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Damages -- Loss of Profits -- Standard of Certainty

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and under circumstances in which the deceased should be considered to have "assumed the risk" of the undertaking. This carries the affirmative proximate cause idea to its logical conclusion and points out the inadequacy of this theory when applied as the sole criterion for establishing the implied crime of felony-murder. The split decision in this case shows a dissatisfaction within the court which has advanced the theory most strongly.41

The use of affirmative proximate cause is not necessary for the obtaining of murder convictions when such ought to be obtained.42 If its use is helpful in the understanding of what the law is doing in felony-murder cases, such use should be limited to those cases where a person trying to prevent a felony dangerous to human life accidentally kills someone other than one of the felons.

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Damages—Loss of Profits—Standard of Certainty

Calling our attention to a much litigated area of damage law is the case of Evergreen Amusement Corporation v. Milstead.1 The plaintiff had contracted to perform the excavation for an outdoor theater, but delayed completion two and one-half months beyond the date specified. To the plaintiff's action to recover the agreed price for the job, the defendant filed a counterclaim seeking damages for the lost profits caused by the delay. The Court of Appeals of Maryland refused to allow recovery of such profits holding them to be too speculative for the jury to

41 The three dissenting judges based their dissents mainly on the fact that the killing was justifiable, and thus concluded that no one, either legally or morally, should have been held guilty of murder. This question involves to some extent a consideration of the wording of the Pennsylvania statute. "All murder . . . which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, robbery, burglary, or kidnapping, shall be murder in the first degree." Pa. Stat. Ann. tit. 18, § 4701 (Purdon 1930). It was an obvious begging of the question if such wording was meant to declare certain killings murder. All such a statute can do is raise certain murders to first degree murder. Whether or not the killing is murder depends on the common law definition.

In thirteen states (Florida, Georgia, Illinois, Indiana, Louisiana, Minnesota, Mississippi, Nebraska, New York, Ohio, Oregon, Washington, and Wyoming) and the District of Columbia, some form of the word "kill" is used instead of "murder"; thus these statutes are definitive in nature. The same is true in Alabama, Missouri, Oklahoma, and South Dakota, where "homicide is used. The Wisconsin statute refers to causing the death. The rest of the felony-murder statutes are like Pennsylvania's in using "murder."

42 A casual polling of laymen has revealed no one who felt that the defendant in this case ought to be considered a murderer. The principal case deals with a set of facts never previously considered in a reported decision in the United States. Appeal would follow automatically on such an unsettled issue if prosecution were brought. It would be absurd to say that a similar set of facts never existed before. The reason for failure to prosecute for murder in such a case must be the failure on the part of the states' officials to consider it appropriate, or even to consider it at all.

1 206 Md. 610, 112 A. 2d 901 (1955).
Denial of recovery for lost profits is commonly based on the court's determination that such profits are too uncertain and speculative. The general rule for recovering any damages is that the plaintiff must show that he has suffered a loss and must show to a reasonable certainty the nature and extent of the loss. On this reasoning the early American courts refused recovery for lost profits altogether, but the present view is to allow such a recovery if the loss is the natural result of the defendant's wrong, and the loss is not uncertain or speculative.

The North Carolina story has not been unique. Attempts to recover damages for lost profits have arisen frequently in two situations: interference in the cultivation of agricultural crops and interference with business enterprises. At the risk of generalizing, it may be said that the early North Carolina Court denied recovery in both instances.

Representative of the early view in respect to crops is the case of Roberts v. Cole. The court refused plaintiff's attempt to recover anticipated profits stating that what the crop would have been worth was "purely and wholly speculative." This reasoning was followed in a later case where the rice seed, which defendant had sold the plaintiff, failed to sprout. The court stated: "... [W]e have concluded, after mature reflection and a careful study... that the principle... in Roberts v. Cole applies. ..." It is interesting to note that only two years later the court in Herring v. Armwood did allow recovery of damages for lost profits where the defendant breached his contract to fertilize the soil.

