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A Perspective on the Michigan Law of Damages

John W. Reed

Generally

To be most useful, this kind of introductory statement ought to have two characteristics. First, it should summarize general (and often familiar) principles. Second, it should take account of shifts and movements and trends, not only to make recent cases more understandable but also to provide a basis for predictions. The truly professional lawyer does not seek to know merely what the law is; rather, he studies what the law has been, as well as what it is now, in order that his client may not be surprised by what the law becomes in the near and middle-distant future, the time when the decisions that will be made by his client on his advice will be tested.

And so I shall first offer a brief survey of the familiar aspects of the law of damages as it has been and as it is, and then move into the field of informed speculation about probable imminent developments in the law.

In undertaking to provide an overview of damages principles, I labor under two handicaps. The first is personal. I am under the disadvantage of having little prior knowledge about the field. You may recall the old Danny Kaye movie in which Kaye, playing the part of an Austrian symphony conductor, turned to the audience to introduce the next piece on the program and said, in a heavy Viennese accent: "The composer of this symphony labored under a great handicap—

This chapter is a revision and extension of an article by Professor Reed, *Trends in the Law of Damages*, which appeared in 3 *Litigation* 8 (Fall 1976).

no talent.” While I teach in the fields of evidence and civil procedure, where one would expect attention to be paid to damages problems, in fact the finer points of damages law are dealt with in such substantive law courses as torts and contracts. I may be wrong, but I have the impression that no major law school in the country today has a course called “Damages.” Certainly I never was enrolled in such a course, nor have I ever taught one.

Accordingly, I had to do considerable general reading to gain some idea of movement in the field. Although I characterize my lack of prior knowledge as a handicap, it may have been a blessing in disguise, because it enabled me to approach the subject in a journalistic fashion, which probably is the best way to provide an overview.

The second handicap under which I labor appeared to me shortly after I began to do my preparatory reading. I discovered that I had been asked to deal with trends in a nonsubject. The subject of damages involves translating harm into dollars, but it is not really a coherent body of knowledge. It is a great exaggeration to refer to the “law of damages,” because it is simply an amalgam of many concepts and rules having to do with fundamental policy questions about loss shifting, about risk spreading and about allocation of functions between judge and jury. Someone called damages “one of the minutiae making up the law of remedies.” Some years ago Maurice Merrill, a former colleague of mine at the University of Oklahoma Law School, wrote a multi-volume treatise on the law of notice, *Merrill on Notice* (1952). We can agree that there are countless ways in which the giving and receiving of notice arises, with rights and liabilities created and destroyed as a consequence; and there are general principles that can be identified; but it surely stretches our notions to think of notice as a major branch of the law.

So also the subject of damages. There are some general principles, but damages is not a coherent body of law. It is small wonder that no one is writing books about it and that law schools do not provide courses in it. The standard, most widely cited text is *McCormick on Damages*, yet that book was published in 1935. There is no more recent book of consequence bearing that title. Professor Dan Dobbs’s 1973 volume entitled *Remedies* contains, as one part of the book, an excellent analysis of recent damages developments; but McCormick continues to be the benchmark.

As a scholar put it, the law of damages “plods its way, ignored by academicians and ‘accepted’ by the courts. . . . The ‘winds of change’

sweeping over other areas of law rarely stir the law of damages. There are a few ripples here and there, to be sure, but no one gets too excited." Sedler, *The Collateral Source Rule and Personal Injury Damages*, 58 Ky LJ 36 (1969).

McCormick on Damages

Before we turn to particular areas, let us survey the general principles that appeared in Dean McCormick's useful book 40 years ago.

In 1935 as now, there was great heterogeneity of view. First, as McCormick said, his book assembled these diverse views and simply gave the reader the array of expedients that should be considered in preparing and trying cases on the issue of amount. Second, he said that anyone who ventures on the task of covering the law of damages in a single brief volume must necessarily select for special emphasis certain aspects of the subject to the neglect of others. However, he identified four major problems dealt with by the law of damages.

