

THE STANDARD OF CERTAINTY IN THE MEASUREMENT OF DAMAGES

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A CLASSIC statement of principle finds place in many opinions, as follows: "The damages . . . must be certain, both in their nature and in respect to the cause from which they proceed."¹ The standard of "certainty,"² applied as a restriction upon the allowance of damages by the jury, is a comparatively recent innovation.³ It seems first to have gained currency in the American decisions in the middle of the last century,⁴ as a development of an earlier doctrine that damages for breach of contract could not be measured by the loss of "profits."⁵ As in the case

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1. *Griffin v. Colver*, 16 N. Y. 489, 495 (1858). In this case, which involved a counterclaim for delay in delivery of an engine, the court denied recovery for loss of profits, and confined the claimant to the value of the use of the engine during the delay.

Other formulations of the standard of certainty: CAL. CIV. CODE (Deering, 1931) § 3301: No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 331: "(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. (2) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property."

2. General References: 1 SEDGWICK, DAMAGES (9th ed. 1920) c. IX; 1 CLARK, NEW YORK LAW OF DAMAGES (1925); c. IV; DEC. & CURR. DIG., "Damages," §§ 6, 24, 26, 40, 147, 159(4), 176.

3. The idea that damages in actions for breach of contract as contrasted with tort actions, are "certain," that is, governed by rule, and hence that the judge could exercise a stricter control by setting aside an award of the jury not conforming to the rule, goes back to the 18th century. Washington, *Damages in Contract at Common Law* (1931) 47 L. Q. REV. 345, 364, 366. But the word "certainty" was not used, at least not commonly used, as a requirement which the proof of damage must meet, until the standard had in the next century been announced by Sedgwick and the American cases. See next following notes.

4. The earliest opinion announcing in terms the doctrine of "certainty," which a casual search has disclosed, is *Griffin v. Colver*, *supra* note 2, although earlier cases had said that "speculative" damages were not recoverable, e.g. *Green v. Goddard*, 9 Metc. 212 (Mass. 1845).

5. In a discussion of "profits" as an element of damages, Sedgwick, in the second edition of his pioneer treatise on Damages, published in 1852, refers (p. 64) to the fact that in Scotland a distinction is made between resulting damage which is "certain" and "uncertain," and the latter may be recovered only when the defendant's conduct was criminal

of most of the other doctrines of damages, this one has been much more highly elaborated in this country than in England, where problems of certainty of amount are usually discussed under the vague rubric of "remoteness." Such questions of certainty are also subordinated by the tendency of the English judges to treat the measurement of damages generally as a matter for the jury's discretion, and to regard most of the traditional doctrines and standards of damages as matters to be given to the jury by way of advice rather than direction.⁶

The earlier vague and tentative doctrine, borrowed from the maritime cases, outlawing "loss of profits" as a measure of recovery,⁷ was one of those rather crude and arbitrary rules which the courts devised for curbing damages in contract cases, until they had found broader and more rational standards to use for the purpose. At precisely this time, the civil law restriction of damages to those injuries "in the contemplation of the parties," was being naturalized in England and this country.⁸ The wholesale restriction against "profits," likewise, was gradually adjusted to the variant pulls of different situations. In the first place, the profit expected as a direct result of the contract sued on was withdrawn from the ban, and allowed as a basis of damages, distinguishing claims for profits lost upon "collateral" transactions with third persons.⁹ Later, as to *all* claims for profits or gains prevented by the defendant's breach, it became recognized that there should be no ban upon "profits" as such, whether direct or collateral, but merely that all claims for prevented gains should meet the usual tests of "contemplation" (in contract cases), "proximateness" of causation, and "certainty" of ascertainment.¹⁰

In the traditional phraseology the "certainty" requirement is usually accompanied by the statement that the damages must not be "contingent," "conjectural" or "remote." Seemingly these phrases have but little additional content. While the development of the doctrine of cer-

or malicious, citing KALMS, *PRINCIPLES OF EQUITY* (2d ed. 1767) 77. The later editions of Sedgwick's treatise progressively expanded the treatment of the standard of certainty, finally devoting a separate chapter to the subject (c. IX, 9th ed. 1920).

6. See pp. 1126 *et seq.*, *infra*.

7. These cases are listed and discussed in *Griffin v. Colver*, *supra* note 1, and in 1 SEDGWICK, *op. cit. supra* note 2, § 175. In the maritime cases, the profits which would have been made at destination were obviously much more conjectural in the days of sail, than today.

8. See *Hadley v. Baxendale*, 9 Ex. 341 (1854); *Griffin v. Colver*, *supra* note 1.

9. *Masterton v. Mayor of Brooklyn*, 7 Hill 62 (N. Y. 1845) (repudiation by city of contract under which the plaintiff was to furnish marble for construction of City Hall: loss of profit that plaintiff would have made upon his contract with defendant—*i.e.*, difference between contract price and cost of marble to plaintiff—held recoverable).

10. See *Brigham v. Carlisle*, 78 Ala. 243, 249 (1884); *Griffin v. Colver*, *supra* note 1; 1 SEDGWICK, *op. cit. supra* note 2, §§ 176, 177.

tainty was worked out in the first instance in the contract cases, its applicability to cases of tort is now conceded, although we shall see that the standard is more rigorously applied, even now, in contract claims.

A collection of the instances of the use in judicial opinions of the word "certainty," in connection with problems of damages, would doubtless disclose a wide variation of meaning. One use seems most common and most practical, that is, to employ the term "certainty" to denote a standard of *provability*. In other words, the *claim* must be such that from its statement there seems no reason that rational proof could not be furnished, that the damage claimed did result from the wrong, and the *actual evidence* must be such that reasonable men, acting upon inference and not from guess, can find therefrom that damage did thus result, and can derive substantial data for fixing the amount.¹¹ From this statement, it appears that the epithet "certainty" is overstrong, and that the standard is a qualified one, of "reasonable certainty" merely, or in other words, of "probability."¹² If the term "probability" had been chosen by the judges in the first instance, perhaps a less intricate doctrinal web might have been sufficient to span the gap between standard and specific desired results.

11. See other general statements in note 1, *supra*, and the following: "In using the words 'uncertain, speculative, and contingent,' for the purpose of excluding that kind of damage, it is not meant to assert that the loss sustained must be proved with the certainty of a mathematical demonstration to have been the necessary result of the breach of covenant by defendant. The plaintiff is not bound to show to a certainty that excludes the possibility of doubt that the loss to him resulted from the action of the defendant in violating his agreement. In many cases such proof cannot be given and yet there might be a reasonable certainty founded upon inferences legitimately and properly deducible from the evidence that the plaintiff's loss was not only in fact occasioned by the defendant's violation of his covenant, but that such loss was the natural and proximate result of such violation. Certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof." Peckham, J., in *United States Trust Co. v. O'Brien*, 143 N. Y. 284, 288-289, 38 N. E. 266, 267 (1894), quoted in *Hetzel v. Baltimore & Ohio Rr. Co.*, 169 U. S. 26, 38-39 (1898). "The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the *quantum* of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty." Depue, J., in *Wolcott v. Mount*, 36 N. J. Law 262 (1873).

12. See Note (1928) 28 COL. L. REV. 76. *Gasoline Products Co. v. Champlin Refining Co.*, 39 F. (2d) 521 (C. C. A. 1st, 1930) *rev'd* without affecting this holding, 283 U. S. 494 (1931).

The concept of "probability" has been a fruitful one in the fields of mathematics and metaphysics, and its applications to social science in the interpretation of statistics of "frequency," have been of widening significance. See COHEN, REASON AND NATURE (1931)

This elaboration of the doctrines relating to the standard of certainty, of which instances are given in the next section, is a by-product of the jury system, springing from the lack of confidence of American judges in the discretion of juries. The use of the doctrines of certainty manifests a pervading insistence that the jury must be furnished with some yardstick, rough though it be, which they can use in making their award, and by which their award can be tested.¹³ Nevertheless, most of these doctrines of certainty are used to rationalize the process of reviewing peremptory instructions and jury verdicts, and not as forms of instructions to be given in the judge's charge at the trial. Usually, the standard of certainty is applied definitively by the trial judge in passing upon the admissibility of evidence, and in deciding whether the case is to be submitted to the jury at all. When the case is submitted, a simple statement in the charge of the standard of "reasonable certainty," and a warning against considering damages, which are "remote, speculative, or contingent," suffice.¹⁴

The Modifying Doctrines

The tension which would be created by an approach to literal use of the standard of certainty is avoided by appropriate antidotes. Among the most common and useful of these is the subdoctrine which endeavors to draw a distinction between ascertainment of the *fact* of damage, and ascertainment of its *extent*:

"It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount."¹⁵ "The general rule is that, where the cause and

125-135; articles on "Probability," 17 ENC. BRITANICA (14th ed. 1929) 529 *et seq.*, and 12 ENCYC. SOC. SCI. (1934) 426 *et seq.* This method has yet to be applied to legal data, and the present subject of inquiry illustrates the difficulties of doing so. The usual legal question of "certainty" is a question of whether it can be shown with adequate persuasiveness, that if one event had not happened (the defendant's breach of contract, or tort), another event (the making of a monetary profit) would have happened. The legal situations not only involve this speculative hypothesis, but each situation has so many factors of variation that group treatment, by the use of statistics of frequency, is impracticable.

