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Damages: Limitations in Recovery on Lost Profits in Indiana

DAMAGES: LIMITATIONS ON RECOVERY OF LOST PROFITS IN INDIANA

Loss of profit is a recognized element of compensable harm.[1] The process by which a court determines whether such a claim is compensable is not unlike that followed in deciding all claims for damages.[2] It must be established that the interest existed in the plaintiff[3] and that invasion of the interest was foreseeable;[4] finally, the loss suffered must be translated into damages.

The determination of the amount of damages was, and is today, to a large extent, peculiarly within the province of the jury.[5] The formula-

1. For specific instances in which the interest has been recognized, See McCORMICK, DAMAGES §§ 123-26 (1935).

2. In tort: See GREEN, RATIONALE OF PROXIMATE CAUSE c. 1 (1927). In contract: See *Id.* c. 2; 5 CORBIN, CONTRACTS §§ 1006-19 (1951).

3. "[Interests] include all those rights of personality, rights of property and rights of economic advantage and opportunity." GREEN, *op. cit. supra* note 2, at 4. The range of difficulty encountered in establishing the interest varies. The plaintiff's interest in being free from physical damage to person or property is assumed. In such cases, the only remaining question is that of liability and damages. *Id.* at 5. However, the interest may be intangible so as to depend for legal recognition upon the existence of an observable fact, *e.g.*, the traumatic injury required for recovery when mental anguish is negligently caused. See Note, 15 IND. L.J. 239 (1940). Legal recognition of rights of economic advantage may depend upon proof of a number of factors from which a court is willing to assume that the interest asserted to have been invaded actually existed. See Eagle Lake Ice Co. v. Munson, 73 Ind. App. 496, 127 N.E. 839 (1920). In these cases the courts attempt to preserve the integrity of their function by predicating liability only upon the existence of a sufficiently proved damage. See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY 475 (1906).

4. Subsumed under this determination are the problems of right-duty, violation of duty, and causal relation as set forth by GREEN, JUDGE AND JURY c. 2 (1930). See also Note, 29 IND. L.J. 622 (1954). The analogous determination in contract cases proceeds from the principle announced in Hadley v. Baxendale, 3 Ex. 341, 156 Eng. Rep. 145 (1854). See RESTATEMENT, CONTRACTS § 330 (1932); 5 CORBIN, CONTRACTS §§ 1007-09 (1951). For a judicial exposition of the principles involved, See Coy v. Indianapolis Gas Co., 146 Ind. 655, 46 N.E. 17 (1897) (tort); Indiana, B. & W. Ry. v. Adamson, 114 Ind. 282, 15 N.E. 5 (1887) (contract). See note 11 *infra*.

5. In the area of damages for injuries to the person there is virtually no control of the jury's discretion. See Consolidated Stone Co. v. Staggs, 164 Ind. 331, 337-38, 73 N.E. 695, 697-98 (1905). Very little can be known of the exercise of power by trial judges over the amount of damages, but some indication of the possible control is indicated by the standards which appellate courts use in reviewing the amount of damages awarded. In appeals taken for inadequacy of damages a court will, apparently, indulge any presumption necessary to affirm. See Henschen v. New York Cent. R.R., 223 Ind. 393, 400-02, 60 N.E.2d 739, 740-41 (1945) (wrongful death); Spannuth v. Cleveland, C.C. & St. L. Ry., 196 Ind. 379, 382, 148 N.E. 410, 411 (1925) (personal injury); Klenke v. New York, C. & St. L. R.R., 83 Ind. App. 478, 481, 149 N.E. 103, 104 (1925) (wrongful death). *But see* IND. STAT. ANN. § 2-2406 (Burns 1946). The standards stated for reversal in appeals for excessive damages may be summarized as passion, prejudice, or corruption; outrageous at first blush; and an improper element of damages included in an instruction. See, *e.g.*, Samuel E. Pentecost Const. Co. v. O'Donnell, 112

tion of a law of damages,[6] however, has resulted in an increased control by courts over the jury's discretion. Injury to property interests, because of the existence of values[7] with which a court has familiarity independent of a record, is most susceptible to judicial control and represents the most fully developed area in the law of damages.[8] The rules applicable to the measurement of damages for invasions of property interests are stated in terms of market value. The existence of these normal rules lays the basis for distinction between general and special injury.[9] It is to the damages granted for special injury that the require-

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Ind. App. 47, 62, 39 N.E.2d 812, 818 (1942); Chicago, I. & L. Ry. v. Stierwalt, 87 Ind. App. 478, 493-94, 153 N.E. 807, 812 (1927); Illinois Central R.R. v. Cheek, 152 Ind. 663, 678, 53 N.E. 641, 646 (1899); Funk v. Bonham, 204 Ind. 170, 186, 183 N.E. 312, 318 (1932). As a practical matter it appears that a judgment claimed to be excessive will not be reversed unless the evidence establishes that there was no reasonable basis for the award. See Pixley v. Catey, 102 Ind. App. 213, 1 N.E.2d 658 (1936).