First, what elements of the party's loss, injury or grievance will be recognized as grounds of compensation? For example, in contract can one recover for disappointment due to the failure of the bargain?

Second, what formula of measurement is to be used in fixing compensation for the elements of loss that are recognized? For example, market value or value in use? Value at what time? In short, what formula?

Third, what are the limits on the application of these formulas to the recognized elements? Thus emerge doctrines of certainty, contemplation of the parties, foreseeability and the like.

Fourth, what procedural rules regulate the ways counsel can plead and prove these things, and what procedural rules govern appellate courts in dealing with these issues?

These four general questions continue to be the generic questions in damages and, in one way or another, underlie all the concerns we shall be considering.

McCormick dealt first with compensatory damages and the principal problems they present. Most important of these was the rule of certainty, which he described as a standard requiring a reasonable degree of persuasiveness in the proof of the fact and of the amount of the damage. This rule, subject to a half dozen or more modifying doctrines, was designed to enable the trial judge to insist that the jury have factual data—something more than guesswork—to guide them in

fixing the award. (Through all of damage law there is a concern about guiding or limiting or supervising the jury in its evaluation of the money it will take to make the plaintiff whole.) It was another way of saying that damages could not be speculative or contingent. As of 1935 the certainty standard was applied primarily to cases involving the loss of commercial profits.

Other problems arising in the attempts to award compensatory damages included such concerns as requiring the person harmed to use reasonable means to avoid or minimize or mitigate his damage, valuation problems (market value and the like), the concept of interest as damages, and the American rules regarding counsel fees and other expenses of litigation that could be assessed as costs.

The balance of the old McCormick book—and therefore much the greater part of it—was divided according to substantive law areas. The section on torts, as you might expect, dealt primarily with rules governing proximate cause (material that might as well have been in a torts book), and it enunciated many particular rules like “the wrongdoer is liable for the consequences of negligent and unskillful treatment by the physician of the injured person, provided that he used reasonable care to select a reputable physician.” McCormick, *Damages* 270 (1935). Other rules of that sort were included, all of them familiar to us now. That subject matter (torts), of course, is not one of the concerns of this volume. I mention it only by way of leading to the simple statement that exemplary or punitive damages were discussed by McCormick only in the torts section. (We shall see shortly that such damages are no longer so limited.) In McCormick’s almost quaint language, punitive damages were said “to give outlet, in cases of outrageous conduct, to the indignation of the jurors, and they are defended as furnishing a needed deterrent to wrongdoing.” McCormick, *Damages* 275 (1935).

The contracts section of McCormick began with a discussion of the general standard of recoverable damages derived from our old friend *Hadley v Baxendale*, 9 Exch 341 (1854), which laid down the familiar rule that damages for breach of contract can be recovered for such losses as were reasonably foreseeable by the party to be charged when the contract was made. As of 1935, damages for breach of contract could not include compensation for mental distress, however foreseeable. There was, however, a crack in the door: mental distress damages were allowed in some cases involving breach of promise to marry, mistreatment of passengers by carriers and mistreatment of guests by hotels.

McCormick stated the familiar rule that liquidated damages constituting a good-faith estimate of the probable injury to be suffered are enforceable, but that a stated amount fixed merely as a deterrent, to prevent a breach, would not be enforced.

Even as McCormick provided separate chapters dealing with specific torts, he provided chapters dealing with particular kinds of contracts, such as employment contracts, construction agreements, sales of property, and the like.

That, in a not very neat nutshell, is something of what the 1935 hornbook was all about. I trust that it triggers your recollection of some of the main problems and that you get something of the flavor of the then-familiar black letter statements of rules and exceptions and splits of authority. There was not—I say this with all respect—very much grappling with the economic and social values that, after all, underlie and give rise to these rules. Awareness of those often competing values is indispensable to the lawyer who seeks not merely to know yesterday's law and not merely to state today's law, but also to predict tomorrow's law, thereby serving his client more effectively and more responsibly. We must understand how these things fit, in the light of tensions concerning loss-shifting and risk-spreading and judge-jury allocation of functions.