The decision turned on the fact that the lost profits sought were for a new business as distinguished from an established business where damages could be more certainly determined by assessing lost profits on the basis of previous earnings.
Since the *Herring* decision the rule has become well established that the value of the lost crop may be recovered.9 But the plaintiff has the burden of proving what the crop would have been worth but for the defendant’s wrong. Where the only evidence as to the anticipated value of the crop was plaintiff’s testimony as to what he thought it would have been, the court denied recovery.10 And where the plaintiff merely made a comparison of the crop yield of one year with that of another the court denied recovery, but in so doing enumerated some of the evidence which should have been presented.11 The recent case of *Perry v. Doub*12 reflects the court’s present liberal view on the recovery of lost profits for damage to crops.13 Interestingly enough, the plaintiff had based his claim for loss of profits on the defendant’s breach of contract to loan money, thus preventing a maximum crop production.14

The liberal trend of the court in allowing recovery for lost profits where the plaintiff’s crop has been damaged has also characterized the court’s reaction to attempts for recovery of lost profits in business ventures. Where there was an existing contract calling for short term performance by the plaintiff, loss of anticipated profits was allowed as the measure of damages. Thus, where defendant reneged on his agreement to allow plaintiff to grind his corn at a profit of three cents per bushel, the court allowed the loss of such profits.15 And where a contract called for the manufacture and sale of certain machinery from which plaintiff expected to make twelve hundred dollars profit, the court allowed recovery of that amount.16 Other cases have allowed similar recoveries.17

11. Perry v. Kime, 169 N. C. 540, 86 S. E. 337 (1915). “The character of the soil and its condition; the kind of seed used, when planted and how; the preparation of the soil for planting; the quality of fertilizer, the quantity and the time and manner of its application; the cultivation of the crop; the harvesting of the crop; the seasons, and other circumstances enter into the estimate of what ought to be made. . . .”
13. Counsel should be wary, however, when the claim for lost profits is based on inferior fertilizer purchased from a fertilizer company. N. C. GEN. STAT. § 106-50.7 (4) (1952) proscribes the bringing of any action for damages based on inferior fertilizer purchased from a fertilizer company, except where enumerated requirements are met. These statutory requirements are so numerous and so technical that the bringing of such actions is virtually barred. However, where the farmer-defendant gave his promissory notes for the purchase price of fertilizer the statute did not prevent his defense of failure of consideration based on faulty fertilizer in an action by the payee-plaintiff. Swift & Co. v. Aydlett, 192 N. C. 330, 135 S. E. 141 (1926).
14. The general rule seems to be that the normal damage for breach of contract to loan money is the difference that plaintiff would have had to pay in interest and expenses under the contract and that paid for a similar loan elsewhere. MCCORMICK, DAMAGES § 139 (1935).
17. Recovery for anticipated profits from accommodating tourists with a pleasure boat which defendant had contracted for hire. Mace v. Ramsey, 74 N. C. 11
Where no such contract existed and the plaintiff sought recovery for the anticipated general profits of his business, the early North Carolina Court denied them as too speculative. In Boyle v. Reeder the defendant failed to deliver certain machinery on the agreed date. The court clearly expressed its aversion to the plaintiff's attempt to recover his lost profits: "Very certainly, damages are not to be measured by any such vague and indeterminate notion of anticipated and fancied profits of a business or adventure which depends so much on skill experience, good management and good luck for success." A clear contrast of lost profits in the "existing contract" category and the "general profits" category is found in Jones v. Call. The plaintiff was allowed the lost profits expected from existing contracts but was denied any recovery for the expected profits on the "continued manufacture and sale" of machinery. A more recent case refused the plaintiff's attempt to recover the lost profits anticipated from the operation of a barbershop.

Without belaboring a summary of the intervening case law one may find the present viewpoint of the court as to lost business profits in Perkins v. Langdon where an oral agreement between the parties provided that the defendant would lease a tobacco warehouse to the plaintiff for three market seasons. The defendant refused to continue the lease after the first season and the plaintiff's action sought recovery for his lost prospective profits. Recovery was allowed based on the peculiarly favorable evidence for meeting the certainty standard: government control of tobacco crops, stabilization of tobacco prices by fixing floor prices of all grades of tobacco, and statutory requirements for maintaining accurate sales records. This commendable decision should lead in the future to the court's according greater weight to sound economic data for purposes of meeting the certainty standard.