13. See for example, *John Hetherington Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 22, 95 N. E. 961, 964 (1911) where the court in denying a claim for lost profits for breach by the principal of a sales-agency contract, said: "They must be capable of ascertainment by reference to some definite standard, either of market value, established experience, or direct inference from known circumstances." See also, Note (1910) 59 U. OF PA. L. REV. 180.

14. *Thomsen v. Cayser*, 243 U. S. 66, 89 (1917) (damages under Anti-Trust Act).

15. *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U. S. 555, 562 (1931); and see Note (1932) 78 A. L. R. 858. While this doctrine furnishes a convenient rationale

existence of damages has been established with requisite certainty, recovery will not be denied because such damages are difficult of ascertainment."¹⁶

Another idea often used by the courts to soften the requirement of certainty is that the wrongdoer who has caused the uncertainty is not entitled to complain if speculative damages are allowed:

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts . . . The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."¹⁷ "The party who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which, by reason of his breach, is unobtainable."¹⁸

Again, the idea of *value* affords a means of making uncertain damages seem less uncertain:

"Nearly all commercial contracts are entered into in contemplation of future profits. As such profits are prospective, they must be uncertain and problematical; but the person injured is not to be deprived of all remedy. He has the right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and direct-

for disposing of cases where it seems undesirable to apply the standard of certainty, yet in other cases it seems clear that the courts do often apply the standard of certainty to questions of amount of damage. *Reilly v. Birmingham*, 53 S. W. (2d) 825 (Tex. Civ. App. 1932) (one who sues for repudiation of contract to take and pay for water from well for three years, conditioned on continuance of supply, must prove length of time supply of water would probably continue). Compare the following view: "It appears that 'the fact of loss' and 'the amount of loss' are in effect different terms for the same thing, since proof of the amount of loss with a reasonable degree of certainty conclusively establishes the fact of loss, and, conversely, the only way to prove the fact of loss would seem to be by proving with reasonable certainty at least a minimum amount of loss. It thus would seem that an attempted distinction between these two is of no real significance." Note (1933) 17 MINN. L. REV. 194, 196.

16. *Hoffer Oil Corp. v. Carpenter*, 34 F. (2d) 589, 592 (C. C. A. 10th, 1929).

17. *Story Parchment Co. v. Patterson Parchment Paper Co.*, *supra* note 15, at 563. See also *Allison v. Chandler*, 11 Mich. 542, 550 (1863) (tort) and the following contract cases: *Burckhardt v. Burckhardt*, 42 Ohio St. 474, 500 (1885); *Hampton v. Supreme Lodge*, 161 S. C. 540, 159 S. E. 923 (1931); *Wood v. Pender-Doxey Grocery Co.*, 151 Va. 706, 144 S. E. 635 (1928). A detailed study of the cases demonstrates that the standard of certainty is enforced much less often against one who complains of a willful tort or deliberate violation of agreement than in other cases. Bauer, *Moral Fault as Affecting Liability*, 81 U. OF PA. L. REV. 586 (1933).

18. *South Chester Tube Co. v. Texhoma Oil & Refining Co.*, 264 S. W. 108, 111 (Tex. Civ. App. 1924); see also *Crichfield v. Julia*, 147 Fed. 65 (C. C. A. 2d, 1906) (in action for breach of contract to issue preferred stock, defendant cannot maintain that since it issued no stock, the value of the loss is not ascertainable).

ly traceable thereto; and it is for the jury, under proper instructions, to determine the compensation to be awarded for the breach. That compensation should be the value of the contract."¹⁹

And where courts are unwilling to go that far, the same result can be attained by distinguishing between probable profits as a *measure* of damage, and probable profits as *evidence* of damage:

"We would by no means say that the jury should make the supposed profits, which the plaintiffs had lost, *the measure of damages*. All we design to affirm is that proof, tending to establish such loss as a consequence of the levy of the attachment, may properly go before the jury to serve as some guide for them, in the exercise of their discretion, in estimating the loss."²⁰

And finally, other modifying doctrines are so strong that they appear almost to repudiate the rule of certainty. For instance, it has been held that mathematical precision is not required and that the best available evidence is sufficient:

"It is not a sufficient reason for disallowing damages claimed that they cannot be exactly calculated. It is sufficient if, from proximate estimates of witnesses, a satisfactory conclusion can be reached."²¹ "A reasonable basis for computation, and the best evidence which is obtainable under the circumstances of the case and which will enable the jury to arrive at an approximate estimate of the loss, is sufficient."²²

The Kind of Damage to which the Standard of Certainty is Applied

Obviously, there are numerous instances when juries as triers of fact are called upon to weigh probabilities, and to choose between conflicting inferences. Thus, if the two eye-witnesses of an automobile collision give opposite accounts of the positions of the vehicles just before the accident, the jury may be put to it to decide which is telling the truth. Again, the circumstances of a death at a railway crossing may

19. *Hoffer Oil Corp. v. Carpenter*, *supra* note 16, at 593; *Manss-Owens Co. v. Owens & Sons*, 129 Va. 183, 105 S. E. 543 (1921); and see also *Wakeman v. Wheeler & Wilson Manufacturing Co.*, 101 N. Y. 205, 4 N. E. 264 (1886); *Pittsburgh Gauge Co. v. Ashton Valve Co.*, 184 Pa. 36, 39 Atl. 223 (1898).

20. *Donnell v. Jones*, 17 Ala. 689 (1850) (malicious prosecution). See also *Gale v. Leckie*, 2 Stark. 107 (1817) (contract to publish a book); *Ingram v. Lawson*, 6 Bing. N. C. 212 (1840) (libel, for stating that plaintiff's vessel was not seaworthy; profits of past voyages admitted); *McNeil v. Reid*, 9 Bing. 68 (1832) (breach of agreement to admit plaintiff into a firm; evidence of value of command of a ship, relinquished by plaintiff, admitted). These English cases are discussed in *Bagley v. Smith*, 10 N. Y. 489 (1853) (action for breach of contract in dissolving partnership). See also the cases cited in note 19, *supra*.

21. *Brown v. McCloud*, 96 Ore. 549, 552, 190 Pac. 578, 579 (1920).

22. *Hoffer Oil Corp. v. Carpenter*, *supra* note 16, at 592; see also *Story Parchment Co. v. Patterson Parchment Paper Co.*, *supra* note 15, and comments thereon (1930) 39 YALE L. J. 1035; (1931) 45 HARV. L. REV. 193.

be such that reasonable men may draw a conclusion that the deceased failed to look before he went on the track, or the opposite conclusion. The choice is for them. But it will be noticed that in neither instance is any standard of certainty insisted upon. The matter is left to the jury's judgment if a reasonable doubt arises from the evidence. It is only as to the fixing of damages that the rigorous requirement that the fact of loss must be proved with "certainty" comes to be laid down, though probably the jury is no less competent to make a reasonable guess as to whether a profit would have been made under given circumstances, than to guess whether one witness is lying, or another.

We have seen that this standard of certainty evolved as an outgrowth of the difficulties which arose in determining claims in contract cases for the loss of "profits" expected to result from the venture.²³ Like the "contemplation of the parties" doctrine,²⁴ the standard of "certainty" was developed, and has been used, chiefly as a convenient means for keeping within the bounds of reasonable expectation the risk which litigation imposes upon commercial enterprise. Although the discussions in the opinions often assume that the standard of certainty of proof applies to the proof of damages generally, and although occasionally the standard is actually used to test the sufficiency of proof of claims for direct physical loss or injury to property,²⁵ or to claims for future consequences of personal injury,²⁶ yet the principal field of its use remains

23. See pp. 1109 *et seq.*, *supra*.

24. See note 8, *supra*.

25. See *McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 143 So. 383 (1932). See *infra* p. 1132. Compare *Turner v. Jackson*, 139 Ore. 539, 11 P. (2d) 1048 (1932) (on rehearing) (counterclaim by owner of building against builder, for damage due to use by builder of inferior materials impracticable to replace; direct evidence of lessened value ruled unnecessary, and facts as to materials sufficient to support verdict).