Damages Since McCormick

What has happened since McCormick and 1935, and where are we headed?

Certainty

First, let us address ourselves to the so-called certainty rule. The rule for at least a century has been that a plaintiff is required to establish the amount of his damage with reasonable certainty. Stated conversely, a trier of fact may not speculate or conjecture, but must have some factual basis for fixing damages. This probably has not meant, and certainly does not now mean, that a plaintiff is without relief if he can prove that he has substantial damages but simply cannot establish the precise sums involved. Courts tend to say that mere uncertainty as to the amount will not prevent recovery if the evidence is of such certainty as the nature of the case permits. In short, the rule is one of "reasonable certainty" rather than "certainty." We do not

require proof with mathematical precision. As an English judge put it: "As much certainty and particularity must be insisted on . . . as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry." *Ratcliffe v Evans*, [1892] 2 QB 524, 532-33 (CA).

There is in the cases, however, a thread suggesting an irreducible minimum below which one may not go. In a Tenth Circuit case, plaintiff alleged that defendant had wasted gas on plaintiff's land by allowing it to escape into the air. Plaintiff proved that some gas had been allowed to escape but could not prove how much, except that there was evidence of pressure from which a maximum could be established. On this state of the record the court said there was no basis on which a jury could make a rational estimate of the wastage, and it affirmed the verdict for defendant. *Shannon v Shaffer Oil & Refining Co*, 51 F2d 878 (10th Cir 1931).

So, traditionally and now, generally and in Michigan, there is a rule requiring some certainty—not absolute, but reasonable under the circumstances—whatever certainty the case permits. What is sufficient certainty obviously cannot be resolved by specific rules. There is little doubt that a court judgment will vary not only between one time in history and another, but also between one kind of claim and another.

Are we then left with no guide? Is there help in the more recent cases? Perhaps there is. From those cases one gets the impression that the more important it seems to vindicate a given claim, the more willing a court may be to accept incomplete evidence on the damages issue. Compare these two cases. The first is an antitrust case awarding lost profits to a theater owner who was unable to get first-run pictures, even though he could not show how much the profits would have been. *Bigelow v RKO Radio Pictures, Inc*, 327 US 251 (1946). But in a second case a federal district court denied loss of profits to a theater owner when a film distributor breached his contract to supply first-run rights to *The Graduate*, on the ground that the theater was new and had no profit record. *Eastern Federal Corp v Avco-Embassy Pictures, Inc*, 326 F Supp 1280 (D Ga 1970); see generally Dobbs, *Remedies* § 3.3 (1973).

The difference between the two cases probably is not a difference in the reasonable certainty of the profits. They were uncertain in both instances. Rather, the difference seems to be one in policy of the

substantive law: strong in the antitrust case but only moderate in the contract breach case. Therefore, weak proof is enough in the antitrust case and not enough in the contract case.

Neither is there a distinction between tort and contract, because there are tort cases in which the court avoids a damage award, ostensibly on the ground that the damages were not proved with adequate certainty, but in fact on the ground (if you read the case carefully) that the court doubted that the substantive liability extended as far as the plaintiff argued.

So I repeat, one concludes from the cases that if the court really believes that a serious wrong has been done and that an important policy of law should be vindicated, it will accept vaguer proof, or less certain proof, of the quantum of damages than when there is no special pressure on the court to vindicate the plaintiff's interests.

The certainty rule is most often applied to bar claims for loss of profits. In the older cases it tended to be an almost flat bar: no lost profits. It has even been applied in numerous instances when the proof was strong and approached certainty. Why this hostility?

Perhaps the real explanation is that courts traditionally have preferred to protect capital rather than income. We value property. Legal protection of property goes back into the dim mists of English legal history and beyond. A diminution in the value of property—a loss of something known—can in one way or another be recompensed in damages, but when we begin to talk about speculative profit, we find the courts less interested. Whatever willingness there has been to allow the recovery of lost profits has been most grudging. Any shift in this direction has been limited largely to recovery of profits for injuries to established businesses. There is a distinction in the cases between the new business and the established business, with no damages available for loss of profits for the business that has no earnings record.