6. The law of damages is a by-product of the control which judges have developed over juries. McCORMICK, DAMAGES § 6 (1935). "[T]he whole development of the common law system was hampered and retarded for want of some simple and effective means of controlling the jury. Apparently it was equity which, by granting relief against unjust verdicts, forced the Courts of the common law to remedy the defect. And of all the ways in which equity might have intervened, the one chosen was to grant a fresh trial at law." Washington, *Damages in Contract at Common Law*, 47 L.Q. REV. 345, 358 (1931). See also SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW c. 4 (1922).

7. The law of damages for the invasion of property interests is oriented around the concept of market value. Market value, though often referred to in opinions as representing an immutably recorded worth, is legal shorthand for that amount of money which a commodity would bring when sold by a willing seller to a willing buyer. Only in the rare cases where a commodity exchange exists is the fiction of "handy reference" efficacious. See McCORMICK, DAMAGES §§ 44-45 (1935). The limits of the concept and its strength are illustrated in cases where personal effects are converted and courts justify resorting to a compensatory measure of damages because of the absence of a market value. See Aufderheide v. Fulk, 64 Ind. App. 149, 112 N.E. 399 (1916).

8. Washington suggests that the growth of commerce in the eighteenth century led courts to develop the requirement of certainty in order to make the measurement of damages in *contract* cases uniform. Washington, *supra* note 6 at 364-65. The illustrations he uses tend to support the broader generalization that the certainty requirement was applied throughout the range of property interests as well. Application of the market value concept would aid this advance. See note 38 *infra*.

9. Damages not measurable by the use of a normal rule, *e.g.*, the difference between contract price and market value, are special damages. This label subjects a plaintiff to the requirement that special damage be pleaded with particularity in order to give a defendant notice of the claim against which he must defend. See Loesch v. Koehler, 144 Ind. 278, 41 N.E. 326 (1896), *rehearing*, 43 N.E. 129 (1896). The problem in recovering for "special" damage is largely one of overcoming the application of a normal rule to measure loss. Of terms such as "direct," "indirect," "immediate," and "consequential," Corbin suggests that "their constant use shows two things: First, that legal responsibility for injuries has a limit. Secondly, that this limit can not be so described in words as to be capable of mechanical application; much must be left to the judgment, and even to the emotions, of the trial court and jury." 5 CORBIN, CONTRACTS § 998 (1951).

ment of certainty of proof of amount has meaningful application.[10]

Since the certainty of amount requirement is practicable only as a standard for review, it is possible that its literal application may result in a denial of damages for an element of damage determined to have been prima facie compensable under a foreseeability test.[11] There are two equally desirable goals: evidence from which a jury can determine the amount of damages and full compensation for injury suffered. Since there are a great number of cases in which the problem arises, often with no consistency between cases, patterns can be found only in the analysis of many cases within a single jurisdiction.

Prior to the recognition in this state of the certainty of amount requirement,[12] judicial review of the grant of damages for loss of profit

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10. It is frequently asserted that in an earlier period both English and American courts denied a recovery of lost profits. 1 SEDGWICK, DAMAGES § 175 (9th ed. 1920). In Griffin v. Colver, 16 N.Y. 489, 69 Am. Dec. 718 (1858), a leading case on recovery of lost profits, the early view was modified so as to recognize that lost profits might be recovered if their amount could be proved with some degree of certainty. In the opinion Judge Seldin went to great lengths to distinguish the certainty of amount requirement, which he announced, from the certainty of responsibility requirement suggested by Pothier and enunciated in the case of Hadley v. Baxendale, 3 Ex. 341, 156 Eng. Rep. 145 (1854). *Id.* at 493, 69 Am. Dec. at 721. See Washington, *Damages in Contract at Common Law,* 48 L. Q. REV. 90, 103-04 (1932). In the words of Judge Seldin, "the party injured is entitled to recover . . . gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract . . . and they must be certain, both in their nature and in respect to the cause from which they proceed." Griffin v. Colver, 16 N.Y. 489, 494-95, 69 Am. Dec. 718, 722-23 (1858). Whether or not the maritime cases, usually cited for the proposition that the early law did not compensate for lost profits, can be distinguished from the cases leading to the principle of remoteness announced in *Hadley's* case is a moot question in view of the favor which the requirement of certain proof has found in present law. It is, nonetheless, interesting to compare the early maritime cases with later cases in which the same problem was resolved differently because lost profits could not fairly be said to be remote. *Compare* The Amiable Nancy, 3 Wheat. 546 (U.S. 1818), *with* Williamson v. Barrett, 13 How. 101 (U.S. 1851).