26. In general, the standard of certainty developed for cases of commercial loss cannot be applied to claims for non-pecuniary injury, such as physical pain, mental anguish, or humiliation. *Warfield Natural Gas Co. v. Wright*, 246 Ky. 208, 54 S. W. (2d) 666 (1932) (pain); *Rice v. Rice*, 104 Mich. 371, 62 N. W. 833 (1895) (alienation of affections; claim for mental anguish distinguished from damages for loss of support). But for pecuniary losses from personal injury the standard of certainty is employed, though less stringently than in cases of breach of contract, or commercial deceit. Thus, for loss of earning power, evidence of loss of profits in a business is admitted only if it was a "one-man" business. *Mahoney v. Boston Elevated Ry.*, 221 Mass. 116, 108 N. E. 1033 (1915). And some courts disallow evidence of the injured person's chances of promotion, unless there was an established practice of promoting by seniority. *Richmond & Danville Rr. v. Elliott*, 149 U. S. 266 (1893). Likewise, if evidence that the plaintiff's injury may develop a future complication is offered, it must be shown to be "reasonably probable." *Howley v. Kantor*, 163 Atl. 628 (Vt. 1933). The jury should be told that to allow for future pain, they must find that it is "reasonably certain." *Coppinger v. Broderick*, 37 Ariz. 473, 295 Pac. 780 (1931) ("in all probability" suffices); *Schwarting v. Ogram*, 123 Neb. 76, 242 N. W. 273 (1932). If an element of future loss is submitted which to the appellate court

the field of loss of commercial profits.²⁷ Such lost profits or prevented gains must be claimed specifically in the pleadings, as "special" damages²⁸ and thus are distinguished from claims based upon some normal or usual standard, such as the value of the property, in cases of conversion, or loss of time, for personal injury. As to the latter, which are called "general" damages, the measure of recovery is assumed to be sufficiently standardized to prevent unlicensed "guessing" by the jury. When a claim for loss of profits is disapproved as too uncertain, the court will nevertheless allow as an alternative basis of recovery, one of these "standardized" measures of recovery.²⁹ This is illustrated in cases where the defendant has contracted to furnish or repair machinery necessary for the operation of the plaintiff's mill or plant, when the plaintiff may recover the value of the use of the machine during a period of delay,³⁰ or where to the defendant's knowledge the machine was not replaceable elsewhere, in which case the plaintiff may even recover the loss of rental value of the plant itself,³¹ or interest on the investment during the "shut-down."³²

The Problem of Proof

Occasionally a claim will appear to the court's mind as being so "inherently" unprovable, that it will fail on demurrer, but usually the problem of certainty emerges during the preparation of the case as a question of what evidence will be available to show the amount of the loss, and at the trial, as a question of the admissibility of items of proof, and of the sufficiency of the items admitted to make a case for the jury, on the amount of damage.³³ Where the issue is as to the profits which would have been made in a period of interruption of an

seems too contingent, it will reverse. *City of Amarillo v. Rist*, 45 S. W. (2d) 285 (Tex. Civ. App. 1932) (girl of 12, permanent scars on face; impairment of marriage prospects too contingent).

27. Cases on lost profits are discussed in 1 SEDGWICK, *op. cit. supra* note 2, § 173 *et seq.*; Note (1933) 46 HARV. L. REV. 696 (1933); McCormick, *Loss of Expected Profits*, 7 N. C. L. REV. 235 (1929).

28. *Whitelaw v. Vallance*, 60 Mont. 172, 198 Pac. 449 (1921) (contract); *Stecker v. Weaver Coal & Coke Co.*, 116 App. Div. 772, 102 N. Y. Supp. 89 (1907), *aff'd*, 192 N. Y. 556, 186 N. E. 1116 (1908) (buyer's action against seller); *Sather v. Giaconi*, 110 Ore. 433, 220 Pac. 740 (1923) (destruction of fish-net).

29. See CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 331(2), quoted note 1, *supra*; 1 SEDGWICK, *op. cit. supra* note 2, § 171b.

30. *Griffin v. Colver*, *supra* note 1.

31. *Standard Supply Co. v. Carter & Harris*, 81 S. C. 181, 62 S. E. 150 (1908); and see Note (1924) 32 A. L. R. 120; Note (1933) 17 MINN. L. REV. 194, 203.

32. *Southern Ry. Co. v. Coleman*, 153 Ala. 266, 44 So. 837 (1907).

33. See a discriminating note, citing many cases on proof of certainty, 17 MINN. L. REV. 194 (1933).

"established" business, the *past profits* may be shown.³⁴ It is a question in each case whether the business is "established," that is, whether it has such stability and regularity as to give its past record of profits some probative value as indicating the probable subsequent profits. This habit of looking to the past profits (a habit as ingrained in courts as in prospective investors) which only an established business can furnish, has made the courts reluctant to attempt to evaluate the probable profits of a new enterprise which has been prevented by defendant's wrong from making a start.³⁵ It has been suggested that in such a new venture, with no past record of profits, the chances of loss are equal to the chance of profit.³⁶ Doubtless this is true if the only fact known is that it is a new venture, but the practice of investors indicates that a prudent evaluation of a new enterprise may disclose that the chances of successful profit-making of a new undertaking, given the right conditions as to character of business, location, and personnel, are much more favorable than the chances of failure. The courts should be willing to accept a similar showing, if the proof is strong and the wrong deliberate.

In a few cases, the evidence of the record of profits of other business enterprises similarly situated may come in.³⁷ In the exclusive-agency

34. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359 (1927) (action for damages under Anti-Trust Act, for refusal to sell to plaintiff at regular prices; plaintiff's past profits for four years admitted); *Wellington v. Spencer*, 37 Okla. 461, 132 Pac. 675 (1913); 1 SEDGWICK, *op. cit. supra* note 2, §§ 182, 182a.

35. *Stephany v. Hunt Bros. Co.*, 62 Cal. App. 638, 217 Pac. 797 (1923) (violation by fruit-packing concern of agreement to give plaintiff European sales agency); *Narragansett Amusement Co. v. Riverside Park*, 260 Mass. 265, 157 N. E. 532 (1927) (interference by lessor with erection in amusement park of plaintiff's building for exhibits; profits held too conjectural though evidence given of profits from exhibit at other locations); *American Oil Co. v. Lovelace*, 150 Va. 624, 143 S. E. 293 (1928); Note (1919) 1 A. L. R. 156; (1933) 46 HARV. L. REV. 696, 698.

The habit of denying claims for profits of a new business has been carried to the unreasonable length of holding, in cases where a new business has been delayed in opening by defendant's wrong, that later profits furnish no criterion for the profits that would have been made during the delay. *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63, 119 N. E. 227 (1918).

36. *Gibson v. Hercules Manufacturing & Sales Co.*, 80 Cal. App. 689, 702, 252 Pac. 780, 784 (1927).

37. *American Can Co. v. Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930) *cert. den.* 282 U. S. 899 (1931) (action under Anti-trust law, profits and losses of other businesses admitted as corroborative); *Lewistown Iron Works v. Vulcan Process Co.*, 139 Minn. 180, 165 N. W. 1071 (1918) (defendant agrees to sell to plaintiff, and to none others in a certain territory, welding apparatus; defendant wrongly sells similar machines to eight other shops; business and profits of these other shops admissible on issue of damages); (1933) 17 MINN. L. REV. 194, 201, n. 37.

cases, the profits made by those by whom the plaintiff has been wrongfully displaced, may be shown.³⁸

The usual medium of making proof of the record of such past profits is by producing the books of the business (with witnesses to identify them as such), showing the income and expenditures.³⁹ If the business was a simple one and books were not kept, an "estimate" of past profits given by a witness familiar with the business will be received.⁴⁰

"Estimates" or "opinions" as to the profits that would have been made, that is, the amount of the lost profits, stand on a different footing.⁴¹ If concrete data, such as the past profits of the same or other businesses, are furnished by the proof, then a witness having special experience in the field may be allowed to interpret the data by giving his opinion therefrom as to the probable profits that would have been made.⁴² But if no such data are available, or if the witness has no special skill or knowledge, his opinion does not lessen the uncertainty of the inference and it is inadmissible.⁴³

38. See note 58, *infra*.

39. *Force Brothers v. Gottwald*, 149 Minn. 268, 183 N. W. 356 (1921); *Kitchen Brothers Hotel Co. v. Philbin*, 2 Neb. (Unoff.) 340, 96 N. W. 487 (1902).

40. See *Aywon Film Corp. v. Hatch*, 126 Atl. 637 (N. J. Supp. 1924) (motion picture house, estimates of lost patronage admitted); *Comstock v. Connecticut Ry. and Lighting Co.*, 77 Conn. 289, 58 Atl. 465 (1904) (personal injury to wife; in proving earning capacity, plaintiffs allowed to give estimates of past profits from boarding house); *cf. Graham Hotel Co. v. Garrett*, 33 S. W. (2d) 522 (Tex. Civ. App. 1930) (counterclaim by barber, tenant, against landlord for failure to furnish steam heat; opinion evidence of plaintiff who kept no books but was experienced in the business, as to probable profits per month, admitted).

41. As to the basis for the opinion rule, see 4 WIGMORE, EVIDENCE (2d ed. 1923) § 1918.

42. *Guerini Stone Co. v. Carlin Construction Co.*, 240 U. S. 264 (1916) (action by subcontractor for loss of profits because of cancellation; evidence of an expert estimating cost to plaintiff of doing the work admissible); *Julian Petroleum Co. v. Courtney Petroleum Co.*, 22 F. (2) 360 (C. C. A. 9th, 1927) (breach of contract to drill for oil); *Daughetee v. Ohio Oil Co.*, 263 Ill. 518, 105 N. E. 308 (1914) (same); *Wheeland v. Fredonia Gas Co.*, 92 Kan. 50, 139 Pac. 1010 (1914) (same). Compare *Beeson Brothers v. Chambers*, 155 Wash. 564, 285 Pac. 433 (1930) (action for diminution in plaintiff's profits from hauling lumber, due to defendant's failure to perform contract to put road in condition; opinion evidence of experienced witness as to lessened cost if road had been repaired admissible, but not opinion evidence of "lost profits").