Michigan, which has pioneered in a number of areas but has lagged dismally in others, has recently jumped over the line here; there is now strong authority for recovery of lost profits from injury to a new business with no record of profits, in *Fera v Village Plaza, Inc*, 396 Mich 639; 242 NW2d 372 (1976).

Fera involved a failure of a shopping center landlord to make available space that had been leased to the plaintiff, who intended to open a "book and bottle" shop in the proposed shopping center—an interesting combination. Apparently one reads more happily in such a store. The shop had not yet opened, and therefore had no record of

profits, when plaintiff sued on a claim for anticipated lost profits. Yet the Michigan Supreme Court, with four justices joining in the majority opinion, two abstaining and one dissenting on this issue, held that the plaintiff could recover anticipated profits, and upheld a verdict of \$200,000 for the lost profits. The proof was as thorough as possible under the circumstances. There were experts from the Michigan Liquor Control Commission, experts from the Cunningham Drug Store chain who conducted similar businesses in the vicinity, and experts who knew how such stores operate in other locations. Between the defendant's and the plaintiff's witnesses, the opinions about the lost profits ranged from zero to \$270,000. The jury brought in a verdict of \$200,000, on which the trial court entered judgment. The court of appeals reversed, 52 Mich App 532; 218 NW2d 155 (1974), and the supreme court reversed and reinstated the trial court judgment on the verdict. The Michigan Supreme Court's great deference to what juries do prompted the court to say: "While we might have found plaintiff's proofs lacking had we been members of the jury, that is not the standard of review we employ." 396 Mich at 648; 242 NW2d at 376.

The *Fera* case thus represents an unusual holding as compared with holdings in other states; it allows speculative future profits as damages for a business that never got started. A number of jurisdictions allow damages for future profits for established businesses, but almost none allow it for new businesses.

Foreseeability

In passing, I wish to mention one other general limitation on damages: foreseeability. I simply touch on it without discussing it at length, for two reasons. First, it serves primarily as a limitation on damages in negligence cases. It is not unknown in contract, but personal injury cases are its prime focus. Second, the foreseeability limitation is subject to the same analysis and is undergoing the same trend we discussed in connection with the certainty rule. That is to say, if a defendant's actions seem to violate a strong policy, the court will find foreseeable certain consequences that it would find not foreseeable in a case of less culpable or reprehensible activity. In some small part also, foreseeability and certainty are two sides of the same coin, and as one expands, so does the other. In law, if not in life, courts are requiring defendants to be more foresighted. Finally, there is always no-fault, which makes foresight irrelevant.

The Collateral Source Rule

Any overview of the law of damages that purports to be concerned with movement and trends in the field must take account of the collateral source rule. The collateral source rule has its primary application in the personal injury field. Nevertheless, knowledge of what is happening to this aspect of the law of damages is helpful to an understanding of what is happening generally as the courts continue to adjust the allocation of losses and the shifting of risks between litigants.

As you know, even though a plaintiff is compensated for his injuries by some source independent of the tortfeasor—by insurance, for example—he is permitted to obtain full recovery from the tortfeasor himself. It matters not that this may give the plaintiff a double recovery or even a recovery for losses he never had at all. Illustrations are donated medical services, wage continuation plans, social security, workers compensation benefits and the like. Some courts do not apply the collateral source rule across the board, denying it when the collateral payment is really a gift, but suggesting that if the plaintiff himself paid for those benefits, as with an insurance policy, then the defendant cannot have the benefit of them.

