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DAMAGES, RESPONSIBILITY, AND LOSS OF PROFITS

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THE process of assessing damages in actions at law is hidden by "remoteness," "contemplation of the parties," mitigation of damages," and "uncertainty."[1] The courts generally do not give it adequate treatment. A careful comparison of the records in a substantial number of cases as set forth in the reported opinions should give one some basis for criticism.

The damage problem in every case is the problem of evaluating injuries for which the defendant can be held responsible. Several interests of one or more persons may have been affected by the defendant's act. His probable responsibility for the injury to each interest should be separately considered. The problem of fixing responsibility is one primarily for the trial judge, eventually, perhaps, for the appellate court. The interests concerned, the injuries thereto, the nature of the defendant's act, if it is a tort, whether it is wilful, inadvertent, or

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[1] The approach suggested in this paper is not original. Dean Leon Green in his *Rationale of Proximate Cause* and his *Judge and Jury* has presented a detailed discussion of the problems of responsibility. He has criticized what he calls the language technic of the courts. The purpose of this paper is to point out how the process of assessing damages can be separated from the process of fixing responsibility, and to emphasize that each process must be separately considered if the courts are to deal intelligently with those cases involving losses of profits. The idea was suggested to the writer when he was a graduate student under Dean Green at the Yale University Law School.

grossly careless, what was within the contemplation of the parties, if it is a breach of contract, suggest to him how far the defendant can be held responsible.[2] Any disputed questions of fact upon which the determination of responsibility is to be made must be submitted to the jury. The problem of evaluating the injury or injuries, which are within the scope of the defendant's responsibility, is primarily a problem for the jury. The court must be satisfied that there is enough evidence in the record upon which this evaluation can be made. If the evidence is too "uncertain" or too "speculative" the jury will not be allowed to consider it.

No extended review of all the possible kinds of damage cases will be made. Some cases dealing with losses of profits will be used to illustrate how plausible the suggested hypothesis can be. That a person wronged should be compensated for gains prevented as well as for losses sustained is assumed to be a rule of thumb. One must be skeptical about it. Any rule of thumb is likely to be too general to be of any practical value. This particular rule does not indicate how or when a plaintiff can recover for a loss of profits. To know what is meant by a loss of profits requires a careful analysis to which the rule can give no help.

Tort Cases

Where the alleged wrong is a tort, one can be reasonably specific about classifying the interests affected. It is apparent in these cases that proximate cause concerns the problem of responsibility and is not a damage factor. It is apparent, too, that there is no simple test to show when the jury can make an award based upon a loss of profits. The courts themselves often fail to analyze the cases with enough care to disclose the particular problems upon which the cases turn. A few examples can be used to illustrate these suggestions.

A jockey was apprenticed to the plaintiff, a horse trainer.[3] The jockey had been thrown from his horse during a race when the defendant's dog was allowed to wander onto the track. The jockey had obtained a judgment in a separate action against this same defendant for personal injuries. The plaintiff hoped to get a verdict and a judgment against the defendant measured by the sum his jockey would have won for him during the season. The plaintiff was non-suited. The

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[2] Precedents are important, perhaps decisive. Nevertheless, precedents do not leave the courts without some discretion. The problems of administration, even in the field of so-called substantive law, are important in every case presenting more than a mere conflict in the evidence. It is just as important to understand the process of working with the general principles as it is to know what those principles are.

[3] Cain v. Vollmer, 19 Ida. 163, 112 Pac. 686, 32 L.R.A. (N.S.) 38 (1910).

judgment on the non-suit was affirmed by the appellate court. The court said that the damages were too remote and uncertain. Did the court mean to decide that the injury to this plaintiff's interest was not within the scope of the defendant's responsibility, or that there was not enough evidence in the case upon which the jury could reach a satisfactory verdict? The court said that the evidence was uncertain because it could not be known how much the jockey would be able to win during the course of a racing season. If this had been an action by the jockey himself, average winnings might have been considered in estimating earning capacity.[4] The interest involved in the case was the master-servant relationship between the plaintiff and his jockey. The risk of interruption to that relationship was not protected against the particular conduct of the defendant. There was no damage problem in the case.

The master's interest in the relationship between himself and his servant, or employee, is protected against some acts of third parties. Had the defendant in the case above intended to interfere with the relationship between the plaintiff and his jockey it is probable that the employer could have stated a cause of action against him.[5] Certainly, had the defendant, with knowledge of the contract between the plaintiff and his servant, sought to entice the latter out of his employment, the plaintiff's interest in the contract would have been protected against that act.[6] How the jury could have evaluated that injury without considering the possibility of average winnings and the amount thereof is open to speculation. The master's interest in the relationship between himself and his apprentice in common law days was protected against a third party's act which had caused the apprentice to suffer physical injuries to his person.[7] And that was true regardless of the nature of the act. The master, instead of the parent, was entitled to the earnings of the apprentice. Possibly the plaintiff had some such idea in mind when he brought this action. The court in its opinion did not indicate that the plaintiff ever thought of the analogy.