43. *Wells v. National Life Association*, 99 Fed. 222, 235 (C. C. A. 5th, 1900) (action for repudiation by life insurance company of contract to continue plaintiff as general agent; general discussion of evidence required, and admissible, to establish amount of commissions lost); *Foote & Davies Co. v. Malony*, 115 Ga. 985, 42 S. E. 413 (1902) (opinion evidence that defendant's breach of contract caused a certain amount of damage to plaintiff's business inadmissible); *Linn v. Sigsbee*, 67 Ill. 75 (1873) (physicians cannot testify to amount of damage caused to plaintiff by defendant's breach of covenant to re-enter practice after sale); *Smith v. Pallay*, 130 Ore. 282, 279 Pac. 279 (1929) (error to allow witness to give his opinion of amount of damages, reversible unless verdict so small that

In some cases the plaintiff proves that he has sustained a loss of a certain amount, but the proof leaves it uncertain how much of the loss is attributable to the defendant's wrong, and how much to other causes. The courts sometimes hold that the plaintiff must go further and show how far the loss is chargeable to the defendant,⁴⁴ but in other cases will allow the jury to make the apportionment unless the defendant clears up the uncertainty.⁴⁵

In deciding questions of certainty of proof, there seems to be a clearly discernible tendency to treat the problems more and more individually and pragmatically, and not only to insist that the claimant furnish the best available proof of the amount of loss,⁴⁶ but also to hold it sufficient if he has furnished the most satisfactory data that the particular situation admits of.⁴⁷

error is harmless); *San Antonio Paper Co. v. Morgan*, 53 S. W. (2d) 651 (1239) ("estimate" of profits that plaintiff would have made in the business that he "imagined" he would have done).

A case which will support a finding of lost profits must include evidence of what the expense would have been. *Callender v. Myers Regulator Co.*, 250 Mich. 298, 230 N. W. 154 (1930).

44. See *Austin v. Roberts*, 130 Cal. App. 328, 20 P. (2d) 97 (1933) (lessee sues landlord for eviction from land on which was a factory building owned by third persons; plaintiff's business was interrupted by the eviction; burden placed on lessee to show what part of loss was due to eviction from land and what part from repossession of building by owners). Cf. *Present v. Glazer*, 225 App. Div. 23, 232 N. Y. Supp. 63 (1928) (counterclaim of buyer of jewelry business against seller for violation of covenant not to compete; proof of amount of competing business done by seller deemed insufficient, buyer having failed to prove to what extent he would have been able to secure the business—a questionable holding).

45. *Hill v. Chappel Bros.*, 93 Mont. 92, 18 P. (2d) 1106 (1932) (action for damages to land by defendant's horses; not fatal to claim for substantial damages that plaintiff's evidence does not show how much damage caused by defendant's horses, and how much by horses of third persons); *Brown v. McCloud*, 96 Ore. 549, 190 Pac. 578 (1920) (similar); cf. *Wood v. Pender-Doxey Grocery*, *supra* note 17 (similar to *Present v. Glazer*, *supra* note 44, with contrary holding).

46. *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96 (C. C. A. 8th, 1901) (action for damages under Anti-Trust Act; held, plaintiff fails to prove amount of lost profits of established business, unless he shows by books income and expenses before and after); *Saint Mary's Machinery Co. v. Cook*, 187 Ky. 112, 218 S. W. 733 (1920) (to recover for breach of warranty of engine, loss of profits of mill, plaintiff must show with precision, capacity of mill, with defective engine); *Grass v. Big Creek Development Co.*, 75 W. Va. 719, 84 S. E. 750 (1915) (action for failure by lessee to develop properly land leased for oil; evidence must furnish definite basis of computing value of oil lost by drainage).

47. See for example, the following passage: "Juries are allowed to act upon probable and inferential, as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case, having any tendency to show damages, or their probable amount; so as to enable them to make the most intelligible and probable estimate which

Lost Profits: Specific Instances

In *Winston Cigarette Machine Company v. Wells Whitehead Tobacco Company*,⁴⁸ damages were sought for the breach of an agreement by the defendant, a manufacturer of cigarettes, to place on exhibition and to operate a cigarette-making machine manufactured by the plaintiff, at the St. Louis World's Fair in 1904. The defendant repudiated its agreement too late for the plaintiff to make other arrangements to exhibit its machine. The machines sold at the price of \$1600, and the proof showed that the plaintiff itself had decided to spend about \$5000 for the purpose of exhibiting a machine at St. Louis, before the defendant contracted to do so. The plaintiff had already sold in all about 150 machines throughout the world, and the method of advertising was mainly that of exhibiting them in actual operation. There was no other evidence bearing on the amount of damage. The jury found that the plaintiff's loss was \$5000. On appeal this was set aside on the ground that conceding the defendant's bad faith, no adequate standard by which the jury could estimate the amount of the profits that would have been made was furnished by the proof.⁴⁹

In another case,⁵⁰ a sale of a grocery-store and the business and good will thereof had been made, but thereafter the seller had violated his covenant by opening a similar store himself in the same neighborhood, and by procuring the buyer's clerks (who had been with the old business) to leave his employment and come to the new store. The proof showed that through solicitation of these clerks, 40 or 45 of the

the nature of the case will permit.'" Christiancy, J., in *Allison v. Chandler*, *supra* note 17, at 555-556 (1863) quoted approvingly in *Story Parchment Co. v. Patterson Parchment Paper Co.*, *supra* note 15, at 564.

48. 141 N. C. 284, 53 S. E. 885 (1906).

49. In a few cases of breach of contracts for advertising and similar trade-stimuli, the advertiser has been able to surmount the obstacle of the certainty requirement. *Marcus v. Myers*, 11 Times L. R. 327 (1895) (refusal to publish advertisement in newspaper; "The plaintiff contracted with the defendants for a particular advertisement space in the *Jewish Chronicle*, which is the particular journal of the Jewish world . . . The plaintiff said he suffered loss of business to the extent of £100, which he attributed to the loss of the advertisement. During the time of the breach he did not get a single new Jewish customer. No suggestion was made by the defendants as to any other cause of the loss of business."). *Gagnon v. Sperry & Hutchinson Co.*, 206 Mass. 547, 92 N. E. 761 (1910) (failure to furnish trading-stamps, after furnishing for a short time; proof was made of rise and fall of plaintiff's business before, during, and after the time when stamps were furnished). But usually such claims have failed as too uncertain. *Tribune Co. v. Bradshaw*, 20 Ill. App. 17 (1886) (newspaper advertising); *Stevens v. Yale*, 113 Mich. 680, 72 N. W. 5 (1897) (same); *North Star Trading Co. v. Alaska-Yukon-Pacific Exposition*, 68 Wash. 457, 123 Pac. 605 (1912) (curtailment of exhibitor's space at exposition). Cases are collected and discussed in Note (1926) 41 A. L. R. 198, 203.

50. *Wood v. Pender-Doxey Grocery Co.*, *supra* note 17.

customers of the old business had transferred to the new, and that their gross patronage amounted to from \$2000 to \$2500 per month. It appeared in evidence also that the parties at the time of the sale had valued the "good-will" at from \$6000 to \$7000. The jury awarded damages of \$3500. On appeal the court, laying great stress upon the deliberate and willful character of the defendant's wrong, held that the evidence furnished a sufficient basis for the award.⁵¹

In *Broadway Photoplay Company v. World Film Corporation*,⁵² a difficult problem of proof faced the plaintiff. The defendant agreed to supply the plaintiff, the owner of a theater, with first-run feature films, for one day each week for a year. This promise it never fulfilled but instead furnished them to a competing house. The plaintiff, unable to secure first-run feature pictures elsewhere, had to content itself with second-run films. In proving damages, the plaintiff showed the record of its returns during the period. It secured a verdict for \$4500. On appeal the court (Cardozo, J.) said:

"The comparison must be between feature pictures of the first run and feature pictures of later runs. The jury were so charged. They were charged that the plaintiff was 'limited to the difference in value between first-run feature pictures and second or third-run feature pictures, and not to the difference between feature pictures and other pictures.' But there is nothing in the evidence to supply a basis for the comparison. No law of averages, no constant or approximate uniformity of returns, can be gathered by induction from the sporadic and varying instances scattered through this record. The pictures of the first run are few in number. They disclose no semblance of equality in their returns when compared with one another. They disclose a like diversity when compared with pictures of later runs. In this business, as in others, there are times when merit triumphs over novelty. Pictures acquire in one neighborhood a vogue that follows them into another. The indifferent show succeeds by force of the reputation of the actor. The results have all the endless variety of human tastes and fashions. To discover beneath these vagaries a unifying law of averages would be a task in any case. The task is hopeless here where only one day a week is covered by the contract. The plaintiff tries to avoid the difficulty by attributing to the defendant all the losses of the business from one week-end to another. The fanciful theory is advanced that the public will flock to poor shows on six days of the week if there is a good show on the seventh. There can be no stable foundation for a verdict that is built on such assumptions. Nothing but guesswork can place the damages at \$4,500 or any other fixed amount."⁵³

51. See also *Burckhardt v. Burckhardt*, *supra* note 17 (action for breach by former partner of obligation not to interfere with good will by competing; in absence of specific evidence of amount of business lost, opinion evidence of good will held admissible, and damages may be based on this).