Although the American courts have liberalized their views in allow-
ing recovery for lost profits there still remains a standard of certainty to be met. It is significant that this standard is not applied in other areas of damage law. Recognizing the speculative character of the plaintiff’s claim, courts nevertheless allow the claim as the measure of damage, for instance, loss of consortium, invasion of privacy, and impairment of an infant’s earning capacity after he reaches his majority.

No decisions have undertaken to analyze the rationale for applying the standard in some instances and not applying it in others. Justification that the standard restrains excessive verdicts is hardly valid, since the remittitur safeguard would be equally effective for lost profits as it would for personal injury claims. Quaere whether such a restraint is necessary.

It has been suggested that the availability of alternative remedies motivates the courts’ application of the standard in actions for lost profits. But the alternative remedies do not necessarily achieve the purpose of money damages, making the plaintiff whole. Some justification might be found in the business-plaintiff’s ability to offset his injury through additional efforts for profits, as contrasted with the usual inability of the personally injured plaintiff to do so. A broader reason could be urged that the policy of spreading the loss can be effectuated through the business-plaintiff’s own efforts, whereas in the case of the personally injured plaintiff, the aid of the court is needed. These conjectures can be nothing more than rationalizations for the now well-entrenched standard of certainty.

According to one authority the extensive use of the certainty standard is a peculiar American contribution to damage law. This being true

\[25\] “In the tort field, it has in fact no application at all to the measurement of damages to interest of personality, such as claims for pain, mental anguish, or humiliation, nor, of course, to punitive damages.” McCORMICK, DAMAGES § 32, p. 124 (1935).


\[28\] “... [T]he law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case.” Birmingham Electric Co. v. Cleveland, 216 Ala. 455, 459, 113 So. 403, 406 (1927).

\[29\] By the very nature of the claim, the plaintiff will ordinarily be a corporation or other type of business association. It is common knowledge that this type of party defendant is jeopardized in accident litigation merely because of what it is. Would it not follow that a jury’s sentiments would be against awarding excessive verdicts to that type plaintiff?

\[30\] Note, 64 HARV. L. REV. 317, 324 (1950).

\[31\] McCORMICK, DAMAGES §§ 25, 26 (1935): “This elaboration of the doctrines relating to the standard of ‘certainty’ ... is a by-product of the jury system, springing from the lack of confidence of American judges in the discretion of juries.”
the standard will probably enjoy a long and productive career in our country. But realizing the enhancement of the economy by business reliance and action on anticipated gains, the courts should continue to liberalize the requirements for satisfying the standard. This may be accomplished without invading the principles involved by an increased reliance on available economic data and a more sympathetic attitude towards efforts for progress and achievement.

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Evidence—The Dead Man’s Statute—Personal Transaction

In the recent case of Hardison v. Gregory¹ the North Carolina Supreme Court once again had before it the problem of deciding whether a particular fact situation constituted a “personal transaction or communication” between an interested witness and a deceased person under N. C. G. S. § 8-51, commonly referred to as “the dead man’s statute.”²

It should be noted that the statute does not disqualify all witnesses or all testimony. A very good analysis of the statute was made by Justice Ervin in the case of Peek v. Shook³ as follows:

“This statute does not render the testimony of a witness incompetent unless these four questions require an affirmative answer:

1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action,⁴ or (c) a person from, through or under whom such a party or interested person derives his interest or title?

² N. C. GEN. STAT. § 8-51. “Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title, by assignment or otherwise, shall not be examined as a witness in his own behalf or person, or the committee of a lunatic, or the person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication.”

Exclusionary statutes of this type are in effect in all but three states: Connecticut, Massachusetts, and Rhode Island. In New Mexico, Oregon and Virginia, the interested party may testify, but his testimony uncorroborated is insufficient to support a recovery. 2 WIGMORE, EVIDENCE § 578 (3rd ed. 1940).
³ 233 N. C. 259, 63 S. E. 2d 542 (1951). See also: Bunn v. Todd, 107 N. C. 266, 11 S. E. 1043 (1890) and STANSBURY, EVIDENCE § 66 (1946).