A traveling man's case of samples was lost through the alleged negligence of the railroad's employees.[8] He sued to recover the value of the lost goods and for the amount of the commissions he would

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[4] Compare this statement with the discussion in the text about personal injuries and losses of profits.

[5] Cf. Coal Land Development Co. v. Chidester, 86 W. Va. 561, 103 S.E. 923 (1920).

[6] Lumley v. Guy, 2 El. & Bl. 216, 118 Eng. Reports 749 (1853); Posner Co. v. Jackson, 223 N.Y. 325, 119 N.E. 573 (1918).

[7] Ames v. Union Railway Company, 117 Mass. 541, 19 Am. Rep. 426 (1875).

[8] Hines v. Denny, 190 Ky. 416, 227 S.W. 567 (1921).

have earned had he been able to solicit orders before the new samples arrived. He had a verdict and a judgment based upon both claims. In reviewing the case the appellate court decided that the judgment should have been entered only for the value of the lost goods. The court said that the trial judge could have peremptorily instructed the jury for the defendant on the other claim. The record, however, presented no request for a directed verdict. The defendant had moved for a new trial which the trial judge should have granted. It is practically impossible to discover from the opinion whether the court was purporting to deal with the problem of responsibility, the damage problem, or with both of them. The court talked about remoteness and uncertainty. But the court did say that the trial judge could have instructed the jury to find for the defendant on the matter of the injury to the plaintiff's occupation. Conceivably that could mean that the court felt that the plaintiff could not obtain compensation for that injury no matter how much evidence he might produce purporting to show a loss of profits. The damages would be too remote, to use the popular phrase. His interest in his occupation was not protected against this defendant who was brought into the case because of the negligence of his servants.

Whether a defendant's act was wilful or inadvertent, whether his alleged responsibility is based upon some element of fault in him, or upon some relationship between himself and the active tort-feasor, can have a material effect upon the scope of the defendant's responsibility. It is suggested here that such facts do have this effect whether or not the courts expressly recognize their presence.

Consider again the case of the traveling man's samples. The defendant's responsibility was based not upon his (its) fault but upon the relationship between himself and his employees. The scope of his responsibility was narrow. He had only to compensate the plaintiff for the injury to the latter's property interest in the physical goods. Had the defendant been an individual who had taken the samples from the plaintiff, had the tort been a conversion instead of a destruction or loss through inadvertence, then the injury to the plaintiff's interest in his occupation might have been found to have been within the scope of the defendant's responsibility. Nor would it have been necessary to have shown that the defendant had intended to cause any injury to the plaintiff in the pursuit of his occupation. Having found that the defendant could be held responsible for the injury to this other interest then the court would have reached the damage problem. Before letting the jury assess damages for this injury the court would have insisted that the plaintiff get into the record enough evidence for the jury to use in making the evaluation. The plaintiff would have had to show, if he could, the number of customers he had on his route, what they

would have bought from him, as estimated from past transactions, and how much they had purchased from his competitors. Popularly stated the plaintiff would have been allowed to recover for a loss of profits.

Any number of cases upon close analysis lend color to this suggestion about the nature of the defendant's act. The defendant may have converted the plaintiff's treshing machine.[9] The plaintiff claims that he is unable to use the machine to thresh grain under contracts that he has with third parties. The defendant, perhaps, knows nothing of those other contracts, but this is an intentional tort in that he knowingly has taken the machine. If the facts are as the the plaintiff claims, if he has not been able to get another machine, so that the defendant's act is in fact a cause of his failure to perform, his interest in the collateral contracts will be protected against that act. In order to get a verdict and a judgment in his behalf the plaintiff must be able to show definitely the number of contracts that he had, the return he was to get for his services, and the amount of grain he would have threshed. That weather conditions would have aided or hindered performance is material in determining the cause of the injury. The plaintiff may even have had a contract to sell his machine to some third party at a price above the market value. The interest in that contract will be protected against the defendant's conversion of the machine.[10] The measure of damages in such a case is certain and does not have to be estimated. It is the price he was to obtain on the resale.