52. 225 N. Y. 104, 121 N. E. 756 (1919).

53. 225 N. Y. 103, 109, 121 N. E. at 757. Other cases where the standard of certainty

In *Julian Petroleum Corporation v. Courtney Petroleum Company*, it appeared that the plaintiff was the owner of a lease on a tract of oil-land in a developed field. It entered into an agreement with the defendant whereby the lease was assigned to the latter, which agreed to drill a well to a certain depth, and to share with the plaintiff the oil produced. The plaintiff sued for the defendant's failure to complete the well and claimed as damages the value of the plaintiff's share under the contract of the oil that would have been produced. The trial court admitted, in proof of damages, the evidence of expert geologists and oil producers familiar with this field, that the well was favorably located, and if drilled to the agreed depth would have produced oil; that the estimated cost of drilling would be a certain amount, and that the production of oil would be a certain quantity, and would sell for a certain price.⁵⁴ They further testified that this method of estimating the production of uncompleted wells is a familiar one in the oil business; that the government of the United States has adopted rules for estimating the future production of such wells; that the corporation commissioner of the state of California acts upon such estimates in authorizing the issuance of bonds and other sureties; and that oil property is bought and sold on the market on such estimates, just as other real property changes hands on the opinion of experts in their particular line. The plaintiff had a verdict based upon this claim and evidence, and the defendant objected that the measure adopted was too uncertain. On appeal, however, the court sustained the award.⁵⁵

of damages was held not to have been satisfied. *Favar v. Riverview Park*, 144 Ill. App. 86 (1908) (side-show); *Chicago Coliseum Club v. Dempsey*, 265 Ill. App. 542 (1932) (action by promoter against world's champion boxer for repudiation of agreement to fight match of which promoter was to get part of gate-receipts after paying defendant \$800,000); *Todd v. Keene*, 167 Mass. 157, 45 N. E. 81 (1896) (contract to furnish theatrical production for hall); *Narragansett Amusement Co. v. Riverside Park Amusement Co.*, *supra* note 35 (exhibit in amusement park); *Carnera v. Schmeling*, 236 App. Div. 460, 260 N. Y. Supp. 82 (1932) (similar to Dempsey case, *supra*); *Willis v. Branch*, 94 N. C. 142 (1886) (suit by lessee of hall used for theatrical purposes against landlord for removing gas-fixtures; plaintiff proved no definite engagements). In other cases the requirement was found to be met: *Orbach v. Paramount Pictures Corp.*, 233 Mass. 281, 123 N. E. 669 (1919) (to furnish motion picture films; plaintiff proved receipts for a year before, and six months after, defendant's breach, and proved that similarly situated theater with pictures contracted for played to crowded houses); *Weinglass v. Gibson*, 304 Pa. 203, 155 Atl. 439 (1931) (to furnish theater); *Lester v. Fox Film Corp.*, 114 S. C. 533, 104 S. E. 178 (1920) (to provide films). See Note (1922) 19 A. L. R. 1004, on damages in film distribution contracts.

54. See note 42, *supra*.

55. Actions for damages for breach of contract to drill an oil or gas well, or for failure to "develop" or to drill "off-sets" upon land leased, present unusually controversial questions of damages, since the plaintiff's interest is usually a contingent share in the expected production, and the question whether production would be secured, and if so how much,

"Fisherman's luck" has not always been considered too uncertain to be measured. In an Oregon case,⁵⁶ two rival groups of salmon fishermen quarreled when the plaintiffs set their nets close to the defendants' in Tillamook Bay. Defendants secured a temporary injunction against plaintiffs' continued use of their net, and this injunction remained in force for fourteen days, and was then dissolved, as it was found that the plaintiffs were rightfully there. The plaintiffs then sued on the injunction bond for the damages ensuing from the issuance of the in-

may be of various degrees of uncertainty, dependent on whether the proposed well is to be in "wild-cat," undeveloped territory, or in a settled and developed field. For the different types of obligations, mentioned above, and various degrees of predictability of production, divers measures of recovery are appropriate, but naturally the courts in a given jurisdiction tend to center upon a single rule of damages without always allowing free play for adjustment to the special situation. In Texas the favored rule is to allow the value of the plaintiff's interest or royalty, without deduction for the fact, when such is the case, that the oil or gas remains underground subject to future recovery. *Texas & Pacific Coal & Oil Co. v. Barker*, 117 Tex. 418, 6 S. W. (2d) 1031 (1928) (fairly settled field; action by lessor against lessee for failure to continue development, and for failure to protect against drainage by off-set well; discriminating opinion by Greenwood, J., reviewing cases supporting various theories of damages); accord, *Daughetee v. Ohio Oil Co.*, *supra* note 42 (settled field, opinion evidence allowed); see also, *Guardian Trust Co. v. Brothers*, 59 S. W. (2d) 343 (Tex. Civ. App. 1933) (semi-developed field; breach of lessee's covenant to drill; plaintiff proves only the amount it would cost to drill; judgment for defendant, since cost is not a proper measure; Funderburk, J., dissenting, makes a penetrating argument for cost as an alternative measure where the value of plaintiff's share is uncertain). In California, the value of the plaintiff's interest in the expected production has been held too uncertain by the state courts, but seemingly may be recovered in the Federal Court. *Fallis v. Julian Petroleum Co.*, 108 Cal. App. 559, 292 Pac. 168 (1930), Note (1931) 4 So. CAL. L. REV. 413 (lessor's suit against lessee for failure to protect against drainage by drilling to proper depth, in proven territory—demurrer sustained); cf. *Higgins v. Grant*, 111 Cal. App. 351, 295 Pac. 532 (1931) hearing denied by state Supreme Court (plaintiff, owner of land 1 to 2 miles from producing wells, leases to defendant for 5% royalty, defendant agreeing to drill to 3000 feet; plaintiff proves contract, breach, and that cost of well would be \$50,000: held, plaintiff did not make out a case, cost of drilling not the measure); *Julian Petroleum Corp. v. Courtney Petroleum Co.*, *supra* note 42 (see text above). In Oklahoma, the state court leans to the cost of drilling as the measure. *Dixon v. Dalton*, 158 Okla. 178, 12 P. (2d) 1108 (1932) (plaintiff, seemingly for the benefit of other land or leases owned by him in undeveloped territory, secures 1500 acres of nearby leases for defendant, in return for defendant's agreement to drill a test well; plaintiff recovers the cost of a well); but the Federal court, disregarding the local rule, gives for the breach of contract to drill a test well in "wild-cat" territory, the "value" to the plaintiff of securing the information to be furnished by such a test, which may be proven by expert opinion evidence. *Hoffer Oil Corp. v. Carpenter*, *supra* note 19; *Bu-Vi-Bar. Corp. v. Krow*, 40 F. (2d) 488 (C. C. A. 10th, 1930) (adhering to rule of last case, as matter of "general" law), same case on later appeal, 47 F. (2d) 1065 (C. C. A. 10th, 1931). An illuminating analysis of these various measures is made, in a comment on the Hoffer case (1930) 39 YALE L. J. 431. See Notes (1920) 5 A. L. R. 240; (1922) 19 A. L. R. 430, 450; (1929) 60 A. L. R. 936, 957.

56. *Blanchard v. Makinster*, 137 Ore. 58, 1 P. (2d) 583 (1931).

junction. It was proved that though new to this location, the plaintiffs were experienced fishermen, with proper equipment; that this was the best location in the bay; that the defendants made a large catch in the fourteen days, and that during that month there was the largest run of salmon that had occurred in recent years. The plaintiffs also proved their receipts and expenses on the location, for the few days before they were interrupted. The availability of a ready market and the market price for salmon were also shown, and experienced fishermen gave their estimate of the probable value of the catch. The trial court charged that the plaintiffs were entitled to recover "the value of the use of the location" during the fourteen days and instructed them that this value comprehends the loss of profits, if any, which would have been made. The jury found that the damages were \$1500, and on appeal, the instructions and finding were held to be proper in the light of the proof. The court said:

"It will be observed that the defendants conceded their wrong, and the foregoing proof renders it certain that the plaintiffs sustained some injury by reason of the admitted wrong. Doubtless it is true, as the defendants contend, that a commercial fisherman is confronted with many hazards over which he can exercise no control; for instance, the tides, the weather, market conditions, the number of other fishermen operating in the same locality, and so forth. But no business is free from uncertainties, and if the courts are to search only for the hazards which might deprive a particular venture, whose course is interrupted by a tortious defendant, of its profits, no injured plaintiff can ever recover just relief for the damage sustained. The situation disclosed by the testimony renders applicable the principle of law to which we have already alluded; that uncertain damages are nonrecoverable only when the uncertainty is due to inability to establish with certainty the cause."⁵⁷