11. It has been suggested that there is no significance in distinguishing between "fact of loss" and "amount of loss" because proof of one necessarily establishes the other. Note, 17 MINN. L. REV. 194, 196 (1932). While this is no doubt true, compensation does not result to the plaintiff by having proved the minimum amount of loss required to establish a cause of action. Doddridge v. American Trust & Savings Bank, 98 Ind. App. 324, 342, 189 N.E. 165, 168 (1934). Proof of the fact of loss is proof of the interest allegedly invaded and of the defendant's responsibility for the invasion. After a trial judge has made a determination of these facts in favor of the plaintiff it is doubtful that he would be inclined to rule that the same evidence is too uncertain to measure the amount of damages. It would seem to follow that it is appellate courts which make meaningful the requirement that damages be proved with certainty. The implication of this requirment is that, regardless of the certainty of the fact of damage, there can be compensatory damages only in the amount proved with certainty. Doddridge v. American Trust & Savings Bank, *supra.* Insofar as the evidentiary requirements of proof of amount exceed what is required to prove the fact of damage, the certainty requirement provides opportunity for frustration of the effectiveness of the damages remedy. See Note, 15 IND. L.J. 237 (1939).

12. See note 10 *supra.*

was largely limited to the determination of questions of liability. This is a question of foreseeability of the injury. The principle of *Hadley v. Baxendale*[13] was used in cases of breach of contract, and, in tort, the analogous test of proximate cause or unreasonable risk was employed.[14] The case of *Shelbyville L.B.R.R. v. Lewark*[15] illustrates the review process under this approach. There a wagon with which plaintiff conducted a freight-hauling business was negligently damaged. The Supreme Court affirmed recovery of "what the value of the use of the wagon would have been to him while it was undergoing repair."[16] Since the injury was a proximate result of the defendant's negligence, it was ruled that the loss must be compensated.[17] Though the opinion refers to speculative lost profits, this was apparently intended for those cases in which the loss could not be clearly termed "immediate." The case stands for the proposition that the measure of damages for a deprivation of use is the "value of the use" to the injured party.

The evidentiary problems involved in establishing the value of use were first raised in *Fultz v. Wycoff*.[18] Damages were sought for a misrepresentation which caused a stallion to be incapacitated during the "foal-getting" season; and, over the defendant's objection, testimony was allowed on loss of profit for the season.[19] In affirming for the plaintiff, the Court stated: "[T]he jury should have information of the prospects for the season, not as the measure of damages, but as a guide to the exercise of that discretion, which must always, to a certain extent, rest with a jury."[20] It is not apparent from the opinion in either case above that there was evidence substantiating a potential demand for the services which the plaintiffs proferred.[21]

Indicative of the change in approach by the Indiana courts after recognition of the certainty of amount requirement[22] are the cases of *Western Gravel Road Co. v. Cox*[23] and *Glass v. Garber*.[24] In the *Cox* case the defendant, in a counterclaim, specified a loss of tolls as an ele-

13. 3 Ex. 341, 156 Eng. Rep. 145 (1854). See note 10 *supra*.
14. See cases cited, note 4 *supra*.
15. 4 Ind. 471 (1853).
16. *Id.* at 473.
17. "The principle is to indemnify the party injured—to compensate him for any loss which is the *immediate result* of the wrongful act." *Id.* at 474 (Emphasis added.)
18. 25 Ind. 321 (1865).
19. "I think I lost, by the loss of the season, about $250." *Id.* at 322.
20. *Id.* at 326.
21. The court rejected defendant's contention that the proper measure of damages was the cost of renting another stallion during the period of the deprivation; there was no possibility that a similar stallion could have been rented. *Id.* at 325. See discussion at pp. 146-47 *infra*.
22. See note 10 *supra*.
23. 39 Ind. 260 (1872).
24. 55 Ind. 336 (1876).

ment of damage arising from the plaintiff's delay in completing a road pursuant to contract. This element of damage was stricken from the counterclaim on motion by the plaintiff, and the order was affirmed on appeal. In view of the procedure used, evidence could not have been introduced as to loss of tolls; and it is, therefore, difficult to agree with the court's assumption that the trial judge had invoked a rule requiring certainty in the proof of the amount of damages. The claim was probably stricken after the trial court had determined that it was not maintainable under the principle of *Hadley v. Baxendale*. The appellate court's opinion ignored the question of foreseeability and discussed, rather, the contingent nature of profits so as to infer that, by their very nature, they are not a proper basis for the assessment of damages.

The significance of the *Cox* decision was obscured by the reasoning through which the affirmance was reached;[25] this confusion is compounded in the *Glass* case. The defendant contracted to publish a notice of plaintiff's intention to reapply for a saloon license. Because the notice was not published the license was denied; plaintiff sued to recover lost profits for the thirty day period he was forced to close.[26] In reversing the trial court's order sustaining a demurrer to the complaint, the Supreme Court based its decision on the narrow ground that the complaint stated a valid claim for the consideration paid for the publication. Although the plaintiff had an established business upon which the probability of profits could have been predicated,[27] the opinion evaded all discussion which might have served to guide the lower court on this point in the new trial.[28]

25. If the effect of a determination that damage is remote is to be distinguished from that where the damages resulting from foreseeable damage can not be proved with the requisite certainty, it would seem that the former must proceed from an interpretation of the contract and the latter upon the evidence adduced to support the damages. Doddridge v. American Trust & Savings Bank, 98 Ind. App. 324, 342, 189 N.E. 165, 168 (1934). "[I]n *Hadley's Case,* the Court decided that on the facts the plaintiff was not entitled to maintain a claim for loss of profits. If it had decided that a claim was maintainable, the problem of measuring the damages to be recovered would still remain." Washington, *supra* note 10, at 105.