The defendant may have converted logs that the plaintiff was to run through his mill,[11] or he may have converted other goods used by the plaintiff in his business.[12] If in fact the carrying on of his business is

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[9] See the following cases: Cushing v. Seymour, Sabin & Co., 30 Minn. 301, 15 N.W. 249 (1883); Harlin v. Dahlgren, 157 Minn. 100, 195 N.W. 765 (1923); Cannon v. Oregon-Moline Plow Co., 115 Wash. 273, 197 Pac. 39 (1921); Truman v. J. I. Case Threshing Machine Co., 169 Mich. 153, 135 N.W. 89 (1912). It is suggested that these cases are decided as they are not because the collateral interests could not have been within the scope of protection against the defendants' acts, but because those acts were not the substantial factors in producing the injuries, or because the plaintiffs were unable to meet the damage problems.

[10] See Cent. of Ga. Ry. Co. v. Cooper, 14 Ga. App. 738, 82 S.E. 310 (1914). Cf. E. H. Taylor, Jr. & Sons v. Julius Levin Co., 274 Fed. 275 (C.C.A., 6th, 1921).

[11] Quay v Duluth, etc., R. Co., 153 Mich. 567, 116 N.W. 1101, 18 L.R.A. (N.S.) 250 (1908).

[12] Preble v. Hanna, 117 Or. 306, 244 Pac. 75 (1926). Cf. Allison v. Chandler, 11 Mich. 542 (1863). The latter was not a conversion case. The interruption to the plaintiff's business was caused by the defendant's wrongfully evicting the plaintiff. See also Best Mfg. Co. v. Creamery Co., 307 Ill. 238, 138 N.E. 684 (1923), and DePalma v. Weinman, 15 N. Mex. 68, 103 Pac. 782, 24 L.R.A.

interrupted, if the goods cannot be replaced immediately, the plaintiff's interest in the business will be protected against that interference. How can that injury be evaluated? If the plant is a large one, if the showing of daily profits makes it appear that the claim will be a considerable sum, the court may suggest that the jury evaluate the injury by taking into consideration the rental value of the mill or factory rather than the amount of profits the plaintiff would have made.[13] The plan which the jury must follow in the particular case is that which seems most satisfactory to the trial judge in the first instance, eventually, perhaps, that which seems most convenient to the appellate court.

The forceful interfering with the plaintiff in the pursuit of his occupation,[14] the pollution of a stream essential for the use of the plain-

(N.S.) 423 (1909). In neither case was the tort technically an intentional tort, but it was a common law trespass. When the defendant's act caused the walls of the plaintiff's building to cave in, the court did not find it difficult to fix responsibility upon the defendant for the interruption of the plaintiff's business.

[13] Quay v. Duluth, etc. R. Co., 153 Mich. 567, 116 N.W. 1101, 18 L.R.A. (N.S.) 250 (1908). This is not the only type of case where rental value may be suggested as a measure of compensation. The plaintiff's automobile has been damaged. While the repairs are being made he loses the use of the car. He is compensated for loss of use. Rental value of the car may be suggested as a factor to be considered in estimating the compensation for "loss of use." Allen v. Brown, 159 Minn. 61., 198 N.W. 137 (1924); Gould v. Merrill R. & L. Co., 139 Wis. 433, 121 N.W. 161 (1909). Cf. Helin v. Egger, 121 Neb. 727, 238 N.W. 364 (1931). It is to be noted, however, that in the automobile cases, rental value, if it is used, is taken as a measure of the injury to the property interests in the chattel. In the case referred to in the text, rental value of the premises is suggested as a measure for an injury to the business in which the premises are being used. Conceivably the court might suggest that the interest in the plaintiff's business is not protected against the defendant's act, although the interest in the use of the premises is, and that the conversion of the logs, for example, had prevented the plaintiff's using that mill, and that the injury to the property interest in the mill should be measured by its rental value. That would make the case depend upon a choice of interests rather than a choice of measures. Perhaps no court would make such a fine distinction. Certainly the court in the case discussed was purporting to lay down the measure to be used in evaluating the injury to the plaintiff's interest in his business.

[14] Pacific, etc. Co. v. Packers Ass'n., 138 Cal. 632, 72 Pac. 161 (1903); Whitelaw v. United States, 9 F. (2nd) 103 (N.D., Cal., 1925). Cf. Wright v. Mulvaney, 78 Wis. 89, 46 N.W. 1045, 9 L.R.A. 807, 23 A.S.R. 393 (1890). In the latter case the defendant's servants negligently ran against the plaintiff's fish nets. Perhaps there was not enough evidence in the case to enable the jury to evaluate the injury to the plaintiff's occupation, but it is submitted that the nature of the defendant's act affected the decision, and that the real reason that the plaintiff lost the case was because he could show no injury to his interest in his occupation that the court felt could be within the scope of the defendant's responsibility.

