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LOSS OF PROFITS AS AN ELEMENT OF DAMAGES

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As a general principle, one of the most important elements of damage in an action for personal injuries is the loss of time incurred by the injured party.[1] Such loss is most easily shown in the case of a person who works on a salary basis by showing loss of earnings arising from his enforced absence from work. However, in the case of a man who owns his own business, pays himself no salary, and does not evaluate his services, but who simply takes the net profits as his income, proof of loss of time is a more difficult problem.

In a case such as this, can the profits of the business in preceding years be shown to provide a basis on which to measure the value of his loss of time?

This is the problem with which we are concerned here. We do not attempt to deal with the question of damages which arise from loss of profits caused by the breach of a contract, nor are we concerned with such damages as arise out of a tort which has caused the injured party the loss of a specific opportunity to make profits. It is important to distinguish the problem at hand from these situations, especially the latter. The principles and reasoning behind the recovery for each differ entirely. The courts in many cases fail to make the distinction and find themselves lost in a morass of reasoning and rules.[2]

There is general agreement with regard to the general rule which is easy to state, more difficult to apply. The courts say that if profits are to be used as a measure of past earnings, the element of personal service must predominate in the business, and the business cannot involve the investment of more than an insignificant amount of capital.[3] The reasoning behind this rule is quite clear. If the business were based on any economic factor other than personal service of the injured party, any loss in its profits might be due to any one of several factors above and beyond the injury to the plaintiff. On the other hand, where the business is purely personal, it would seem that past profits are the most realistic measure of past earnings that are available.[4] Some courts even go so far as to say that when the business is a purely personal one, then profits may be called earnings and the two terms are synonymous.[5] The better reasoning recognizes that the two

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[1] McCORMICK ON DAMAGES 309 (1935).

[2] Herr v. Warren Scharf Paving Co., 118 Wisc. 57, 94 N. W. 789 (1903).

[3] Kronold v. City of New York, 186 N. Y. 40, 78 N. E. 572 (1906); Crozat v. Toye Bros. Yellow Cab, 145 So. 60 (La. App. 1933); 25 C.J.S. 618.

[4] McCORMICK ON DAMAGES 311 (1935).

[5] Roy v. United Electric Ry. Co., 52 R.I. 173, 159 A. 637 (1932).

terms are not synonymous and that the profits are simply evidence of the earnings.[6]

In cases where the capital invested is not insignificant in amount and the relative proportion of personal services rendered by the injured person is small, the profits in other years are inadmissible as evidence of past earnings.[7] In such a case, however, it is always permissible to show the character, nature, and extent of the business and the value of the services rendered by the injured person in determining the value of the loss of his time.[8]

The Colorado cases which have dealt with this problem are in conformity with the general rule. In at least two decided cases, evidence as to the amount of past profits was allowed to be shown.[9] It is plain that Colorado uses the past profits only as evidence of the loss of time and does not consider that profits are identical with earnings.[10] In an early Colorado decision, the court held that evidence of past profits was not admissible since the profits in question were not the result of the labor of the plaintiff alone, but were, at least in part, derived from other elements; and because of the uncertainties and fluctuating nature of such business, they could not be the basis for the estimation of damages.[11] In the same case, the court ruled that such profits, if this had been the type of situation where they were recoverable, would have had to have been specially pleaded. Most courts impose no such requirement.[12]

This statement of the general rule and its applicability should give us little pause. The application of the rule to concrete facts, however, is more difficult, for only then does the concept of the rule take form and begin to embody meaning.

One of the easiest fact situations with which to begin is that of the professional man—the dentist, physician, or attorney. It is at once obvious that his business depends entirely on his skill and proficiency, that the capital invested is only in books or tools of the trade, and that these would be useless were it not for his professional skill. The courts agree that in the case of injury to a doctor, lawyer, or other professional man, the personal and intellectual ability of the individual is the predominating feature and is so great as compared to the insignificant amount of capital invested that past profits may be shown as evidence of past earnings.[13] Some courts are even prone to consider the professional

[6] Apfelbaum v. Markley, 134 Pa. 392, 3 A. 2d 975 (1939); Dempsey v. Scranton, 264 Pa. S. 495, 107 A. 877 (1919).