The reasons most often advanced to justify the collateral source rule are three in number: (1) the plaintiff has in many instances paid for these benefits; (2) the donor intended to benefit the plaintiff; and (3) the wrongdoer should not get a windfall. The commentators nearly all agree that these are stated reasons but not real reasons and that the rule is retained for its value in financing personal injury litigation. The padding of a tort award with collateral source rule damages helps pay the contingent fee, just as pain and suffering damages do. The collateral source rule probably will not be abolished until there are new methods of financing litigation or until no-fault wipes out personal injury litigation. Meanwhile, however, the rule appears to be decreasingly effective protection for plaintiffs, as defendants increasingly succeed in getting around it by adroitly suggesting other sources of succor. In addition, there are now some statutes reducing plaintiff's recovery by the amount of other benefits.

The collateral source rule was formulated in a time when such sources were rare, when there was no health and accident insurance or workers compensation. At that time also, conduct had to be quite bad to be considered negligent. The tortfeasor usually was a rather

bad person, or at the least, a very careless one. In modern tort law, however, tortfeasors are by definition in the wrong, but are not always morally bad. Now, jurors likely will infer the existence of a collateral source—certainly will be receptive to the suggestion that it exists—and likely will also think that if the defendant is not a morally bad person, damages should be held down. As Harry Kalven wrote, “[The jury’s] plaintiff sympathy does not extend to compensating the plaintiff for a loss which some other source has already made good.” Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St LJ 158, 169 (1958). And the Seventh Circuit has said, “[T]he ‘smell’ of insurance or workmen’s compensation must be presumed to affect a jury adversely to a plaintiff’s cause.” *Mangan v Broderick & Bascom Rope Co*, 351 F2d 24 (7th Cir 1965).

Punitive Damages

Most of the general rules about damages—the certainty and foreseeability rules, limitations on damages for psychological harm, rules concerning collateral sources, adjustments for inflation, interest and taxes, and limitations on amount, such as statutory ceilings, judicial control by means of additur and remittitur, and scheduling, as in workers compensation—have to do with the law’s attempt to provide for damages that compensate the plaintiff, that make the plaintiff whole, that place the plaintiff as nearly as possible in the position he would have been in had the defendant’s wrongful conduct not occurred.

In fact, however, damages sometimes serve to do more than, or something different from, restoring plaintiff to his condition before the breach or injury or other harm occurred. An excellent illustration of this different use of damages is in the field of punitive damages. No portion of the law of damages is more in transition than that dealing with punitive damages.

First, a brief word about the concept. As I noted, damages generally are thought to be compensatory and are designed to put the plaintiff in the status quo that obtained before the event occurred. We can do that, sometimes, with respect to dollars. We typically can do that with respect to certain kinds of property that can be repaired or replaced. But we cannot do that with respect to emotional harms, pain and mental suffering, and the like. In many instances it somehow seems that mere compensation is not enough. So the law occasionally applies

punitive damages not only to give vent, as McCormick said, to the outrage of the jury, not only to provide something by way of an offset to injury to so-called dignitary interests (as when someone spits in my face), but also typically as a deterrent, along with the criminal law sanctions, to keep people from doing that sort of thing again.

Thus, four purposes for punitive damages are advanced: (1) there is a heavy element of deterrence; (2) there is some element of compensation, probably to pay attorney fees; (3) there is some element of bounty, like the private attorney general doctrine, so that the possibility of punitive damages may encourage one to vindicate a right that he might otherwise abandon because there would not be enough dollar damages to make the action worthwhile; and (4) there is, some suggest, a vengeful or vindictive aspect to punitive damages.

As for the amount of punitive damages, the theory has not changed much. Most jurisdictions do not require a fixed ratio between compensatory and punitive damages. The emphasis is on hurting the defendant. McCormick spoke of exemplary damages as "smart money," designed to make the defendant hurt or smart. Obviously a thousand dollars may make one person smart yet be nothing to another who is a multimillionaire. So punitive damages have more to do with what it takes to hurt the defendant and to deter him than with what it takes to help the plaintiff.