tiff's cattle,[15] an unlawful combining to restrain trade,[16] are torts. Several interests of the plaintiff may be injured by the defendant's act. He may be physically injured or at least physically restrained from carrying on his occupation. There is an injury to his person and an injury to his business. The lower riparian owner is protected against the pollution of the stream. But he may have had to sell his dairy business because the pollution has been so bad. Not merely has the value of the farm as a piece of land been affected, but the plaintiff's goodwill in his business has been destroyed. This is more than a temporary interruption of his business. Ordinary income, expenses, the amount invested, and such facts, will be relevant to show what his business was worth before the injury to it. The difference between that sum and what the plaintiff has in fact realized from the forced sale is what the defendant will have to pay.[17] These claims may be called special damages, and the plaintiff may have to plead them specially, but the fact remains that the plaintiff can be compensated for all the injuries to all his interests for which the court feels the defendant ought to be held responsible.

This fixing of the limits of responsibility is not an arbitrary process. The court, of course, does have some discretion. Where the act is intentional, at least where it is not merely inadvertent, the responsibility of the defendant very likely will be held to cover a collateral injury to the plaintiff's business. On the other hand, where the defendant's servants carelessly deliver kerosene to the plaintiff in place of gasoline, which the plaintiff unknowingly mixes with his own gasoline and sells to his customers, the defendant will have to pay the plaintiff for the gasoline his servants have indirectly spoiled, but he will not have to compensate him for any injury to the goodwill of the business.[18] The defendant's responsibility is vicarious and is not based upon his fault. Moreover, the act was inadvertent on the part of the active tortfeasors. The plaintiff can recover no "special damages." The court says that the damages are too remote. The result would be the same

[15] City of Collinsville, v. Brickey, 115 Okla. 264, 242 Pac. 249 (1925). Cf. Bowman v. Helser, 143 Wash. 397, 255 Pac. 146 (1927); Mugge v. Erkman, 161 Ill. App. 190 (1911); Lawton v. Herrick, 83 Conn. 417, 76 Atl. 986 (1910).

[16] States v. Durkin, 65 Kan. 101, 68 Pac. 1091 (1902). Cf. Berry Foundry Co. v. Moulders' Union, 177 Mo. App. 84, 164 S.W. 245 (1914); Homestead Co. v. Des Moines Electric Co., 248 Fed. 439, 160 C.C.A. 449 (1918) In these cases there is no indication that the courts were concerned with any problems of responsibility. The only interest injured in each case was the interest of the particular plaintiff in carrying on his business. The talk about certainty and uncertainty obviously is meant to cover the problem of assessing damages.

[17] See City of Collinsville v. Brickey, 115 Okla. 264, 242 Pac. 249 (1925).

[18] See Ohio, W. Va. Co. v. Railway Co., 97 W. Va. 61, 124 S.E. 587, 38 A.L.R. 1439 (1924). Cf. Wright v. Mulvaney, 78 Wis. 89, 46 N.W. 1045, 9 L.R.A. 807, 23 A.S.R. 393 (1890).

even though the plaintiff could get into the record a mass of evidence upon which the jury could make a comparatively accurate estimate of the pecuniary injury to the plaintiff's goodwill.

Every case is not going to fit into any prearranged classification. No doubt many cases can be found where the intent or inadvertence of the defendant not only is not expressly considered by the court, but where, even if it is considered, the results so far as responsibility is concerned, are different from what one would expect them to be. That does not mean that the hypothesis is neither workable nor practicable. No one can predict precisely how the courts are going to exercise the broad administrative discretion which is theirs in fixing the limits of responsibility. What the trial judge does in the first instance may be changed by the appellate court. Each case can present its special problem. The exercise of this discretion in the multitude of cases before them gives the judges an opportunity to apply to everyday affairs their concepts of social justice, ethics, and good living.[19] It is important to appreciate the factors that influence the courts in making their determinations.

One other group of cases should be considered in connection with this discussion of tort responsibility. It is often stated that evidence of profits cannot be considered by a jury where a plaintiff is suing to recover compensation for physical injuries to his person.[20] Those cases present a damage problem and only that. The injury which the plaintiff has suffered is an injury to his person. He is not trying to get compensation for any injury to an interest in his occupation. But one of the factors to be considered by the jury in evaluating the physical hurt is impairment of earning capacity. The particular plaintiff may be deriving his income from his own business to which he devotes substantially all of his time. It cannot be doubted that he has an earning capacity. Unless some consideration is given to the income he has been deriving from the business that capacity cannot be measured.

The courts as a rule act reasonably under the circumstances. Some of them may feel that it is dangerous ever to allow a jury to consider "lost profits" in these cases.[21] Most courts do not adopt that attitude.[22] If the plaintiff has a comparatively small sum invested, if he

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[19] Dean Green has, in his *Judge and Jury,* discussed at length a number of the factors that may affect the excercise of this discretion.