26. Glass v. Garber, 55 Ind. 336, 338 (1876).

27. The complaint alleged that the "business, during the thirty days, was worth fifteen dollars per day, above expenses." *Ibid.*

28. "[H]e paid the appellees three dollars and a half for inserting the advertisement, which was never inserted. We think he is entitled . . . to recover this amount, at least; . . . and we think, if . . . the complainant's . . . place of business became useless to him for a time, that it is a fair element for a jury to consider, in estimating the damages . . . [B]ut we are of opinion that the mere problematical, uncertain, contingent, vague and speculative profits, upon expected sales of liquor by retail . . . do not constitute a proper basis upon which to assess damages." *Id.* at 340. Apparently, the court was undecided as to which approach it should take. The fact of loss of profit is clear enough to cause the court to suggest its compensability, but there is no suggestion as to how it could be measured without receiving evidence of the profit actually made.

The last authoritative pronouncement by the Supreme Court on the question of compensation for loss of profits and on the amount of evidence necessary to satisfy the certainty of proof requirement is in the case of *City of Terre Haute v. Hudnut*.[29] To determine the existence of an interest in future gains, the court in this case used the criterion of an established and profitable business.[30] The court concluded that when the fact of injury to an interest is established, evidence of profits made in the past must be considered in determining the amount of damages.[31] As in the *Fultz* case, the court held that evidence of lost profit, while not a measure of damages, is properly considered by a jury in estimating the amount of the damages.[32]

There is some indication that a court's approach in reviewing a grant of damages for loss of profits is influenced by the nature of the wrong causing the damage.[33] When cases involving breach of contract are compared with tort cases, it appears that less concern is shown in the latter toward the certainty of the evidence supporting damages.[34] Although no definitive explanation for this result is apparent, among possible reasons is the opportunity of contracting parties to provide for the contingency of default;[35] tortious invasions are not susceptible of the

29. 112 Ind. 542, 13 N.E. 686 (1887).

30. "We think it clear that where there is an established business of a permanent character . . . the net earnings of the present and past are competent to be considered by the jury in estimating the damages." *Id.* at 557, 13 N.E. at 693. The *Glass* case was both distinguished on the ground that the profit lost was prospective and said to be, by implication, in accord with the result reached. *Id.* at 551-52, 13 N.E. at 691. See note 25 *supra*; Berkey & Gay Furniture Co. v. Hascall, 123 Ind. 502, 24 N.E. 336 (1890) (new business).

31. See note 30 *supra*. Proceeding from the observation that a successful business was interrupted, the court rejected defendant's contention that, in any event, the plaintiff should be limited to a recovery of the rental value of the business as "a doctrine radically wrong." City of Terre Haute v. Hudnut, 112 Ind. 542, 558-59, 13 N.E. 686, 694 (1887).

32. *Id.* at 559, 13 N.E. at 694.

33. *Id.* at 555, 13 N.E. at 692.

34. *Compare* Fultz v. Wycoff, 25 Ind. 321 (1865); City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N.E. 686 (1887) (tort), *with* Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 76 N.E. 294 (1905); J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 71 Ind. App. 401, 118 N.E. 360 (1918) (contract). *But see* Niagara Fire Ins. Co. v. Greene, 77 Ind. 591 (1881) (contract). "But the truth is, probable profits which might have been received, not remote or merely speculative, have often been allowed in proof, not as the measure of damages, but to aid the jury in estimating the damages." *Id.* at 594. See notes 35, 37 *infra*.

35. It might as well be said that if parties to contracts were omniscient there would be no breaches of contract. Nevertheless, this distinction has influenced determinations of liability. "[W]here extraordinary liabilities are to be assumed by a party . . . it should appear that he understood the nature of the responsibility he was taking upon himself, and . . . his compensation should include some consideration for the responsibility assumed. . . . If parties desire to avail themselves of a claim to such damages, they should expressly stipulate for them in the contract itself." Acme Cycle Co. v. Clark, 157 Ind. 271, 278, 61 N.E. 561, 563 (1901). The contemplation of the parties test is also subject to this narrow refinement. "The liability of the party for the extra-

same control. Another possible explanation is that courts may measure the risk assumed under the contract by the value of the consideration received.[36] This would tend to severely limit the damages recoverable. The suggestion made that encouragement of business demands limited damages[37] is hardly realistic inasmuch as the injured party is more often than not a corporate or other business enterprise whose uncompensated harm also represents a serious loss to the business world. The original difference in treatment of the two types of injuries—tort and contract—seems to have disappeared in later cases.[38] At the same time the degree of certainty required to support recoveries in the contract cases seems to vary; reasons for this variance are often suggested by factual differences in the cases.