57. *Id.* at 69, 1 P. (2d) at 586. Other cases relating to fishing, in which the amount of the loss of catch was held to be proved with sufficient certainty: *Linen Thread Co. v. Shaw*, 9 F. (2d) 17, 19 (C. C. A. 1st, 1925) (counterclaim by purchaser of seine and accessories, for breach of warranty of fitness of purse line, used to close net, which broke with net full of mackerel; finding of damages held sustained by evidence of eye-witness that "estimated" weight of the mackerel in the net was at least 20,000 lbs.); *Dennis v. Maxfield*, 92 Mass. 138 (1865) (action by captain of whaling vessel for wrongful discharge in mid-voyage; plaintiff's contract entitled him to share profits; the contract itself contemplating profits as the basis of payment, plaintiff may recover lost future profits, though uncertain). Compare *Anderson v. Columbia Contract Co.*, 94 Ore. 171, 184 Pac. 240, 185 Pac. 231 (1919) (fish-trap in Columbia River injured by collision of defendant's tug; value of use of trap during period of repair measurable by profits, and catch before and after admissible). In other cases, the loss was deemed too uncertain: *Whitehead v. Cape Henry Syndicate*, 111 Va. 193, 68 S. E. 263 (1910) (action on injunction bond, for wrongful issuance of injunction against use of nets in a certain location, by commercial fisherman; proof of plaintiff's profits for one month before interruption held inadequate as basis for finding of lost profits—a new venture); *Wright v. Mulvaney*, 78 Wis. 89, 46 N. W. 1045 (1890) (action for injury to net of commercial fishermen at Green Bay; jury

Another fertile source of holdings as to uncertainty of damages, is the litigation arising over the termination of sales-agencies. In such a case in Wisconsin,⁵⁸ a firm of cigar dealers in Milwaukee was prevailed upon to take the agency for El Producto cigars for an extensive territory in 1921. It was a new firm which had been in business for one year during which year it had made a profit. The El Producto cigars were marketed through this agency to the extent of gross sales of from about \$80,000 to \$100,000 a year for each of the years 1921, 1922 and 1923, but the agency did not make a profit during this period when it was building up a business. At the beginning of 1924 the manufacturer wrongfully repudiated its contract to continue the exclusive agency for that year, established a branch in Milwaukee and sold direct to dealers in the plaintiffs' territory. Sales from this branch in 1924 were \$109,000. The plaintiffs sued for loss of prospective profits and gave evidence that they could have sold a large quantity of defendant's cigars in 1924, without addition to their expense, as their organization was adequate for that purpose, and that their direct profit on defendant's cigars would have been 12%. The jury gave a verdict for the plaintiffs for \$8900, and this was sustained on appeal, when the court said :

"It is well established that prospective profits are a legitimate item of damages resulting from a breach of contract when the circumstances are such that the future profits may be computed with some reasonable certainty, and it is held that evidence of prior profits in the same business furnishes a basis for such computation . . . It is true that in this case there were no prior profits, but there were prior sales. Not only that, but we have the evidence of the amount of defendant's sales of the same cigar in the same territory during the year 1924 . . . According to its own representation made to the plaintiffs, this work should begin to bear fruit during the fourth year, consequently the jury were justified in arriving at the conclusion that the plaintiffs would have sold about the same number of cigars that the defendant actually did sell during the year 1924, and that if they did, the income of the plaintiffs would have been greater to the extent of the profit which they would have made on the sale of these cigars, as they were fully justified in concluding that the plaintiffs would have incurred no additional expense in making such sales."⁵⁹

allowed lost profits for 10 days necessary to repair net, though it was not actually repaired, on evidence of usual profits from lifting net; held, (1) too conjectural, in absence of evidence that weather and price conditions during the ten days continued favorable; (2) impossible at best to prove the probable catch with reasonable certainty, and plaintiff only entitled to the value of the use of the net during the time for repair).

Similarly, the profits of a new agency for trapping and trading in furs were regarded as too speculative. *Prejean v. Delaware-Louisiana Fur Trapping Co.*, 8 F. (2d) 357 (E. D. La. 1925).

58. *Buxbaum v. G. H. P. Cigar Co.*, 188 Wis. 389, 206 N. W. 59 (1925).

59. *Id.* at 393, 206 N. W. at 61. The following will serve as examples of the numerous

The Value of a Chance

The standard of "certainty" is thus observed to be gradually changing in meaning and in application. With increasing confidence in other developing doctrines which are used to control verdicts, such as the doctrines of "contemplation of the parties" in contract cases, and of "proximate cause" in tort cases, and with increasing flexibility in controlling the size of the verdict on the motion for new trial or on appeal, the judges have come to relax their strict insistence that the jury shall not "speculate" as to the amount. "Certainty" becomes "reasonable certainty," and then "reasonable probability." But even so, by "reasonable probability" the judges have usually meant something stronger than fifty-fifty. It seems clear that in passing upon claims for a particular profit lost or gain prevented, of a known amount, they have assumed

sales-agency cases. Claim for lost profits allowed: Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc., 29 F. (2d) 3 (C. C. A. 2d, 1928) (dealer promised to buy 900 cars in a 3-year period; maker did not agree to deliver cars but gave dealer exclusive right to sell in the territory; judgment dismissing dealer's complaint for repudiation of contract, reversed): "The contract had been in force for more than three years, and had only seven months to run; we cannot say that it was an impossible task to show, with certainty enough to support a verdict, how many cars the maker would in fact have delivered under the pressure of this limitation, even though he was not legally bound to deliver any at all." *Id.* at 4. Barnett v. Caldwell Furniture Co., 277 Ill. 286, 115 N. E. 389 (1917) (agent having contract for two years recovers prospective profits upon cancellation before end of first year); Randall v. Peerless Motor Car Co., 212 Mass. 352, 99 N. E. 221 (1912) (evidence held sufficient to show established business with stable demand); Brach & Son v. Stewart, 139 Miss. 818 104 So. 162 (1925) (plaintiff, sales agent in state for sale of candy, wrongfully discharged; recovers commissions on sales made direct by defendant, which is estopped to deny that plaintiff would have made the sales); Wakeman v. Wheeler & Wilson Manufacturing Co. (leading case, liberal opinion: contract for sales agency for sewing machines in Mexico canceled after plaintiff had made sales in two localities of amount sufficient to entitle him to establish local agencies under the contract); Pittsburgh Gauge Co. v. Ashton Valve Co. (exclusive agent with three year contract sues for cancellation after a year and a half, recovers value to him of the contract, in determining which his sales under the contract, and sales of a succeeding agent, are properly considered); Manss-Owens Co. v. H. S. Owens & Son (action by jobber against manufacturer), all *supra* note 19. Claim disallowed: Stephany v. Hunt Bros. Co., *supra* note 35 (cancellation of new agency for sale in Europe of American canned fruit; no basis for calculation of prospective profits; Isbell v. Anderson Carriage Co., 170 Mich. 304, 136 N. W. 457 (1912) (no established market, and agency terminable by principal if dissatisfied). *Cf.* John Hetherington Sons, Ltd. v. William Firth Co., *supra* note 13 (action by English manufacturer of cotton mill machinery against corporation which agreed to act as sales agent in United States for 5 years; prices, quantities, and commissions not fixed in contract; profits held not "in contemplation" as measure of damages when contract made, and too uncertain in view of all conditions, including the fluctuating demand). Cases are collected in Notes (1920) 5 A. L. R. 1504; (1924) 32 A. L. R. 209, 239; (1928) 52 A. L. R. 546, 550. See also Comment (1930) 14 MINN. L. REV. 820 (valuable classification of cases with respect to evidence held sufficient or insufficient on loss of profits); (1931) 9 Tex. L. Rev. 280 (effect of option to terminate).

that unless the jury found the chances were better than even, unless the accrual was at least more probable than not, they should give nothing at all.⁶⁰ But there comes a subtle shift when the claim is not for a single specific gain prevented, but for a net balance of advantage which the claimant expected from a succession of numerous business dealings over a space of time, as in case of an interruption of an established business, by wrongful dispossession of a tenant,⁶¹ or by termination of a sales-agency.⁶² Any particular transaction or sale expected might fall through or might yield a loss rather than a profit. To the jury is committed the more complex task of using some data of comparison to assess the probability that a net advantage would have resulted, and to fix upon a reasonable amount. The jury may believe that as to every one of a hundred prospective customers named by an automobile sales agent in a suit for wrongful cancellation of the agency contract, it was more probable that he would not, than that he would, have bought an automobile from the agent; and yet, obviously, they may find that probably one-fourth of them would have bought, and damages may be assessed on that basis. The prospective sales would not be judged singly and each required to pass the test of probability.⁶³ This standard of probability of net advantage from a series of transactions entailing separate probabilities of expense or gain is conveniently translated to the jury under the formula of "the value of the contract."⁶⁴