[20] See *Assessment of Damages in Personal Injury Actions,* 14 Minn. Law Review 216, 226 et seq. (1930).

[21] Lo Schiavo v. Traction Co., 106 Ohio St. 61, 138 N.E. 372, 27 A.L.R. 424 (1922). Cf. Dempsey v. City of Scranton, 264 Pa. St. 495, 107 Atl. 877 (1919).

[22] Galanis v. Simon, 222 App. Div. 330, 225 N.Y.S. 673 (1927); Alitz v. Minneapolis & St. L. R. Co., 196 Ia. 437, 193 N.W. 423 (1923); Yenney v. Pacific Northwest T. Co., 124 Wash. 660, 215 Pac. 38 (1923). McGlinchey v. Henderson, 240 Mass. 432, 134 N.E. 264 (1922). Cf. Mahoney v. Boston Elev. Ry.,

cannot hire anyone to take his place without hurting the goodwill, if the income in fact does appear to represent a return to him because of his personal services, the court will allow the jury to consider this evidence which purports to show what the plaintiff has been earning in his business. The court will tell the jury to consider these facts when they are attempting to estimate the plaintiff's earning capacity and when they are trying to determine the effect of the injury upon the plaintiff's power to earn.

Contract Cases

Where the wrong is a tort affecting several interests, the nature of the act has a material effect upon the limits of the defendant's responsibility. In the contract cases a factor of relatively similar importance is what the parties have intended to protect by their agreement. In other words, "contemplation of the parties" is a test for responsibility, and is not a measure of damages. What was within the contemplation of the parties to the contract is a question of fact. But it is for the court to determine the effect that fact shall have upon the scope of the defendant's responsibility. Both parties may not have intended to protect the same interests. What each party in fact did intend is, to repeat, a question of fact. What each party might reasonably have expected the other to mean is also a question of fact.[23] Contemplation of the parties does not enter into the damage problem, except in so far as the determination of the limits of responsibility must always precede the evaluation of any injury for which the defendant can be held responsible.

Hadley v. *Baxendale*,[24] the famous English case, has caused the greatest amount of confusion in this field by tying the test of contemplation of the parties to the damage problem. The facts of the case are well known. Because the carrier failed to deliver a shaft to the repair man for the plaintiff within the usual time, the latter had to close his mill for several days. He sought to charge the defendant with the amount of profits the mill would have earned during the period of idleness. The court decided that the plaintiff could not collect this sum. The court said: "It follows, therefore, that the loss of profits here can-

221 Mass. 116, 108 N.E. 1033 (1915); Weir v. Union Ry. Co., 188 N.Y. 416, 81 N.E. 168 (1907).

[23] Where the defendant could have had no reason to believe that that plaintiff meant to protect, by this agreement, his interests in his other contractual relationships, see Primrose v. Western Union Telegraph Co., 154 U.S. 1, 14 S. Ct. 1098, 38 L. Ed. 883 (1893). Where obviously neither party had intended to protect the plaintiff's goodwill by the contract in suit, see American S. L. Co. v. Riverside P. Co., 171 Wis. 644, 177 N.W. 852 (1920).

[24] 9 Exch. 341, 156 Eng. Reports 145 (1854).

not reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants."[25]

Obviously the court in the English case was dealing with the problem of the defendant's responsibility, and it treated that problem as a question of law. The court, in effect, concluded that the plaintiff's interest in the continuous operation of his mill was not protected by the contract with the defendant carrier. If this interest had been held to have been within the scope of the defendant's responsibility for the breach, then the jury would have been allowed to evaluate the particular injury to that interest. Evidence of ordinary daily income, expenses, and the like, all going to show a loss of profits, would have been relevant.

The American courts, it would appear, in cases closely analagous to the Hadley case, have applied the same so-called test and have come to the conclusion that the plaintiff's interest in his business can be within the scope of the defendant's responsibility for his breach of contract.[26] Just how the jury and trial judge work together in finding the facts and reaching a verdict does not always appear in the reported cases. But it does appear in these cases, that, where the plaintiff can get some evidence into the record upon which a pecuniary estimate can be made, the verdict does include an award of compensation for the interruption to the plaintiff's business. When the amount invested in the business is a considerable sum, and when the daily profits are large, although there is plenty of evidence to show what the income and expense would have been, the court may feel that a safer measure for this sort of injury is the rental value of the premises during the period when they were not in use.[27] The choosing between two possible measures is pertinent to the damage problem, and contemplation of the parties does not affect it.[28]

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[25] 9 Exch. 354, 355, 156 Eng. Reports 151.