[7] Note 5, *supra.*

[8] Union Depot & Ry. Co. v. Londoner, 50 Colo. 22, 114 P. 316 (1911); Rio Grande Western Ry. Co. v. Rubenstein, 15 Colo. App. 121, 38 P. 76 (1894); 25 C.J.S. 619.

[9] Trujillo v. Wilson, 117 Colo. 430, 189 P. 2d 147 (1948); Mountain States Tel. & Tel. v. Sanger, 87 Colo. 369, 287 P. 866 (1930).

[10] Note 9, *supra.*

[11] City of Pueblo v. Griffin, 10 Colo. 366, 15 P. 616 (1887).

[12] McCORMICK ON DAMAGES 314 (1935).

[13] Crozat v. Toye Bros. Yellow Cab, 145 S. 60 (La. App. 1933) (dentist); Marshall v. Wabash R. Co., 171 Mich. 180, 137 N.W. 89 (1912) (physician); Nye v. Adamson, 130 Neb. 887, 266 N.W. 767 (1936) (attorney); New Jersey Exp. Co. v. Nichols, 33 N.J.L. 434 (1867) (architect).

man in a category by himself and are apt to state the general rule in only a more limited form as to professional men.[14] Most courts will allow a showing of such profits even if the injured person was a partner with another who continued the business while the injured was absent.[15]

Logically, it would seem that an actor can be placed in the same category as a professional man. Here again, the element of personal skill far outweighs any insignificant amount of capital which may be invested. There can be little doubt of the application of the general rule to this situation, and it gives the courts no trouble.[16]

On the other hand, there are those occupations in which the element of personal supervision and control required in the business is relatively slight in proportion to the amount of capital or labor of others invested. Such a case would be that of a contractor who works merely in a supervisory capacity over his employees. This case would logically be the opposite extreme from the professional man, and any profits made by him might be the result of any one of a number of factors in his business above and beyond his personal supervision. Pursuing this line of reasoning, the courts generally hold that such profits are not admissible as evidence of past earnings.[17]

Within the broad extremes shown by these various occupations others exist. Certain types of occupations seem to fall consistently within the rule, and evidence of past profits is admissible. In the usual case of dressmakers,[18] boarding-house keepers,[19] small farmers,[20] and teachers,[21] the nature of the work is such that personal skill and ability are major elements and the amount of capital is always negligible. Thus, in the case of a boarding-house keeper, it has been said that the ability to acquire profits requires certain special qualities such as having a gift of management, being a good buyer, knowing how to provide liberally but not lavishly, possessing tact, prudence and discretion.[22] In the case of a person running a small restaurant, the Colorado court did not consider these qualities as predominate as the capital invested in the business and did not allow evidence of loss of profits.[23]

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[14] Nash v. Sharpe, 19 Hun. (N. Y.) 365 (1879) (dentist).

[15] Walker v. Erie R. Co., 63 Barb. (N. Y.) 260 (1872) (attorney); *accord*, Chicago R. I. & P. R. Co. v. Scheimkoenig, 62 Kan. 57, 11 P. 414 (1900) (cattle dealer, partner with another allowed to show profits); Welch v. Ware, 32 Mich. 77 (1875) (actor who performed with his wife, but neither acted while P. was sick, allowed to recover as to his share of the past profits).

[16] Welch v. Ware, *supra* note 15.

[17] Chicago, R. I. & P. R. Co. v. Hale, 186 F. 626 (8th Cir. 1911) (contractor employed to deliver gravel, used teams, tools, labor to do work); Gombert v. New York Central & H. R. R. Co., 195 N.Y. 273, 88 N.E. 382 (1909) (building carpenter who seldom did work himself, but supervised and furnished materials); Pryor v. Metropolitan Street R. Co., 85 Mo. App. 367 (1900) (contractor on public improvements).

