash flow that best reveals the effective capacity of wealth generation of a given enterprise.

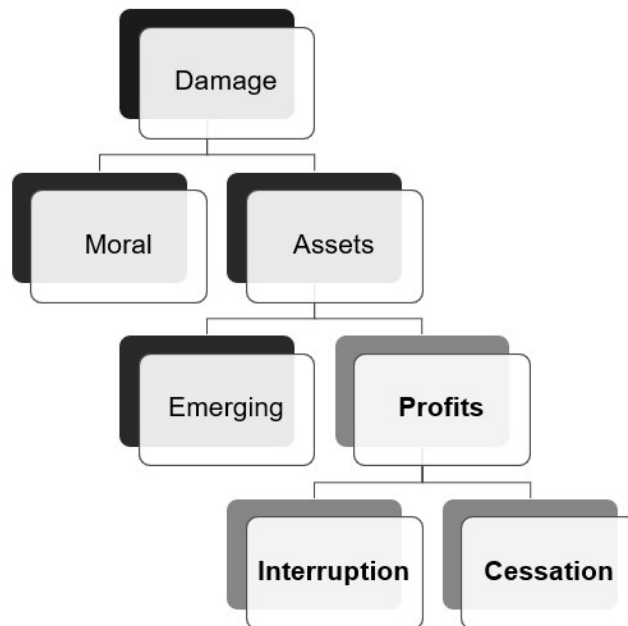
The differences between accounting and economic profit, the latter related to value generation, allow the application of the theoretical approach of the following topic, focusing on wealth preservation and lost opportunities, especially loss of profits damage.

2.5 The accounting nature of loss of income

In the legal sphere, loss of profits damage are analyzed from the perspective of Civil Liability, included in the category of damages, specifically, property damages. Figure 1 presents a systematization of this category of damage in relation to the others.

Figure 1

Loss of profit included in damages



Source: Nogueira (2013)

Based on the provisions, as mentioned by Nogueira Jr. (2013), that property damages have two categories: emergent damages and loss of profits damage. The category of loss of profits damage was segregated in the plaintiff's study based on the extent of the damage, interruption and cessation.

Nery and Nery (2022) understands that there is a clear distinction between emergent damages, which translate into concrete damages, that is, what the victim effectively lost; and the loss of profits damage, being the estimated damages, correspond to what the victim reasonably failed to earn as a result of the damage. The same author, Nery (2014), states that: loss of profit must be considered any gain or profit frustrated by the occurrence of the unlawful act, because it considers that frustrated is the gain or profit that would be expected, based on the normal course of things and the special, determinable circumstances of a

concrete case, including the organization, the measures and forecasts that have been observed.

As stated by Guedes (2011), the fragmentation of property damage is useful even for the judge to better justify his decision, thus covering the compensation for the loss suffered by the victim in all its extension, therefore, it helps in the problem of defining reimbursement.

Ulhoa Coelho (2023) states that emergent damages refer to the creditor's actual losses, without the need for projections, while loss of profits damage aims to replace the creditor's assets with gains that he would have obtained, if there were no defaults, based on past events and accounting records.

In relation to loss of profits damage, the legal literature presents considerable material and debate on the subject, even provided for by law, which does not occur in the accounting literature, where the concept is not standardized, except for authors who address aspects of accounting expertise.

Loss of profits damage reported by legal entities must be calculated according to the accounting records of the affected party and, when necessary, of the person who caused the damage. This responsibility is exclusive to accountants, according to the NBC, which defines forensic accounting as the exclusive competence of the accountant registered with the State Accounting Council (CRC).

The expert accountant is the specialized accountant professional in charge of calculating loss of profits damage, in accordance with article 156 of the Code of Civil Procedure. Zanna (2017), points out that, in order to be compensable, loss of profits damage must be based on secure bases, not including imaginary and fanciful profits.

Sá (2002), in turn, defines that what needs to be proved, in expert work, is, basically, what was not earned due to one or more acts performed by third parties and that infringed such damages, impacting on possible loss of profits damage. The accounting aspects of loss of

profits damage highlight the accountant as the ideal professional to carry out expert examinations, due to his technical intelligence.

With the creation of the business and arbitration courts, in 2017, by the Court of Justice of São Paulo, which aims to specialize judges in business claims, the participation of expert accountants is essential, even in multidisciplinary expertise, to ensure accuracy in the quantification of loss of profits damage.

3 METHODOLOGY

3.1 Characterization of the study

The study aims to investigate whether the Court of Justice of São Paulo, in the Business and Conflicts Courts related to Arbitration in Forum 33 João Mendes Júnior, District of the Capital, uses the skill of accountants to assess the damage (loss of profits damage).