Should the courts insist, in claims for loss of a single, specific ad-

60. See cases in notes 66-70, *infra*.

61. See *Allison v. Chandler*, *supra* note 17.

62. See notes 48-59, *supra*, and accompanying text.

63. It is believed that the court in *Wright v. Mulvaney*, *supra* note 57, fell into this error.

64. A clear exposition of this idea appears in *Taylor v. Bradley*, 39 N. Y. 129, 144 (1868), an action by one who had agreed to work a farm for three years, on shares, against the land-owner who repudiated the contract at the outset. The court (Woodruff, J.) said: "It was, in view of the decisions, a special contract, partaking somewhat of the nature of an adventure, and entitling the party to the chance of profit or benefit derivable therefrom . . . Here the court cannot say, that, if the contract had been performed, he would have realized one dollar for his services; *non constat*, that the returns of the cultivation would have equaled his expenditure. It may be presumed that the earth will yield a reward to the husbandman; but, how large? That depends upon details more or less contingent and speculative . . . To my mind the only rule which can be prescribed, and the only rule which will do justice to the parties is, that the plaintiff is entitled to the value of his contract. He was entitled to its performance; it is broken; he is deprived of his adventure; what was this opportunity which the contract had apparently secured to him worth? To reap the benefit of it, he must incur expense, submit to labor, and appropriation of his stock. His damages are what he lost by being deprived of his chance of profit." But in *Kentucky*, on similar facts, a demurrer was sustained because of the impossibility of calculating damages. *Turpin v. Jones*, 189 Ky. 635, 225 S. W. 465 (1920).

vantage, upon a showing that the chances were substantially better than even, and upon giving all or nothing? To adopt this attitude seems to result in oscillation between over-lavishness and niggardliness. In conversion cases, many courts give to the plaintiff the highest amount for which he could have sold the property after the conversion,⁶⁵ though the probability is overwhelming that he would not have been so fortunate as to sell at the peak. Nevertheless, he had a *chance* of doing so, for which he is compensated in this generous fashion. Contrariwise, a leading case in the United States Supreme Court⁶⁶ held that one who had by telegram requested his broker to buy on the Exchange ten thousand barrels of oil, when the price was \$1.17, could not recover against the telegraph company for failure to deliver the message on the day sent, though the price had risen to \$1.35 the next morning. However, the plaintiff's proof failed to afford evidence that he would have resold at the advanced price. In other cases, similar chances of a resale at a higher price have been held compensable by allowing the whole profit that might have been made.⁶⁷ Similarly, in cases of delay by a carrier of architect's plans sent to be submitted in a prize competition,⁶⁸ of failure to deliver a telegram, thus preventing a race horse from being sent to meetings at which he would have competed for purses,⁶⁹ and of delay of a message in regard to the whereabouts of a criminal, depriving the plaintiff of an opportunity to secure a reward,⁷⁰ the courts have

65. E. g., *Berberich's Estate*, 264 Pa. 437, 107 Atl. 813 (1919); *Note* (1926) 40 A. L. R. 1279, 1282.

66. *Western Union Telegraph Co. v. Hall*, 124 U. S. 444 (1888). See also *Farabee-Treadwell Co. v. Planters' Bank & Trust Co.*, 135 Tenn. 208, 186 S. W. 92 (1916) (agreement to extend credit to plaintiff to buy grain on exchange; plaintiff buys on faith of this agreement, and when defendant repudiates, is forced to sell at loss; plaintiff recovers actual loss, but not prospective profit on rising market).

67. *Newby v. Atlantic Coast Realty Co.*, 180 N. C. 51, 103 S. E. 909 (1920) (measure of damages for failure to furnish money with which to take up option on land, is plaintiff's agreed share of the profit, that is, the difference between the option price and the price for which the land could have been resold within a reasonable time); *National Bank of Cleburne v. M. M. Pittman Roller Mill*, 265 S. W. 1024 (Tex. Comm. App. 1924) (action for breach of contract to make loan for plaintiff to buy wheat, plaintiff recovers for lost profit on expected re-sale, if in contemplation when contract made for loan).

68. *Adams Express Co. v. Egbert*, 36 Pa. 360 (1860) (plaintiff failed because one of the judges of the competition testified that his plans were unsuitable). In *Watson v. Ambergate Ry. Co.*, 15 Jur. 448, (Q. B. 1851), similar on the facts, the question of the measure of damages was not decided, but that the judges intimated that the loss of the prize was too "remote."

69. *Western Union Telegraph Co. v. Crall*, 39 Kan. 580, 18 Pac. 719 (1888) (error to admit evidence that, in view of his race-winning proclivities the value of the use of the horse during the meeting was \$10 per day).

70. *McPeck v. Western Union Telegraph Co.*, 107 Iowa 356, 78 N. W. 63 (1899) (judgment for plaintiff for full amount of reward affirmed, on ground that evidence

not considered the possibility of allowing the jury to assess the value of the chance at a sum less than the prize itself, but allow the plaintiff all or nothing, dependent upon whether they regard it as being susceptible of proof, and proved, that the plaintiff would have captured the prize.

It has been properly pointed out⁷¹ that the foregoing cases are distinguishable from the larger class of cases involving claims for loss of business profits, in that the former afford a chance of gain, and gain only, while the latter afford usually a chance of actual out-of-pocket loss as well.⁷² Consequently, in the latter class, as in the case of a new business,⁷³ or an oil-well to be drilled in "wild-cat" territory,⁷⁴ the court may often properly conclude that the proof is too "uncertain" in that it affords no basis to find that the chance of gain was greater than the chance of loss, and the problem of valuing the chance of gain does not arise. The chance has no value.

But where there is no chance of actual loss, or it is less than the odds in favor of success, shall the jury be allowed to value, at less than par, the mere chance of a specific gain? It is not surprising to find the English judges, with their habit of concealing problems of certainty under the cloak of "remoteness," and with their adherence to the tradition that questions of damages are for the jury's discretion,⁷⁵ leading the way toward a liberal practice. In *Chaplin v. Hicks*,⁷⁶ the defendant, a theatrical manager, had conducted through the newspapers a voting contest, to select from photographs fifty young women as the most beautiful in the kingdom; and from these, the prize-winners to the number of twelve were to be chosen by the defendant himself. The prize consisted in the promise of employment on the stage for three years for each of the twelve winners, the first four to be paid £5 a week, the second four, £4 a week, and the last four, £3 a week. The plaintiff submitted her photograph, and out of six thousand contestants she was chosen by the

showed that "in all probability" he would have made the arrest and reaped the reward; *Smitha v. Gentry*, 20 Ky. L. R. 171, 45 S. W. 515, (1898) (contra to last case; damages inherently too uncertain).

71. Note (1933) 46 HARV. L. REV. 696, 697.

72. This is occasionally emphasized in the cases, e. g. *Greene v. Goddard*, *supra* note 4 (loss of chance to use money in speculating in the China trade).

73. See note 35, *supra*.

74. See note 55, *supra*.

75. See notes 1-10, *supra*, and accompanying text.

76. [1911] 2 K. B. 786, 791, 793. The decision somewhat limits the authority of the previous lower court case of *Sapwell v. Bass* [1910] 2 K. B. 486, in which damages were denied for defendant's breach of contract to allow his stallion to serve plaintiff's mare at a fee of 300 guineas. But the earlier case is distinguished and supported on the ground that there was no evidence to show that the privilege was worth any more than the price.

votes of newspaper readers as one of the fifty fairest. The next step was for the fifty to appear before the defendant, so that he might select the twelve. The defendant, as the jury found, failed to take proper steps to notify the plaintiff of the time for appearance; in consequence she did not appear for inspection, and the twelve were chosen in her absence. She sued for breach of contract, and the jury found that the value of the opportunity of which she was deprived was £100, for which she had judgment. This was unanimously affirmed in the Court of Appeal. Vaughan Williams, L. J., said:

"It is said that in a case which involves so many contingencies it is impossible to say what was the plaintiff's pecuniary loss. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize. In the present case I understand that there were fifty selected competitors, of whom the plaintiff was one, and twelve prizes, so that the average chance of each competitor was about one in four. Then it is said that the questions which might arise in the minds of the judges are so numerous that it is impossible to say that the case is one in which it is possible to apply the doctrine of averages at all. I do not agree with the contention that, if certainty is impossible of attainment, the damages for a breach of contract are unassessable. I agree, however, that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming. . . . None of the fifty competitors could have gone into the market and sold her right; her right was a personal right and incapable of transfer. But a jury might well take the view that such a right, if it could have been transferred, would have been of such a value that every one would recognize that a good price could be obtained for it. My view is that under such circumstances as those in this case the assessment of damages was unquestionably for the jury."

