

Through a Glass, Darkly

Back to Basics to Eliminate Speculative Damages Claims in Commercial Litigation

By Daniel D. Quick

It is sometimes difficult to unpack a concept and truly understand how to apply it in the real world. Case in point: judicial pronouncements regarding the quantum of proof required to establish damages. It is generally accepted that a trier of fact may not base its findings on speculation and guesswork, and the courts invoke this very concept as applied to damages proofs. Yet in practice, juries are often permitted to hear highly speculative proofs, and parties are free to submit damages claims based on little more than the say-so of the party, even when more reliable proofs are readily available.

Modern court decisions do not provide clear criteria as to when damages proofs are overly speculative and hence inadmissible, and some of the boilerplate regularly invoked by the courts simply muddles the issues. By unpacking the various pronouncements of the courts and applying basic principles that were first enunciated by the Michigan Supreme Court more than 150 years ago, the courts can clarify this critical area of Michigan law while preserving fundamental fairness for all litigants.

A related topic involves the admission of expert testimony regarding damages. While experts are sometimes subjected to rig-

Fast Facts

Modern court opinions delineating when damages claims are sufficiently established and supported for submission to a jury suffer from lack of precision and unclear legal descriptions.

Unnecessary speculation and conjecture should render damages claims subject to dismissal by simple application of basic principles already established in Michigan law.

Courts must continue to rigorously screen expert witness testimony to avoid the back-door submission of questionable damages claims and proofs.

orous review of their qualifications and opinions, the “battle of the experts” just as often leads to the back-door submission of speculative proofs, which would, standing alone, be deemed unacceptably speculative. Nevertheless, courts have the tools available to them, both doctrinally and procedurally, to live up to their gatekeeper function and minimize the amount of speculation being submitted to the jury.

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Precision, Speculation, and the Court as Gatekeeper

The fundamental questions surrounding the line between inadmissible speculation and jury-submissible damages claims are captured by the following quote:

A party asserting a claim has the burden of proving its damages with reasonable certainty. Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision. Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. Additionally, our Supreme Court has stated, “We do not, in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable.”¹

This combination of concepts, using substantially similar language, appears in a plethora of appellate opinions. The questions that arise from this formulation are manifest. What does it mean to say it is the plaintiff’s burden to establish damages with “reasonable certainty” but not “mathematical precision”? How is a court to apply the concept of a “relaxed” standard where the fact of damage has been established, and precisely when is that fact established in a commercial context? And how should the court evaluate when precision is “attainable” and, on that basis, hold proffered damages proofs inadequate?²

It turns out that Michigan law is actually quite clear on the proper framework to be applied to such questions. The central concept is that reasonable certainty is required. While equity dictates that this standard be relaxed if precision “from the very nature of the circumstances” is not possible (and if the fact of damage is evident), the corollary of this must be that when precision is reasonably possible, it is required. Indeed, the basic test, established as early as 1863 in *Allison v Chandler*,³ often seems forgotten by trial courts—evidence that permits the jury “to make the most intelligible and probable estimate which the nature of the case will permit” is the standard that trial courts must enforce.⁴ This one statement much more clearly captures the concept: if you can reasonably be less speculative, you must be.

What, then, does it mean for a court to examine the “very nature of the circumstances” and the availability of less speculative proofs? In a commercial case, where claimed damages often are

either lost profits or other business-related consequential damages, there are many tools for calculating damages with significant precision. For example, an injured party in commercial litigation often claims lost profits for some future period. By definition, any claim for future lost profits involves some speculation. However, “the very nature of the circumstances” principle requires parties to seek out and use the most certain information available to eliminate as much speculation as possible from the process. Thus, the Michigan Supreme Court has noted in the context of future lost-profits claims that “a reasonable prediction can often be made as to its future on the basis of its past history.”⁵ This is the “very nature of the circumstances” principle in practice; if means are available for more precision (or less speculation, if you prefer), those means must be used. This position is supported by the Restatement of Contracts, which provides: “Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.”⁶

What quantum of proofs regarding certainty is “reasonable” and, thus, necessary is context-specific (and, in part, the reason for the controlling “abuse of discretion” standard of appellate review). The real challenge for the courts is to reject a damages claim when it is based on *some* evidence but not *the best available* evidence under the circumstances. There are instances in which the guiding principle of *Allison* has been upheld. In *Denba v Jacob*,⁷ the Court of Appeals rejected a lost-profits claim where “[t]he only evidence offered at trial regarding lost profits was plaintiff’s relatively brief testimony.” In *Central Contracting, Inc v JR Heineman & Sons, Inc*,⁸ the Court of Appeals rejected a lost-profits claim where no additional evidence supported testimony that the plaintiff enjoyed a 25 percent profit margin on some jobs, especially where plaintiff’s testimony was equivocal as to amounts. And in *Harvey Investments, Inc v Toyota Motor Sales, USA, Inc*,⁹ the federal court found a president’s testimony concerning future lost profits insufficient when he admitted to engaging in speculation, and other means—such as a review of other similar businesses’ profits—were available but not used.¹⁰

Yet the caselaw is hardly uniform. In *Summit Polymers, Inc v Atek Thermoforming, Inc*,¹¹ a business owner was permitted to testify regarding his profit margin in a breach of contract case, allegedly backed by documentation that was never admitted as evidence or even produced in discovery. The trial court overruled the objection concerning this testimony, and after the jury awarded damages, the Court of Appeals rejected attacks on the sufficiency of the evidence and upheld the judgment. The Court reached that conclusion because the business owner testified without equivocation as to his past profits (thus distinguishing the less strident testimony in *Central Contracting*); the fact that he otherwise was testifying strictly from memory and without any of the alleged underlying documents either produced or in evidence was of no consequence.¹²

This ruling seems contrary to the principle stated in *Allison* and followed in cases such as *Working Inc v Heitsch*.¹³ There, the party claiming damages alleged loss of value to real property. While a witness was permitted to testify regarding value (under

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MRE 701 as lay opinion testimony), no damages were awarded since the court found that the witness did not corroborate his testimony with any other evidence and thus the testimony, standing alone, was too speculative to justify recovery.¹⁴

Working and the other cases previously discussed embody the “very nature of the circumstances” principle by requiring proofs when they reasonably exist, whereas *Summit Polymers* permitted a jury to hear uncorroborated testimony from a self-interested party despite the apparent existence of superior proofs. In light of the principles at play, judicial restatements of the governing principles—for example, “where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery”¹⁵—are confusing and often misapplied. Uncertainty as to the amount of damages *will* bar recovery *if* superior means exist to establish the amount with less speculation and such means are not used. These sorts of gatekeeper determinations are regularly made by trial courts in any number of evidentiary rulings before and during trial. Courts should meet their obligation to save a jury from guesswork if superior, reasonable means exist but are not used.

Damages Experts: Raising the Bar or Compounding the Problem?

Standard advice for the plaintiff in a commercial case is to retain an expert witness to testify concerning damages, especially with a lost-profits claim. Even the Restatement notes that use of a damages expert will help the plaintiff reach the level of certainty necessary to submit a damages claim to the jury.¹⁶

Michigan courts have accepted their role as gatekeeper in preventing unreliable expert testimony from being admitted as evidence.¹⁷ But the courts have sometimes struggled when faced with

dueling experts. Here again, citations out of context can distort the applicable principle. In *DeLuca v Jehle*,¹⁸ the court held that “[w]here an expert’s knowledge is limited but the limits of his knowledge are revealed in testimony, then those limits go to the weight of his testimony, not the admissibility.” Similarly, in *City of Detroit v Crown Enterprises*¹⁹ the court held that “[a]n opposing party’s disagreement with an expert’s opinion or interpretation of the facts is directed to the weight to be given the testimony and not its admissibility.” Clearly, not every attack on an expert’s proffered testimony goes to admissibility. On the other hand, it is not difficult for legitimate and central critiques of an expert’s proposed testimony—critiques that go to the heart of the court’s gatekeeper function—to be improperly waved aside as disagreements with the expert’s opinion.²⁰

Two recent cases decided in the Eastern District of Michigan exemplify proper enforcement of the gatekeeper function in commercial litigation. In *Rondigo LLC v Casco Township*,²¹ defendants moved to strike plaintiffs’ damages expert, who was opining on lost profits. Defendants attacked, among other things, the means by which the expert employed the “yardstick” or “control group” method of calculating lost profits.²² Defendants did not attack the methodology generally, but rather the expert’s application. While the caselaw previously cited, if hastily applied, would end the analysis—this is, after all, an opposing party’s disagreement with the expert’s opinion—the court in *Rondigo* correctly noted that “general acceptance of the methodology is not enough to satisfy” FRE 702.²³ Rather, “[p]laintiffs’ expert loss report must: (1) be based upon sufficient facts or data, (2) be the product of reliable principles and methods, and (3) apply the principles and methods reliably to the facts of the case.”²⁴ The court went on to hold that elements one and three were not satisfied, and the expert was struck. The primary problem for the expert was



that a number of assumptions or data in the opinion were simply unsupported by any evidence or were distortions of the existing evidence.

In *Auto Industries Supplier ESOP v SNAPP Systems, Inc.*,²⁵ the court held a five-day *Daubert* hearing regarding the admissibility of plaintiff's proposed damages expert. After additional rounds of briefing, the court concluded the opinion had to be struck. The basis was that the expert had been "a mere conduit for information prepared by others" without application of any expert, specialized skills.²⁶ The case was subsequently dismissed because of lack of proof of damages.²⁷ Query whether this case—had the logic of *DeLuca* or *Crown Enterprises* been applied—would have been improperly submitted to the jury.

Conclusion

Justice is not served by either the unfair exclusion of damages claims from jury consideration or by the submission of claims based on inferior and overly speculative proofs. The process of "cut and paste" judicial opinion writing has led to muddled statements by the courts on what precisely is required. What is required, interestingly enough, is precisely that which has been required in this state for almost 150 years—evidence that permits the jury "to make *the most* intelligible and probable estimate which the nature of the case will permit."²⁸ To permit less than this is to enable a jury to engage in unnecessary speculation and guesswork; to demand more than this is to deprive the plaintiff of a remedy assuming the fact of harm is clearly established. The use of experts does not change this basic law, but simply requires more from the trial court as it sifts through the testimony and evidence. By the courts more vigorously adhering to these basic and established principles, what has been rendered opaque might once again be made clear, thus aiding all parties and the administration of justice. ■



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FOOTNOTES

1. *Hainer v Lasalle Bank Midwest Nat'l Bank*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2010 (Docket No. 292124) (citations and quotations omitted).
2. The problem is not unique to Michigan. As noted by one academic, and speaking on a national scale, "At first glance, the case law is a jumble of inconsistent rules, some purporting to say what constitutes reasonable certainty, others purporting to say that reasonable certainty doesn't matter, and all of them at odds with at least some other pronouncements of the same court." Lloyd, *The reasonable certainty requirement in lost profits litigation: What it really means*, 12 Transactions: Tenn J Bus L 11, 13 (2010). Professor Lloyd offers a broader and in-depth review of the same issue addressed in this article.
3. *Allison v Chandler*, 11 Mich 542 (1863).
4. *Id.* at 554–555 (emphasis added).
5. *Fera v Village Plaza, Inc.*, 396 Mich 639, 648; 242 NW2d 372, 376 (1976), citing 5 Corbin on Contracts, §1022, pp 145–146.
6. Restatement Contracts, 2d, §352.
7. *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989).
8. *Central Contracting, Inc v JR Heineman & Sons, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 247800).
9. *Harvey Investments, Inc v Toyota Motor Sales, USA, Inc.*, unpublished opinion per curiam of the U.S. District Court for the Western District of Michigan, issued July 22, 1997 (Docket No. 95-00664).
10. By contrast, in *Bonelli v Volkswagen of America, Inc.*, 166 Mich App 483, 512–513; 421 NW2d 213 (1988), the Court of Appeals held that the plaintiff's evidence was sufficient when two independent third parties with significant experience in the industry testified regarding what the plaintiff's lost profits likely would have been. See also *Broan Mfg Co v Associated Distributors, Inc.*, 923 F2d 1232, 1240 (CA 6, 1991) (stating that "[a]lthough the question is a close one, we believe that Broan's evidence of damages has been shown with as much certainty as the nature of the tort and the circumstances permit.").
11. *Summit Polymers, Inc v Atek Thermoforming, Inc.*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2010 (Docket No. 289596).
12. See also *Akyan v Auto Club Ins Ass'n*, 207 Mich App 92, 96; 523 NW2d 838 (1994) (where the value of a vehicle was testified to only by plaintiff, while "plaintiff had a wide variety of evidentiary options available to her, including expert testimony from an insurance adjuster, bank loan officer, dealer, salesman, or appraiser," such evidence was not necessary).
13. *Working Inc v Heitsch*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket No. 264356).
14. *Id.* at *19.
15. *Bonelli*, n 10 *supra* at 511.
16. Restatement Contracts, 2d, §352, comment a (stating that "increasing receptiveness on the part of courts to proof by sophisticated economic and financial data and by expert opinion has made it easier to meet the requirement of certainty.").
17. *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 780 n 46; 685 NW2d 391, 408 (2004).
18. *DeLuca v Jehle*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2007 (Docket No. 266073).
19. *City of Detroit v Crown Enterprises*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 2010 (Docket Nos. 285258; 288429).
20. Another corollary of this troubling concept is found in *G&V, Inc v Al-Jufairi*, unpublished opinion per curiam of the Court of Appeals, issued November 6, 2007 (Docket No. 271246). After rejecting plaintiffs' challenge to defendants' damages expert, the Court noted that plaintiffs called a rebuttal expert witness. From this, the Court concluded that "Were there any error in admitting [defendants' expert's] testimony, then, plaintiffs were provided adequate remedy in the form of an ability to challenge or discredit [the expert's] testimony through their own expert." *Id.* at *6. The logic of this proposition is dubious and it hints at sanctioning the court's abdication of its gatekeeper role.
21. *Rondigo LLC v Casco Township*, 537 F Supp 2d 891 (ED Mich, 2008).
22. *Id.* at 894–895.
23. *Id.* at 895.
24. *Id.* (emphasis omitted).
25. *Auto Industries Supplier ESOP v SNAPP Systems, Inc.*, unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued December 23, 2008 (Docket No. 03-74357).
26. *Id.*
27. *Auto Industries Supplier ESOP v SNAPP Systems, Inc.*, unpublished opinion of the U.S. District Court for the Eastern District of Michigan, issued May 26, 2009 (Docket No. 03-CV-74357).
28. *Allison*, n 3 *supra*.