Exploratory studies are carried out when the objective is to investigate a topic or a research problem that is little addressed, about which we have many doubts, or which has not been addressed before. (Sampieri et al., 2013).

3.2 Data collection process

This research uses information from judgments of the Business and Conflict Courts related to the Arbitration of the Central Court of the Capital, in São Paulo, from its inauguration in December 2017 to April 2021, addressing the term "loss of profits damage". It is based on documents and analysis of the data collected.

Indirect documentation uses data collected by other people, and may or may not be prepared material. It is divided into documentary research (primary sources) and bibliographic research (secondary sources). The primary source is composed of materials without analytical treatment, which serve as the basis for the researcher's investigation.

The documents used in this research are primary sources, with data collected from the database of the Brazilian Association of Jurimetrics (ABJ) on business courts. A total of 816 cases with the terms "trademarks and patents", "industrial property" and "unfair competition" were analyzed, of which 203 presented the expression "loss of profits damage".

Data on judicial proceedings, such as the number, parties involved and competent courts, were obtained in the collection of 203 cases, which was carried out entirely through access to the *website* of the Court of Justice of São Paulo, ensuring the completeness and reality of the information obtained.

4. ANALYSIS AND DISCUSSION OF RESULTS

The detailed analysis of the data collected from court judgments is shown in Table 2, which considers the following points, the Table shows the judge's decision on cases involving loss of profit; A total of 80 cases (lawsuits) were analyzed in which the request for loss of profits damage was denied by the judge in the ruling. It was found that 92 lawsuits were decided based on Article 210 of Law No. 9,279/96, which deals with rights and obligations related to industrial property, in 12 judgments, the judge determined the loss of profits damage, in 7 cases, there was no express request for loss of profits damage in the initial petition, finally, it was observed that there was 1 withdrawal of the request for loss of profits damage and 2 withdrawals of the process by the party involved.

Table 2

Loss of Profit Decisions

Judgments and others	Result	Percentage
Denied	80	39,41%
Article 210 of Act No. 9,279/96	92	45,32%
Arbitrated by the Judge	12	5,91%
No specified criterion	9	4,43%
No loss of income was requested	7	3,45%
Waiver of loss of income	1	0,49%
Withdrawal from the lawsuit	2	0,99%
Grand Total	203	100,00%

4.1 Post-Sentencing Data Analysis

From the analysis of the sentences, it was found several resolutions or determinations that include the liquidation or not of the sentence, as shown in Tables 3 and 4.

Table 3

Incidence of Reversed Sentence and Withdrawal

Sentence Reversed	Result	Percentage
No	149	73,40%
Yes	11	5,42%
Partially	4	1,97%
Withdrawal from the lawsuit	2	0,99%
Appeal in progress	37	18,23%
Grand Total	203	100,00%

Considering Table 3, it was possible to verify that only 15 sentences were reformed in a higher court, 11 totally and 4 partially, in the course of this study, considering the cut-off period chosen for analysis, 37 appeals were in a higher court.

In relation to the two cases in which the party withdrew the case, due to the lack of procedural continuity, such judgments did not pass through the second instance and, therefore, were not reformed.

Both cases, because they differed from the rest of the sample, were presented separately in Table 3. From the sentences handed down, it was found that there was agreement in 48 of the cases, as shown in Table 4.

Table 4

Incidence of agreements

An agreement was reached	Number of shares	Percentage
No	155	76,35%
Yes	48	23,65%
Grand Total	203	100,00%

Table 5 shows the 113 cases that proceeded to the liquidation phase, i.e., cases in which the judge ordered liquidation, according to the guidelines of Law No. 9,279/96 (Brasil, 1996), therefore, whether he arbitrated the loss of profits damage or did not specify the liquidation criterion.

Table 5

Case Which Proceeded to Settlement of Award

Expertise (yes/no)	Administration	Accounting	Criminal	Industrial Designer	Right	Not indicated	Intellectual property	Total
No	-	-	-	-	-	-	-	90
Yes	-	8	1	-	-	2	1	12
Yes, but not to calculate loss of profit	1	-	-	1	4	1	-	7
Appointed, but there was agreement	-	1	-	-	-	1	-	2

Expertise (yes/no)	Administration	Accounting	Criminal	Industrial Designer	Right	Not indicated	Intellectual property	Total
Stage of acceptance by the expert	-	-	-	-	-	1	-	1
Canceled	-	1	-	-	-	-	-	1
Total	1	10	1	1	4	5	1	113

In 90 cases there was no determination of expertise of any nature, in 23 cases, there was a determination of expertise, and in 5 situations it was not possible to identify the specialty of the judicial expert; 7 were not allocated to calculate loss of profit, 1 was canceled and 1 was not completed due to an agreement entered into by the parties, among the 10 cases in which an accounting expert was performed, 1 was canceled and 1 was not completed due to an agreement entered into by the parties.