While the preponderance of the American decisions may still lean against the practice of valuing a less-than-even chance for a single specific gain,⁷⁷ a more liberal tendency clearly appears in recent legal

77. See the cases cited in notes 70-74, *supra*, and see *Hall v. Hall*, 91 Conn. 514, 100 Atl. 441 (1916) (no recovery for false statements that plaintiff was insane, leading father to convey land to defendants, which plaintiff might have inherited); *Cain v. Vollmer*, 19 Idaho 163, 112 Pac. 686 (1910) (plaintiff employer sues for damages to himself due to personal injury to unusually skillful jockey apprenticed to plaintiff; no recovery for value of future services of jockey as race-winner, as too conjectural; "if this were a case where appellant was seeking damages for the loss of a prize for a race in which his horse had been entered, and in which at the time of the injury he had turned the home stretch, and was so in the lead that it could be said with reasonable certainty that he would have won

writing⁷⁸ and in at least two recent decisions.⁷⁹ Certainly, where the value of the chance is not outweighed by a countervailing risk of actual loss, and where it is fairly measurable by calculable odds, or by evidence bearing specifically on the probabilities, or by expert opinion,⁸⁰ and where the amount of the expected gain is itself fixed or approximately ascertained, the jury should be allowed to value the lost opportunity.

the contest, then the damage would be direct, and a recovery might be had; but that is not the case before us"). *Walser v. Western Union Telegraph Co.*, 114 N. C. 440. 19 S. E. 366 (1894) (failure to deliver message: "Would you accept receivership First National Bank Wilmington, compensation \$200 per month, subject to future modification"; held, no obligation on Government to appoint him if he had accepted, since telegram not an offer, hence impossible to determine damages); *Phillips v. Pantages Theater Co.*, 163 Wash. 303, 300 Pac. 1048 (1931) (plaintiff, one of six chosen in preliminaries of vaudeville contest, by applause, sues for not allowing her to participate in finals; prize, two weeks in Hollywood; no recovery, since damages were too speculative in absence of evidence showing plaintiff would have won finals; brief opinion not citing *Chaplin v. Hicks*, *supra* note 76).

78. See Note (1933) 46 HARV. L. REV. 696 (1933); Note (1928) 28 COL. L. REV. 76; 1 SUTHERLAND, DAMAGES (4th ed. 1916) § 71; see also CONTRACTS RESTATEMENT (Am. Law Inst. 1932) § 332, which reads: "Where a right to a promised performance is conditional upon the happening of some fortuitous event, the promisee can recover damages measured by the value of the conditional right at the time of breach, (a) if it is impossible to determine with reasonable certainty whether or not the event would have occurred if there had been no breach; or (b) if the breach causes the injured party reasonably to make a new contract for the assumption of the same risk by another contractor." This section, however, seems too narrow, as not covering such situations as the carrier and telegraph cases, where the chance of a collateral advantage is lost by the breach. See cases notes 70, 72, 74, *supra*, and note 83, *infra*.

79. In *Kansas City Ry. Co. v. Bell*, 197 S. W. 322 (Tex. Civ. App., 1917) the plaintiff had recovered in the trial court, as damages for delaying a shipment of pedigreed hogs, the amount of the prize he claimed that he would have won at the Stock Show. On appeal, this was reversed in an enlightened opinion by Boyce, J., who cited and approved *Chaplin v. Hicks*, *supra* note 76, and held that the plaintiff would only be entitled to recover the value of the chance. "The chance might be worth little or nothing, or it might be worth, under some circumstances, the full amount of the premium offered for the best of the class in which plaintiff was to be a competitor. In such a case, evidence as to all such matters as would tend to show the probability that the plaintiff would be successful in the competition would be admissible, and, as one of the judges in the English case says, it would then be left to the good sense of the jury trying the case to determine the value of the plaintiff's chance in the competition. If any recovery in such cases can be had at all, it would evidently be only on this theory, and not on the theory on which plaintiff proceeded in this case." See also *Wachtel v. National Alfalfa Journal Co.*, 190 Iowa 1293, 176 N. W. 801 (1920), which was an action by one who had entered as a contestant in a prize contest for magazine subscriptions. Many prizes of different values were offered for securing the highest number of subscriptions in each of the different districts, and a grand prize for the entire contest. After the plaintiff had secured some subscriptions and stood first in her district, the defendant wrongfully declared the contest abandoned in that district. On appeal, the court approved the doctrine of *Chaplin v. Hicks*, *supra* note 76, and held that plaintiff should recover the value of her chance to win a prize, to be estimated by the jury.

80. Compare the following language of Woodruff, J., in *Taylor v. Bradley*, *supra* note

The Relation between Responsibility and Certainty

It is useful to attempt, as we have attempted in this article, to isolate for separate inspection, as a recurrent phase of damage litigation in general, the problem of ascertainability of the amount of loss. The development of the standard of certainty of amount is probably the most distinctive contribution of the American courts to the common law of damages. Moreover, the doctrines of certainty form perhaps the most important and characteristic part of the law of damages, in its proper sense of the rules and practices governing the *measurement* of awards, as contrasted with the law of liability. These two phases of a case—responsibility, and ascertainability of amount—should be distinguished.⁸¹ Only so can the two streams of past experience be centered accurately upon a particular problem. This was appreciated by the Kentucky court, in a case⁸² where the plaintiff sought damages against a rival candidate in a party primary to choose nominees for a public office, for bribery of voters. It was urged that the amount of damage was uncertain, but the court declined to place its holding on that ground, and concluded that the interest of the candidate in such a primary is not to be legally protected at all, by private action, against the harm of bribery. While the court's solution of this underlying problem of policy is highly debatable, and while the question of whether the amount of damages in this class of cases will usually be fairly ascertainable has a proper bearing on this problem of policy, the question of liability was correctly faced as a primary and separate one. The facts, likewise, of a recent Louisiana case,⁸³ mark out the two problems. The defendant owned a gas-well. The plaintiffs, owners of the immediately surrounding land, claimed damages on the ground

64, at 144-145: "How, then, can the value of the contract be proved? If it cannot be proved, then the plaintiff can only recover nominal damages. I think the plaintiff is not without a better rule. The administration of justice frequently proceeds . . . in the face of similar difficulties with reasonable certainty of accomplishing what is right . . .

" . . . it is a result based upon years of experience and observation, with knowledge of the farm itself, upon which the plaintiff must rely to prove the value of his contract. How much is such a privilege (whether it be called a lease or right of occupation, or by whatever name) *worth*? . . . Such privilege may be worth nothing. It may be worth more than the labor and expense attending it. I think it is a proper subject for proof in that form." See also note 42, *supra*.

81. Emphasis is placed upon the need for this distinction, in GREEN, PROXIMATE CAUSE (1927) c. 6; GREEN, JUDGE AND JURY (1930) c. 2; Miller, *Damages, Responsibility, and Loss of Profits* (1932) 17 MARQ. L. REV. 3. Compare, however, Note (1928) 28 COL. L. REV. 76, 79 where problems which these writers would classify as questions of responsibility are said to turn on the issue of certainty of damage.

82. *Shields v. Booles*, 238 Ky. 673, 38 S. W. (2d) 677 (1931).

83. *McCoy v. Arkansas Natural Gas Co.*, *supra* note 25.

that the defendant had negligently allowed the casing in the well to break and had otherwise carelessly handled it, allowing large amounts of gas to escape, and thereby impairing the gas-supply and gas-pressure under the plaintiffs' land and the value of the plaintiffs' interest therein. The court held, first, that the interest of the plaintiffs was one not protected against the kind of misconduct here asserted, that is, mere negligence. Secondly, it held that, even if the hazard were one for which protection is extended, the damages are inherently too unascertainable in amount to be assessed. Both conclusions are quite arguable, but the problems are rightly presented as distinct. Finally, a celebrated Idaho case⁸⁴ deserves mention. The plaintiff, a race-horse owner, had in his service an apprentice who was a highly successful jockey. During a race-meeting, when the jockey was at the exciting moment before the stretch, the defendant negligently permitted a dog to enter and cross the track. In consequence the jockey was thrown and injured, and permanently disabled from racing. The plaintiff proved that the jockey had earned \$12,000 in prizes for him in the races of the previous year, and otherwise proved so far as circumstances made it possible, the value of the opportunity to use the jockey's skill in winning races and prizes during the rest of the period of apprenticeship. Counsel and court seem wholly to have ignored the initial question: is the plaintiff's interest in the employment relation protected against this merely negligent interference? The trial judge nonsuited the plaintiff, and the court on appeal discussed the problem as one of certainty of damages. They found the damages too indeterminable, a conclusion which if liability were conceded, might seem unduly conservative. It would seem, however, that a more complete analysis would have led the court to consider first the primary problem of the limits of the protection extended to the master's interest in the services of the apprentice.

Every attempt to classify and discuss cases according to factual kinship roils the clear pool of doctrine; so the attempt herein to classify and treat them together because of doctrinal affinity under the standard of certainty may falsify the picture of what the courts are doing, by suggesting an illusory adherence to a single standard in the medley of litigated cases. Consequently, we must remind ourselves that though the verbal terms of the standard of certainty may be repeated in like language, yet the actual use of it varies in the different classes of cases, and within the classes varies with the slant of the balance of sympathy, justice, and equity in the particular case. It is applied with relative strictness in cases of routine breach of contract, is relaxed somewhat

84. *Cain v. Vollmer*, *supra* note 77.

if the breach was avoidable and deliberate, is relaxed again in torts to property according to the wantonness of the act, is applied still more loosely in personal injuries, and becomes shadowy, almost to vanishing, in cases of malicious wrongs. In the tort field, it has in fact no application at all to the measurement of damages to interests of personality, such as claims for pain, mental anguish, or humiliation, nor any application, of course, to punitive damages.