In a case[39] in which the damage was foreseeable but in which there was neither an established business nor a basis for estimating profit from the past,[40] a jury was allowed to make an estimate of loss. It does not appear what evidence entered into the determination although the court seemed to indicate that, when the fact of damage is clear, the best evidence which the plaintiff can provide will be admissible in proving damages.[41] Allusion is frequently made in such a case to the propriety of

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ordinary damages . . . should be so plainly understood as to render it one of the terms of the contract." *Ibid.* A tendency to limit the damages recoverable for breach of contract is also found in cases which label recoveries based upon *market value* rules as *legal* or *ordinary*. See Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 135, 76 N.E. 294, 298 (1905).

36. See note 35 *supra*. This view has been strongly criticized; consideration has no necessary relation to the damages recoverable. See 5 CORBIN, CONTRACTS § 996 (1951). "Assumpsit was not a natural growth; an acorn was not dropped and later found to have become an oak. It was a man-made creation, for certain very definite purposes. . . . The requirement of consideration was imposed out of an obvious necessity of policy, but to make it the measure of damages would have been largely to defeat the object for which assumpsit was created." Washington, *supra* note 6, at 373.

37. "In allocating the risks of business, the promisor, who is generally the entrepreneur, has been favored . . . If the parties wish to make some other arrangement, it is open to them to do so; otherwise, in these mercantile transactions, it is often the part of wisdom to sacrifice consistency and theory in favour of definiteness and expediency." Washington, *supra* note 10, at 97. See note 8 *supra*.

38. See Weddle v. I.R.C. & D. Warehouse Corp., 119 Ind. App. 354, 85 N.E.2d 501 (1949) (negligence); Moorman Mfg. Co. v. Barker, 110 Ind. App. 648, 40 N.E.2d 348 (1941) (breach of warranty); Weisman Motor Sales, Inc. v. Allen, 106 Ind. App. 284, 19 N.E. 2d 505 (1938) (contract).

39. Berkey & Gay Furniture Co. v. Hascall, 123 Ind. 502, 24 N.E. 336 (1890). Defendant built a hotel and contracted with the plaintiff to furnish it for occupancy by a specified date. To an action for the cost of the furniture, defendant entered a counterclaim for lost profits during a period of delays prior to performance. *Id.* at 503, 24 N.E. at 337.

40. The rental value of the hotel for the period subsequent to the loss was alleged. *Ibid.*

41. *Ibid.* See also Niagara Fire Ins. Co. v. Greene, 77 Ind. 591 (1881); Aetna Life Ins. Co. v. Nexsen, 84 Ind. 347, 355-56 (1882). In the latter case it was held that damages could be based upon the probabilities that insurance policies sold by the plain-

allowing the jury discretion in assessing damages.[42]

A claim for loss of use of production facilities alleged to have resulted from breach of contract presents the problem of recovering lost profits in its most difficult aspect. In *Acme Cycle Co. v. Clark*[43] an order sustaining a demurrer to a counterclaim for lost profits was affirmed because it was not shown that, if the machinery had been delivered according to contract terms, the claimant would have been in a position to put it to use. The case was, clearly, not one in which the amount of lost profits could be an issue, and the court's statement of the requirement of certain proof is not necessary to the holding.[44]

In *Connersville Wagon Co. v. McFarlane Carriage Co.*,[45] however, the plaintiff recovered a judgment for loss of use of production facilities.[46] In reversing, the Supreme Court decided that the admission of evidence of lost profit was error.[47] This was accomplished by a holding that the loss was not a "direct"[48] result of the breach and that, in any event, lost profits are not a proper basis upon which to determine value of use.[49] Since the loss was held to be unforeseeable, reference to the measure of damages for deprivation of use was, again, unnecessary.

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tiff would remain in force and that premiums would continue to be paid. "Certainty is not attainable, but this may be said of all kindred questions. Because absolute certainty is not attainable is no reason for rejecting all claims to recovery. If certainty were to be taken as the criterion, there would be few cases indeed where there could be any recovery at all." Aetna Life Ins. Co. v. Nexsen, *supra.* In Cleveland, C.C. & St. L. Ry. v. Woodbury Glass Co., 80 Ind. App. 298, 120 N.E. 426 (1918), the certainty requirement was departed from in favor of "some evidence to sustain the amount of damages assessed." *Id.* at 314, 120 N.E. at 432. *Contra,* Indianapolis Rys. v. Terminal Motor Inn, Inc., 112 N.E.2d 596 (Ind. App. 1953).