[26] Griffen v. Colver, 16 N.Y. 489, 69 Am. Dec. 718 (1858), is the leading case. Cf. Ft. Smith & W. R. Co. v. Williams, 30 Okla. 726, 121 Pac. 275, 40 L.R.A. (N.S.) 494 (1912) and Elzy v. Adams Express Co., 141 Ia. 407, 119 N.W. 705 (1909). See also McKinnon v. McEwan, 48 Mich. 106, 11 N.W. 828 (1882) and Allis v. McLean, 48 Mich. 428, 12 N.W. 640 (1882).

[27] Griffin v. Colver, 16 N.Y. 489, 69 Am. Dec. 718 (1858); Elzy v. Adams Express Co., 141 Ia. 407, 119 N.W. 705 (1909).

[28] Compare the discussion in note 13, above, with the statement in the text.

Almost any kind of interest will be protected against the defendant's breach where it was intended by both parties that the interest should be protected.[29] The defendant, for example, may agree to construct a building for the plaintiff on the latter's land. He knows that the plaintiff is entering into the contract, and wants him to put up this building on the particular lot, to bring about an increase in the value of other lands which the plaintiff owns in the vacinity. Will the interests in the other lands be protected against the defendant's breach of his contract to construct the building? They ought to be protected unless it is decided by the court, in spite of the obvious intent of the parties, that the plaintiff can be compensated only for his "loss" of bargain. Where the particular land is granted or leased to the defendant and he is to put up a building on it for his own use, the only interests that the plaintiff can have intended to protect are his interests in his other lots. He has no bargain with the defendant whereby the latter is to construct a building for him at a stipulated price. The plaintiff must be able to show that those interests have been affected by the defendant's breach, and he must also be able to show the extent to which those interests have been affected.[30] The case, however, will present the problem of evaluating the injuries to those interests. It is not apparent why the interests in the other land cannot be protected when the plaintiff has a bargain with the defendant for the construction of a building on a particular tract of land at a definite price and both parties in fact have intended to protect all the interests by their agreement.[31]

That a plaintiff must mitigate his damages is another rule of thumb which the courts propose as a rule for measuring compensation. It is important to appreciate that when the courts talk about mitigating damages they are actually dealing with the problem of causation and not with any damage problem. Disputed questions of fact on this issue as a matter of course must be submitted to the jury. Any questionable inferences to be drawn from the facts as found or admitted must be made by the jury. If there is in the case an alleged injury to some interest other than the plaintiff's interest in the bargain, it is for the

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[29] See the following cases: Forbes v. Wyatt, 143 Va. 802, 129 S.E. 491 (1925); California Mfg. Co. v. Stafford Pack. Co., 192 Cal. 479, 221. Pac. 345, 32 A.L.R. 114 (1923); Minneapolis Threshing Machine Co. v. Bradford, 206 Mo. App. 609, 227 S.W. 628 (1921); Metzger v. Brincat, 154 Ala. 397, 45 So. 633 (1908); Wolcott, Johnson & Co. v. Mount, 36 N.J.L. 262, 13 Am. Rep. 438 (1873). See particularly Tague Holding Corp'n. v. Harris, 250 N.Y. 422, 165 N.E. 834 (1929), where the interest in a collateral contract for resale was protected against the defendant's breach of a contract to convey.

[30] Shelley v. Eccles, 283 Fed. 361 (C.C.A., 8th, 1922). Cf. O'Shea v. North American Hotel Co., 109 Neb. 317, 191 N.W. 321 (1922).

[31] Cf. Artwein v. Link, 108 Kan. 393, 195 Pac. 877 (1921).

court to determine whether the evidence can, or whether it unquestionably does, show that the plaintiff's failure to act was a substantial cause of that injury. If that fact is found against the plaintiff then the defendant can be held to compensate him for the loss of bargain and for that alone. If, however, the defendant's breach has been the prime factor in causing the injury to the other interest, if the plaintiff was not expected to act, or if his failure to act has had no appreciable effect, and if protection to that other interest was within the contemplation of the parties when the agreement was made, then the defendant can be held responsible for that injury and it should be evaluated by the jury.