It is important to highlight that, considering the initial sample of the 203 cases analyzed, 32 expert examinations were determined, including those that occurred before the settlement phase, obtaining the result shown in Table 6.

Table 6

Incidence of Expert Determination

Expertise (yes/no)	Administration	Media	Accounting	Criminal	Industrial Designer	Right	Graphotechnics	Not indicated	Intellectual property	Grand Total
No	-	-	-	-	-	-	-	-	-	171
Yes	-	-	8	1	-	1	-	1	1	13
Yes, but not to calculate loss of profit	1	1	-	-	2	8	1	-	-	14
Nominated, but there was agreement	-	-	1	-	-	-	-	-	-	2
Estoppel	-	-	-	-	-	-	-	-	-	1
Stage of acceptance by the expert	-	-	-	-	-	-	-	-	-	1
Canceled	-	-	1	-	-	-	-	-	-	1
Grand Total	1	1	10	1	2	9	1	1	1	203

5 FINAL THOUGHTS

Considering the objective of the present study, we seek to examine whether the judiciary, when determining the calculation of loss of profits damage, employs the expertise of the auxiliary accountants of the justice to evaluate the damage. The analysis of the sentences of the 1st and 2nd Business Courts of São Paulo, from December 2017 to April 2021, showed that, of the 203 cases with the term "loss of profits damage", 80 had the request denied and 92 were sentenced with determination in accordance with Article 210 of Law No. 9,279/96 (Brasil, 1996), on industrial property and, therefore, compensation for damages arising from infringements in that context.

Ultimately, of the 113 cases in the liquidation phase, in 90 the judge did not order an expert opinion, and among the 23 with expertise, only 10 included an expert accountant. The result shows that, even with accounting relevance, expert accountants are little required to evaluate loss of profits damage.

This shows a significant discrepancy, considering that accounting experts are the most qualified professionals to quantify this type of economic damage, given their technical knowledge about the calculation of financial flows and the maintenance of assets.

The low number of requests for accounting expertise, despite the relevance of Accounting for the correct evaluation of loss of profits damage, suggests that the Judiciary, in some cases, does not resort to this intelligence, which can compromise the accuracy of calculations and the fair reparation of damages.

The fact that the expert accountant is requested in a reduced portion of cases may reflect an underutilization of this specialized competence, which, if applied in a more systematic way, could improve the assessment of the financial failures suffered by victims.

This study highlights the need for a better understanding of the reasons that lead to the non-use of the technical opinion of accountants in the calculation of loss of profits damage. It is essential that future research seeks to understand the reasons for this practice, which may involve procedural issues, lack of knowledge about the relevance of forensic accounting work, or even the lack of a culture of valuing this specialization in the Judiciary.

In addition, a broader reflection on how to improve the application of forensic accounting in judicial decisions can contribute to a more efficient and fair justice system, ensuring that economic damages are adequately compensated.

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Análise da Apuração de Lucros Cessantes: Uma Perspectiva do Judiciário Paulista

RESUMO

Objetivo: Investigar a abordagem judicial adotada na apuração de lucros cessantes, assim como o emprego da expertise dos contadores auxiliares da justiça para a estimativa do dano.

Método: Pesquisa exploratória, documental, de fonte primária, por meio da análise das sentenças que citaram “lucros cessantes” das 1.ª e 2.ª Varas Empresariais do Foro Central da Capital, São Paulo, de dezembro de 2017 a abril de 2021, no total de 203 casos.

Originalidade/Relevância: A pesquisa bibliográfica demonstrou ausência de estudos publicados sobre o tema e aponta a necessidade de realização de pesquisas.


Resultados: Os resultados indicam que, apesar da complexidade contábil nos lucros cessantes, o judiciário parece não utilizar a habilidade técnica e científica dos contadores auxiliares para assegurar a precisão na quantificação do prejuízo da parte credora (pessoa jurídica).

Contribuições Teóricas: O estudo revela uma contradição entre a teoria da perícia contábil com a realidade das práticas do judiciário, quer seja, a falta de abordagem mais especializada na Contabilidade pode afetar a assertividade na determinação dos valores dos lucros cessantes.


Contribuições para a Gestão: O estudo abre a possibilidade de uma reflexão sobre a incorporação da expertise contábil no processo judicial, visando aprimorar análises e decisões em casos deste tipo, em benefício das partes envolvidas.

Palavras-chave: Lucros Cessantes, Perícia, Perito Contador.

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Recebido: Abril 06, 2024
Revisado: Março 07, 2025
Aceito: Junho 18, 2025
Publicado: Julho 30, 2025