42. Berkey & Gay Furniture Co. v. Hascall, 123 Ind. 502, 510, 24 N.E. 336, 339 (1890). *See* Fultz v. Wycoff, 25 Ind. 321, 326 (1865); City of Terre Haute v. Hudnut, 112 Ind. 542, 557, 13 N.E. 686, 693-94 (1887).

43. 157 Ind. 271, 61 N.E. 561 (1901).

44. "Here there was no outlay, no deprivation of the use of property, no loss upon contracts previously entered into. . . . The only damages alleged to have been sustained . . . consisted in the loss of future, contingent, speculative, and imaginary profits." *Id.* at 278, 61 N.E. at 563. This is a determination that plaintiff had no interest in future gains from the performance of the contract. See note 3 *supra.*

45. 166 Ind. 123, 76 N.E. 294 (1905).

46. Unlike the facts of the Clark case, the plaintiff alleged the availability of other parts necessary to produce, employee and plant capacity, and orders from solvent customers for full production. *Id.* at 127, 76 N.E. at 295.

47. *Id.* at 135, 76 N.E. at 298.

48. Professor Corbin has fittingly characterized the test of natural consequence as "probably the most commonly used verbal justification of decisions already arrived at." 5 CORBIN, CONTRACTS 75 (1951). See note 51 *infra.*

49. The court did not, however, justify this on its determination that the loss was unforeseeable, i.e., remote. "[B]ecause of the uncertainty of future profits and because the risks of the business should rest upon the owner thereof, the value of the use should be regarded as the basis for a recovery, where a case is made for the allowance of special damages growing out of a deprivation of the use of property." Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 136, 76 N.E. 294, 299 (1905).

This dictum is contrary to the cases heretofore considered,[50] and this fact, along with the formulistic reasoning which led to the determination of unforeseeability,[51] deprives the case of value as precedent. Since this is the Supreme Court's last pronouncement on the subject, the answer to questions concerning the recognition of an interest in lost profits and the factors which properly enter into a determination of damages for such a loss must be found either in the line of cases culminating in *City of Terre Haute v. Hudnut* or in the later cases decided by the Appellate Court.

A breach of a construction contract or an agreement for the purchase of unascertained goods raises the problem of lost profits for the contractor or manufacturer.[52] The requirement of certainty was considered with respect to proof of profits lost by a manufacturer in *W. J. Holliday & Co. v. Highland Iron & Steel Co.*[53] The violated contract contained options which defendant might have exercised in fulfilling its obligation to order and submit specifications for bar iron. Defendant predicated its argument as to uncertainty upon the varying prices of the iron during the option period, the varying sizes at different production costs which might have been ordered, and the fact that plaintiff had not shown the cost of manufacturing his products.[54] The court rejected these contentions with the observation that "if the vendor can make his goods for less than the market price, he is entitled to his actual profit."[55] Though the loss of profit was probable, the evidence could not have established its amount with any degree of certainty.[56] The recitation

50. See note 42 *supra.*

51. "Whether . . . [plaintiff] brought itself within [the rule of the *Hadley* case] we shall not inquire." Connersville Wagon Co. v. McFarlan Carriage Co., 166 Ind. 123, 136, 76 N.E. 294, 299 (1905). "[A]nd, finally, a measure of damages (the difference between contract and market price of the wheels not delivered) can in any event be applied which is substantial in its character and sufficient to cover all natural or proximate results of the breach." *Id.* at 135, 76 N.E. at 298. It is submitted that the substantiality of an inapplicable measure of damages should have no bearing upon the right to recover special damages. See note 25 *supra.*

52. The amount ordinarily recoverable is the difference between the contract price and cost of constructing or manufacturing. Dunn v. Johnson, 33 Ind. 54, 59 (1870); Richter v. Meyers, 5 Ind. App. 33, 34, 31 N.E. 582, 583 (1892); RESTATEMENT, CONTRACTS § 346(2) (1932).

53. 43 Ind. App. 342, 87 N.E. 249 (1909).

54. *Id.* at 351, 87 N.E. at 251.

55. *Ibid.*

56. The court suggests that where the specific goods to be manufactured are unknown, sufficient certainty is found by looking to the ordinary course of the manufacturer's business; and, as to variations of price with time, the cost least injurious to the one having the option should be used. Further considerations in his favor, it is suggested, must be shown by the defendant. *Id.* at 354-55, 87 N.E. at 252-53. *Cf.* Maddox v. Yocum, 114 Ind. App. 390, 398, 52 N.E.2d 636, 639 (1944) (evidence of profit within knowledge of defendant). *Compare* Cincinnati, I. St. L. & C. Ry. v. Lutes, 112 Ind. 276, 11 N.E. 784 (1887), *rehearing, Id.* at 284, 14 N.E. 706 (certainty question held

of the requirement of certainty in these cases is merely an attempt at logical consistency.[57]