A few cases will illustrate this suggestion. The defendant has agreed to extend credit to the plaintiff.[32] The plaintiff needs this credit to finance his purchases of grain on the local exchange.. The defendant has full knowledge of the plaintiff's way of doing business and why he needs the credit. The plaintiff contracts to buy the grain. The defendant refuses to lend. The plaintiff is forced to sell his options immediately at a loss. If he could have procured other credit, but at a higher rate of interest, in time to finance his purchases, then all that he can get for this breach will be enough to compensate him for his loss of bargain, a sum based upon the difference between the two rates of interest. The damage problem in such a case is simple. If he has been unable to get credit from anyone and has had to dispose of his options, he will recover from the defendant a sum measured by the loss on the resale. Again the damage problem will be an easy one. But the plaintiff's business may be a well established one. If he is unable to get credit anywhere else his business may be interrupted. His interest in his business may be protected against the breach, and the damage problem in this event will be more difficult to solve. The plaintiff will have to introduce evidence showing the usual extent of his business, ordinary income, hazards, expenses, and all such facts that any plaintiff must produce who seeks any compensation for an injury to any business interest. The responsibility of the defendant is worked out upon a consideration of what the parties have intended to protect, and whether in fact the breach has caused the injury.[33]

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[32] Farabee-Treadwell Co. v. Bank & Trust Co., 135 Tenn. 208, 186 S.W. 92, L.R.A. 1916 F, 501 (1916).

[33] Cf. Shurtleff v. Occidental B. & L. Ass'n., 105 Neb. 557, 181 N.W. 374 (1921), where the defendant broke its agreement to extend credit to the plaintiff who had undertaken to build an apartment house. See also Sherman Center Town Co. v. Leonard, 46 Kan. 354, 26 Pac. 717, 26 A.S.R. 101 (1891), where the defendant broke its agreement to transport the plaintiff's hotel from one town to another.

The defendant may have agreed to make repairs upon the plaintiff's place of business.[34] The defendant knows that the repairs must be made if the plaintiff is to keep his business running. The defendant fails to perform. The plaintiff cannot then sit back and hold the defendant responsible for the interruption of his business when he could have hired another contractor to make the same repairs. The defendant will have to pay him the difference between the contract price and what it would have cost the plaintiff to get someone else to do the job, but under the circumstances the defendant will have to pay no more than that. Only the interest in the bargain has been injured by the defendant's act. The damage problem is a simple one. But the facts may show that before the plaintiff could hire someone to do the job, or to finish it, the business has been interrupted. The defendant's failure to perform has caused the injury. That injury must be evaluated. The plaintiff will have to get enough evidence into the record upon which the jury can make some estimate of the amount of business the plaintiff might have done and what his net income from the business might have been.

When the defendant has leased the premises to the plaintiff, and has agreed to make specified improvements, the lessee will not be expected to incur the heavy outlay necessary to pay for these improvements if the lessor fails to perform.[35] If the plaintiff is forced to vacate and to enter other premises, then the defendant will have to pay him any difference between the agreed rent and what he has had to pay the other landlord.[36] He is being compensated for his "loss" of bargain, providing, of course, he has had to pay the other landlord more than the contract rental. But the continuous operation of the plaintiff's business may have been interrupted. When the court suggests that the defendant should pay the injured party the difference between the actual rental value of premises as improved, and the rental value of the premises in their present condition, it is refusing to meet the problem squarely.[37] If the tenant has in fact been using the premises, if his business is being operated in spite of a degree of interference, and in a

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[34] Compare the following cases with the discussion in the text: Union Cotton Co. v. Bondurant, 188 Ky. 319, 222 S.W. 66 (1920); Bush v. Baker, 51 Mont. 326, 152 Pac. 750 (1915); Goebel v. Hough, 26 Minn., 252, 2 N.W. 847 (1879). See also the cases set forth in note 35.

[35] Compare the following cases: Fennin v. Balter, 168 La. 527, 122 So. 716 (1929); Johnson v. Inman, 134 Ark. 345, 203 S.W. 836 (1918); Chambers v. Belmore Land & Water Co., 33 Cal. App. 178, 164 Pac. 404 (1917); Ingalls v. Beall, 68 Wash. 247, 122 Pac. 1063 (1912); Spencer v. Hamilton, 113 N.C. 49, 18 S.E. 167, 37 A.S.R. 611 (1893); Farce Bros. v. Gottwald, 149 Minn. 268, 183 N.W. 356 (1918).

[36] Cf. Forbes v. Wyatt, 143 Va. 802, 129 S.E. 491 (1925).

[37] See particularly Johnson v. Inman, 134 Ark. 345, 203 S.W. 836 (1918).

suit over the payment of rent, he is allowed credit according to the suggested measure, the adjustment is being made for the injury to his interest in his bargain, and not because of any injury to his interest in the business. If he should be allowed the use of the premises in their unimproved condition without having to pay any rent, and in addition to that should get the sum computed according to the court's suggestion, then he would be getting compensation for something more than the "loss" of bargain.

It is submitted that this would be an inadequate measure of any injury to the plaintiff's interest in the continuous operation of his business If this interest has in fact been injured, then he ought to be able to show how that business has been affected. The evaluation could be made with reasonable accuracy in many cases. Perhaps the tenant ought to be charged for the use of the premises if he has been able to use them. Concededly, one of the factors to be considered in estimating what the cost of operation would have been is the agreed rental value of the premises with the improvements as anticipated. It is not apparent why this interruption to the continuous operation of the plaintiff's business should not be evaluated like any other similar injury produced under slightly different circumstances, unless it is because the amount claimed seems unusually great. Rental value of the premises used in the business is suggested as an apt measure in other cases where the plaintiff's business has been interrupted and the profits claimed are large. Perhaps the court has some such idea in mind here when it suggests the difference in rental values as a measure for the plaintiff's injury. In this type of case the measure is particularly inapt.

Wherever there has been a breach of an exclusive agency contract, or a breach of a contract for the exclusive showing of films or entertainment, the damage problem is most important.[38] The agency or monopoly has been destroyed. There is no difficulty about injuries to several interests. Only one interest has been affected, and that is the plaintiff's interest in his bargain. To give the plaintiff adequate compensation for his "loss" of bargain the jury should be allowed to con-

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[38] Sales agencies: Buxbaum v. G.H.P. Cigar Co., 188 Wis. 389, 206 N.W. 59 (1925); Barnett v. Caldwell Furniture Co., 277 Ill. 286, 115 N.E. 389 (1917); Hirschhorn v. Bradley, 117 Ia. 130, 90 N.W. 592 (1902); Entertainment contracts: Lester v. Fox Film Corp'n., 114 S.C. 533, 104 S.E. 178 (1920); Orback v. Paramount Pictures Corp'n., 233 Mass. 281, 123 N.E. 669 (1919); Broadway Photoplay Co. v. World Film Corp'n., 225 N.Y. 104, 121 N.E. 756 (1919). These cases all present damage problems. The plaintiff's task in each case was to introduce enough evidence to show the effect of the defendant's breach upon the plaintiff's business prospects. Cf. Prejean v. Delaware-Louisiana Fur Trapping Co., 13 F. (2nd) 71 (C.C.A., 5th, 1926); Naraganset Co. v. Riverside Park etc. Co., 260 Mass. 265, 157 N.E. 532 (1927).

sider the possible income he would have earned had the defendant continued to perform. The plaintiff cannot waste his time during the period the contract was to run. He is expected to do something to earn a living, he is expected to handle some other product or to show some other entertainment in his theatre, in other words, he is expected to mitigate his damages. But the sale of no other product, nor the showing of any other films, will give him the same advantages he would have enjoyed had the defendant continued to furnish the articles he had agreed to supply to the plaintiff. It will be necessary for the plaintiff to show how much he has made in the past when he had been selling the defendant's product, or showing his films, the amount of business his competitors, the defendant's new agents, have done during the time when the defendant has been in default, and what he himself has earned from the sales of other products, or the showing of other films, during this period. Perhaps he has never shown this brand of films in his theatre, nor has he ever before sold the defendant's product. The defendant has broken the contract before the plaintiff has had a chance to sell or exhibit under it. If he can show the amount of business he has been doing with the other products, and can also show what his competitors have done with the defendant's line, and that he and the competitors have had to meet the same general business hazards, there will be enough evidence in the case so that the jury can evaluate the injury. All that is required in any case is that the injured party get enough evidence before the jury that they may be reasonably accurate in fixing the amount of compensation he is to receive. The greater the sum that the plaintiff claims the more strict the court is in requiring certain and positive evidence to support a verdict in his favor.[39]

The Conclusion

The vague rules of thumb about "remote consequences," "contemplation of the parties," "mitigating damages," and the like, do not help one to make a realistic analysis of the process of assessing damages. Several interests may have been affected by the defendant's act in the particular case under consideration. A careful analysis must be made to find out what those interests are, how they have been affected, and why compensation has been, or should be, denied, or awarded to the injured party. Loss of profits is a phrase which describes nothing in particular.[40] It is usually when the interest concerned is a business interest that the courts and the parties will be talking about a loss of profits.

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[39] Cf. Stephany v. Hunt Bros. Co., 62 Cal. App. 638, 217 Pac. 797 (1923).

[40] See the opinion of Jaggard, J., in Emerson v. Pacific Coast & Norway Packing Co., 96 Minn. 1, 4, 104 N.W. 573, 574, 1 L.R.A. (N.S.) 445, 448, 6 Ann. Cas. 973, 974, 113 A.S.R. 603 605 (1905).

No method of approach to an understanding and presentation of the problems in these cases can be perfect. Some systematic attempt at analysis should be made. It is suggested that the scheme outlined above can be used to make the analysis of cases already decided a comparatively satisfactory process. It is suggested, too, that the cases should be subjected to some such inquiry during the course of litigation and before the decisions are handed down.