Obviously, therefore, the defendant's financial situation is important. One reason for stating a claim for punitive damages, if there is any ground for it whatever, is to aid in discovery. If you have a claim for punitive damages, then in the pretrial discovery process you have a tactical weapon, due to the leverage it permits, with respect to discovery of defendant's financial position. Of course, punitive damages must be legitimate, or at least arguably legitimate, in the particular kind of case; but if plaintiff has any reason to state punitive damages, allegation and claim of them will permit discovery of defendant's financial position.

In what kind of case are punitive damages legitimate? Traditionally, punitive damages have been thought of as a tort remedy, there generally being no punitive damages in contract. The Michigan cases, few in number, are in accord. *Caradonna v Thorious*, 17 Mich App 41; 169 NW2d 179 (1969); *Isagholian v Carnegie Institute*, 51 Mich App 220; 214 NW2d 864 (1974). But even by the time of McCormick it was well settled that there were exceptions to the rule in contract. For example, a breach of contract to marry involving seduction could carry punitive

damages with it. A contract involving fraud could sometimes carry punitive damages, but that result was not especially remarkable because of the similarity to the tort of fraud or deceit, for which punitive damages were readily allowed. Finally, there were cases awarding punitive damages for an oppressive breach by a public utility, the idea being that the public utility had been given a favored position by the public and therefore a breach of duty owed to the public merited punishment. Thus, even 40 years ago there was a punitive damages possibility in a limited group of contract cases.

More recently the courts have begun to give punitive damages for oppressive breaches of insurance contracts. You know of the multimillion-dollar recoveries in cases against insurance companies held to have resisted payment to beneficiaries unreasonably. I suggest that these cases, which seem so extreme, are not the end of the line.

The courts are getting around the conceptual problems in several ways. In California, for example, the courts have been straightforward. They have said, in effect, that oppressive breaches of contracts are torts, and of course one can get punitive damages in torts. Other courts have taken an indirect approach and have redefined some existing tort, such as the intentional infliction of emotional distress, to make it apply to the insurance case. A third—and, to me, preferable—way is simply to declare that punitive damages are allowable for a sufficiently outrageous, unconscionable breach of contract. There are Florida and Indiana cases, and perhaps an Ohio case, on that. *See* cases collected in Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind L Rev 668, 677 *et seq* (1975).

What is the thread in these cases? It is that in this age of consumerism, if an oppressive breach is committed by someone with superior economic power (economic leverage), punitive damages may be assessed. It is the “big guy–little guy” disparity of power. It is the utility cutting off services. It is the carrier breaching a contract for passage. It is the employer deliberately firing the employee in violation of the employment contract. It is the bank maliciously refusing to honor a check. Most recently it is the insurance company seeking to force an unfair settlement with a policyholder.

I see no reason to assume that the illustrations will stop there. Indeed, there are two recent Indiana cases suggesting that punitive damages may be available against an automobile dealer unreasonably refusing to honor a warranty in one case, *Jerry Alderman Ford Sales, Inc v Bailey*, 291 NE2d 92 (Ind App 1972), and against a real estate

developer who had sold houses around a golf course and then tried to force the buyers of the houses to buy the golf course, *Standard Land Corp v Bogardus*, 289 NE2d 803 (Ind App 1972) (reversing award of damages because inadequate proof of fraud).

To repeat, when there is an oppressive breach of contract by a person in a superior position, punitive damages are likely to be allowed; whether by defining the breach as a tort or simply by saying that it is a special kind of contract. They will not be awarded, I think, in contract cases where the parties are on reasonably equal footing. See Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 Ind L Rev 668, 677-81 (1975); Galane, *Proving Punitive Damages in Business Tort Litigation*, 2 Litigation 24 (Spring 1976).

Evidence in Damages Cases

Whatever the technical rules governing recoverable damages in any kind of action, it is essential that counsel adequately communicate to the trier of fact the dollar value of those elements. Even the most liberal rule regarding certainty or foreseeability, or the like, means little if counsel does not persuade the fact finder. In the personal injury area, lawyers of great forensic talent have swayed juries with dramatic appeals. In the more prosaic kinds of cases, there is less room for poetry and emotion; but this does not mean that there is no need for clear, imaginative communication of the elements of damage. Despite all the criticisms of dramatists in the courtroom, the canons of ethics do not impose on the trial lawyer a professional obligation to be dull.