In the breach of a sale contract by the seller the ordinary measure of damages is the difference between market value and contract price of the goods at the time of the breach.[58] Like all rules based upon market value, there is an assumption that this amount will enable the damaged party to procure a substituted performance.[59] But when the property can not be replaced, losses will depend upon the uses which were to have been made of it; the amount of the recovery then depends upon the foreseeability of the loss. In *J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co.*[60] the recovery was the difference between *retail* and contract price of shoes which the defendant failed to deliver.[61] In the course of the opinion the court, quoting with approval from an Oregon case,[62] states: "The rule that damages which are uncertain or contingent cannot be recovered . . . applies to such damages as are not the certain result of the breach, and not to such as are the certain result but uncertain in amount."[63] This is a refutation of the certainty of amount requirement and of the reasoning process which it embodies.[64] Plaintiff was deprived of the opportunity of making a profit on the sale of shoes. The difference between this loss and a total interruption of a business or the frustration of an expansion is one of degree only. There seems to be no reason why the same approach should not be applicable to all such cases.

In *Weddle v. I.R.C. & D. Warehouse Corp.*,[65] plaintiff sought damages resulting from negligent injury to a tractor and trailor. The ap-

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waived), *with* Weddle v. I.R.C. & D. Warehouse Corp., 119 Ind. App. 354, 85 N.E.2d 501 (1949) (certainty considered despite appellant's failure to properly raise question).

57. Though the requirement of certain proof of the amount of damages is generally considered a part of plaintiff's case, the burden of disproving a presumed amount may be shifted to the defendant. See note 56 *supra*; Dunn v. Johnson, 33 Ind. 54, 63 (1870). See also Weisman Motor Sales, Inc. v. Allen, 106 Ind. App. 284, 19 N.E.2d 505 (1938); McCormick, Damages § 27 (1935).

58. Kent v. Gintner, 23 Ind. 1 (1864); Rahm v. Deig, 121 Ind. 283, 23 N.E. 141 (1889).

59. Washington, *supra* note 10, at 97; McCormick, Damages § 44 (1935).

60. 71 Ind. App. 401, 118 N.E. 360 (1918).

61. *Id.* at 438, 118 N.E. at 369.

62. Blagen v. Thompson, 23 Ore. 239, 31 Pac. 647 (1893).

63. J. P. Smith Shoe Co. v. Curme-Feltman Shoe Co., 71 Ind. App. 401, 432-33, 118 N.E. 360, 367 (1918).

64. *But cf.* Eagle Lake Ice Co. v. Munson, 73 Ind. App. 496, 127 N.E. 839 (1920). The court reversed a judgment for damages allegedly resulting from defendant's failure to deliver ice. Plaintiff claimed a loss of profits resulted from his consequent inability to make ice deliveries at the customary early hour. The court suggested that the certainty requirement would have been met if there had been evidence: of definite contracts of sale for a definite period; that the customers were lost solely by reason of the plaintiff's inability to deliver ice at an early hour; that the customers were solvent; and that the customers continued to reside in the city. *Id.* at 499-500, 127 N.E. at 840.

65. 119 Ind. App. 354, 85 N.E.2d 501 (1949).

pellate court disallowed a recovery of the value of the use during the period in which repairs were being made on the ground that value of use is a proper measure of damages only when property has no rental value.[66] The court also stated that net profit, when ascertainable with reasonable certainty, is an *alternative* measure of damages for value of use.[67] This departure from local precedent is traceable to a South Carolina case[68] in which rental value was used synonomously with the Indiana concept of value of use. The South Carolina court admitted evidence of lost profit to establish rental value.[69] It is, however, confusing to use rental value in this way.[70] Rental value is a proper measure of damages for deprivation of use only where there is a duty on the part of the injured party to mitigate by renting substitute property[71] or where a claim is based upon the cost of a rental made pursuant to mitigation.[72] In either context, it is a modification of market value and is coextensive with

66. "[T]here is no evidence whatever as to the rental value of the [plaintiff's] tractor-trailer nor is there any evidence that it had none." *Id.* at 359, 85 N.E.2d at 503. "'[I]n cases involving the deprivation of the use of property, the damage is its rental value, if it has a rental value, but, if not, then the value of its use is the measure of damages.'" *Ibid.*, quoting Fisher v. Carey, 67 Ind. App. 438, 119 N.E. 376 (1918). See note 67 *infra.*

67. Weddle v. I.R.C. & D. Warehouse Corp., 119 Ind. App. 354, 359, 85 N.E.2d 501, 503 (1949). The court drew this conclusion from the case of Maddox v. Yocum, 114 Ind. App. 390, 52 N.E.2d 636 (1944), in which the court, while purporting to follow the *Hudnut* case, equated rental value with lost profits but used lost profits as the measure of damages. Clearly, the court, in equating rental value and lost profits, did not fully consider the authorities it used. Rental value was emphatically rejected in the *Hudnut* case. See note 31 *supra.* The case of New York Cent. R.R. v. Reidenbach, 71 Ind. App. 390, 125 N.E. 55 (1919) illustrates an appropriate use of the rental value measure. In that case the plaintiff's loss was only rental value because similar equipment could have been rented. Thus, no loss of profit could be attributed to the defendant's negligent destruction of the equipment. *Cf.* Acme Cycle Co. v. Clark, *supra* note 44.