[18] City of Kankakee v. Steinbach, 89 Ill. App. 513 (1900).

[19] Rogers v. Youngs, 252 Mich. 420, 233 N. W. 365 (1930).

[20] Note 9 supra; Chicago, R. I. & P. R. Co. v. Scheimkoenig, 62 Kan. 57, 11 P. 414 (1900).

[21] Simonin v. New York, L. E. & W. R. R. Co., 36 Hun. (N. Y.) 214 (1885).

[22] Comstock v. Conn. Ry. & Lighting Co., 77 Conn. 65, 58 A. 465 (1904).

[23] City of Pueblo v. Griffin, *supra* note 11.

On the other hand, some cases exist in which evidence of past profits quite generally is inadmissible. Any large business falls in this category as in the case of a merchant [24] or manufacturer.[25]

In certain other occupations, the admissibility of evidence of profits is dependent upon the particular facts surrounding the case. A variance of facts may lead to opposite results within the same occupation. A distinction has been made in the case of a mover who perhaps owns a small truck and does his own work and a large concern of movers employing a fleet of trucks.[26] In the case of a jeweler whose main business was to repair watches, the court allowed a showing of profits.[27] If the jeweler had been engaged in a more extensive business such as that of selling jewelry, had maintained a large inventory, and engaged employees to aid him, the result might well have been different.

In the same vein, it would seem that the profits of a druggist, as the term is commonly employed, might well be based on so many factors other than personal service that evidence of past profits would be inadmissible. On its particular facts, however, one case has held that evidence of such profits was admissible.[28] The corner filling station operator was allowed to show his profits, but in that case the owner personally operated his station with only one hired employee.[29] The modern super-service chain operator who does not own a pair of overalls might well be in a different situation as to the showing of his profits. A fisherman,[30] a florist,[31] and an iceman [32] who worked for themselves with no hired help or had at the most one hired employee were involved in cases in which the decisions varied with the particular facts at hand.[33]

In the last analysis then, it seems that when the personal skill of the plaintiff is the major factor, the predominating factor, in the success or failure of the business the value of his time may well be said to be measured by the profits of such a business. On the other hand, when the business becomes dependent upon the labor of others or upon capital investments, the profits and any decrease thereof, do not necessarily result from the owner's time spent in the business, and the value of his time cannot be said to be measured by the profits of the business. Profits in the latter case may be the result of these other factors rather than any personal efforts of the plaintiff.

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[24] Dempsey v. City of Scranton, supra note 6 (P. sold tea and coffee in his business employing three clerks, and he drove a wagon from which selling was done. Business had been built up by P. personally).

[25] Bierbach v. Goodyear Rubber Co., 54 Wisc. 208, 11 N.W. 514 (1882).

[26] Spreen v. Erie R. Co., 219 N.Y. 533, 114 N.E. 1049 (1916).

[27] Helken v. United Rys. Co., 227 S.W. 654 (Mo. 1921).

[28] Dallas R. & Terminal Co. v. Darden, 38 S.W. 2d 777 (Tex. Comm. App. 1931) (P. ran a drugstore with no capital and only one helper).

[29] Bissonette v. National Biscuit Co., 100 F. 2d 1003 (2d Cir. 1939).

[30] Lund v. Tyler, 115 Iowa 236, 88 N.W. 333 (1901).

[31] Gilmore v. Philadelphia Rapid Transit Co., 253 Pa. 543, 98 A. 698 (1916).

[32] DiBernardo v. Conn. Co., 100 Conn. 612, 124 A. 231 (1924); Fishang v. Eyermann Contracting Co., 333 Mo. 874, 63 S.W. 2d 30 (1933).

[33] See 9 A.L.R. 511, 27 A.L.R. 432, 63 A.L.R. 146, 122 A.L.R. 297 for a classification by occupation of many cases dealing with this problem.