It is not an overstatement to suggest that improvement in the quality of communication with jurors has had as much effect on the size of damages as have changes in the rules of substantive liability.

The new Federal Rules of Evidence and the new Michigan Rules of Evidence make it easier for counsel on both sides to offer evidence relating to damages issues.

For example, Article VII of the Federal Rules of Evidence, dealing with opinion testimony, relaxes and makes more informal the process of expert opinion evidence of the kind used in the *Fera* case. No longer is it a valid objection that the expert opinion bears on the ultimate issue in the case. The expert need not state the factual basis of his opinion before giving it; and the opinion may be based on information not in evidence—indeed, not even admissible—if that information is of a kind ordinarily and reasonably relied on by experts in that field in forming

opinions or inferences on the subject. Moreover, the expert is allowed to testify "in the form of an opinion or otherwise," if his specialized knowledge will assist the trier of fact not only to determine a fact in issue but even "to understand the evidence." In other words, he can even be used as a "lecturer" to the jury (or court).

I take these various relaxations to indicate that it will now become considerably easier to make use of the various specialists who have helpful views about such damages issues as loss of profits, the effects of inflation, actuarial calculations, market surveys, property appraisals, and the like. Any lawyer who tries damages issues is derelict if he does not study Article VII and the Supreme Court Advisory Committee Reports.

Another, much more particular, liberalization appears in Federal Rule 803(18), making learned treatises admissible as substantive evidence. Although the authority of the treatise must be established, it is relatively easy to employ as evidence, and trial counsel will find economy in using the well-written text of the distant, expensive expert on damage issues.

A third, still narrower provision of potential utility is Rule 803(6), the business records exception to the hearsay rule. It provides that a business record (with the usual elements of regularity and routine) may be admitted not only to prove the traditional acts and events that are recorded but also "opinions, or diagnoses" contained in those routine records. Although the more obvious utility of that provision is in connection with the records of physicians and hospitals—in short, medical records—it may also be of use to counsel in some kinds of business and contract cases in which the records contain regularly entered opinions and conclusions as to causes and effects of various kinds of transactions and activities.

The new Michigan Rules of Evidence are less liberal on these various points than the Federal Rules; but even they are helpful to the lawyer seeking more effective persuasion on the issue of damages.

The Future of the Law of Damages

It may be useful for me to conclude with some prophecies about what lies ahead in the damages field.

First, I predict that the reasonable certainty rule will be relaxed, and there will be more protection of profits on any reasonable calculation or computation. Especially will this be true in cases of strong policy

support for liability. In other words, mathematical doubts will be resolved in favor of policy concerns about conduct.

My second prediction, being obvious, requires little courage. The courts will continue the centuries-old practice of fashioning remedies for invasions of interests that come into being as society and technology devise new mechanisms for living. For example, the creation of laws barring discrimination will be followed by judicial fashioning of damages remedies for violations of those laws. The common law, in other words, will continue to work.

The third prediction is that the collateral source limitation will lose yet more of its vitality. Put another way, jurors increasingly will use collateral sources as a basis for reducing damages or, even, deciding not to award damages at all.

Fourth, I believe there will be more scheduling of damage amounts as an element of the spreading concept of no-fault and as a restraint on jury generosity.

Finally, I predict that in this age of consumerism there will be more punitive damages where the powerful are found to have oppressed the weak—where the big guy has oppressed the little guy.

Despite the general perception, supported by the lack of major writing in the field, that the law of damages is relatively static, with nothing much happening, there is indeed considerable ferment and sense of change in the area. It is bound to make the trial lawyer nervous. You may recall the old Chinese curse: "May you live in a time of transition." It may be a curse to live in a time of change; but it is exciting, and movement of the law in this field will provide challenges for you and opportunities for your clients. Put more directly, there will be more business for trial lawyers.