68. Standard Supply Co. v. Carter, 81 S.C. 181, 62 S.E. 150 (1908). This case was first cited in Fisher v. Carey, 67 Ind. App. 439, 119 N.E. 376 (1918), an action for injunctive relief and damages for past and threatened malicious trespasses, and seems unrelated to the case. Though it can only be surmised, it appears likely that damages were given only to allow the plaintiff to recover costs from the defendant. See IND. ANN. STAT. § 2-3004 (Burns 1946) (recoveries under $5 in tort).

69. "But neither the past success, indicated by the profits, nor any other single factor is to be taken as controlling." Standard Supply Co. v. Carter, 81 S.C. 181, 187, 62 S.E. 150, 152 (1908). *See* Fultz v. Wycoff, 25 Ind. 321, 326 (1865); City of Terre Haute v. Hudnut, 112 Ind. 542, 559, 13 N.E. 686, 694 (1887).

70. The rental value concept is generally applied to cases of deprivation of the use of agricultural land. Western Indiana Gravel Co. v. Opp, 121 Ind. App. 673, 99 N.E.2d 265 (1951); Oceana Oil Producers v. Portland Silo Co., 229 Ind. 656, 100 N.E.2d 895 (1951). But even in these cases an attempt is made to make this value coextensive with value of use. Indiana Pipe Line Co. v. Christensen, 94 Ind. App. 155, 160, 180 N.E. 30, 32 (1932).

71. New York Cent. R.R. v. Reidenbach, 71 Ind. App. 390, 125 N.E. 55 (1919). See note 67 *supra.*

72. Universal Carloading & Distributing Co. v. McCall, 107 Ind. App. 479, 25 N.E.2d 253 (1940).

value of use only if the interest invaded lay in renting the property of which one has been deprived.[73]

Prior to the *Weddle* decision there were no cases in Indiana holding that value of use and lost profits are distinct measures of damages.[74] The delineation was drawn on the assumption that lost profit can not be considered in determining value of use. Considering its effect, as shown in the case of *Indianapolis Rys. v. Terminal Motor Inn, Inc.*,[75] this result should be reexamined.[76]

The *Indianapolis Rys.* case has the distinction of presenting a clear instance where the deprivation of use was a "direct" result of breach of contract. In reviewing the damages, however, the Appellate Court decided that, since the amount of lost profit was not certainly provable, the damages should have been based upon rental value.[77] The plaintiff had leased four tracts of land on which it operated a parking lot. The business had been in operation on two of the tracts for ten years, with two tracts being leased in later years. The agreement for lease of the original tracts provided that the lessor should not cancel for the purpose of permitting another lessee to conduct the same kind of business on the premises unless the lessor, or subsequent lessee, should make improvements on some part of the premises costing not less than $50,000.[78] After termination the plaintiff waited a reasonable time, but no improvements were made. Suit was brought charging defendant with bad faith in terminating, and the trial court decided in favor of the plaintiff.[79] Evidence of profits for the preceding four years was admitted as a fact bearing upon the reasonable value of the use for the time remaining under the lease.[80]

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73. Berkey & Gay Furniture Co. v. Hascall, 123 Ind. 502, 24 N.E. 336 (1890). See note 39 *supra.*

74. See note 67 *supra.*

75. 112 N.E.2d 596 (Ind. App. 1953).

76. See notes 21, 31, 49, 67 *supra.*

77. Indianapolis Rys. v. Terminal Motor Inn, Inc., 112 N.E.2d 596, 599 (Ind. App. 1953). Further, "profits derived from a business conducted on property are too speculative, uncertain and remote to be considered as a basis for computing or ascertaining the rental value of property." *Id.* at 600, quoting Maddox v. Yocum, 109 Ind. App. 416, 31 N.E.2d 655 (1941). *But see* Maddox v. Yocum, 114 Ind. App. 390, 52 N.E.2d 636 (1944) (second appeal), discussed in note 67 *supra.*

78. Petition to Transfer, p. 3, Indianapolis Rys. v. Terminal Motor Inn, Inc., 112 N.E.2d 596 (Ind. App. 1953).

79. See note 80 *infra.*

80. The rental value of the leased premises was a primary right of the plaintiff's at the time of the breach. Assuming that the court might have affirmed but for the estimate of total net profit allowed in evidence, it may be doubted whether or not the jury was intelligently aided by the evidence of capacity of each lot, hourly rates of turnover, and parking rates for 1939 through 1948. Petition to Transfer, p. 13-14, Indianapolis Rys. v. Terminal Motor Inn, Inc., 112 N.E.2d 596 (Ind. App. 1953). More significant, it is submitted, are the facts relating to the defendant's breach of agreement: