

# Establishing Expectation Damages

---

Courts in contract litigation must determine the consequences when a party breaches an enforceable contract. Generally, the non-breaching party receives a remedy of damages. The most frequently adopted damages measure is the expectation damages measure. The following cases explain and apply that measure in two distinct contexts.

## **Hawkins v. McGee**

84 N.H. 114 (N.H. Supreme Court 1929)

Assumpsit against a surgeon for breach of an alleged warranty of the success of an operation. Trial by jury. Verdict for the plaintiff. The writ also contained a count in negligence upon which a nonsuit was ordered, without exception.

Defendant's motions for a nonsuit and for a directed verdict on the count in assumpsit were denied, and the defendant excepted. During the argument of plaintiff's counsel to the jury, the defendant claimed certain exceptions, and also excepted to the denial of his requests for instructions and to the charge of the court upon the question of damages, as more fully appears in the opinion. The defendant seasonably moved to set aside the verdict upon the grounds that it was (1) contrary to the evidence; (2) against the weight of the evidence; (3) against the weight of the law and evidence; and (4) because the damages awarded by the jury were excessive. The court denied the motion upon the first three grounds, but found that the damages were excessive, and made an order that the verdict be set aside, unless the plaintiff elected to remit all in excess of \$500. The plaintiff having refused to remit, the verdict was set aside "as excessive and against the weight of the evidence," and the plaintiff excepted.

The foregoing exceptions were transferred by Scammon, J. The facts are stated in the opinion.

BRANCH, Justice.

The operation in question consisted in the removal of a considerable quantity of scar tissue from the palm of the plaintiff's right hand and the grafting of skin taken from the plaintiff's chest in place thereof. The scar tissue was the result of a severe burn caused by contact with an electric wire, which the plaintiff received about nine years before the time of the transactions here involved. There was evidence to the effect that before the operation was performed the plaintiff and his father went to the defendant's office, and that the defendant, in answer to the question, "How long will the boy be in the hospital?" replied, "Three or four days, not over four; then the boy can go home and it will be just a few days when he will go back to work with a good hand." Clearly this and other testimony to the same effect would

not justify a finding that the doctor contracted to complete the hospital treatment in three or four days or that the plaintiff would be able to go back to work within a few days thereafter. The above statements could only be construed as expressions of opinion or predictions as to the probable duration of the treatment and plaintiff's resulting disability, and the fact that these estimates were exceeded would impose no contractual liability upon the defendant. The only substantial basis for the plaintiff's claim is the testimony that the defendant also said before the operation was decided upon, "I will guarantee to make the hand a hundred per cent perfect hand or a hundred per cent good hand." The plaintiff was present when these words were alleged to have been spoken, and, if they are to be taken at their face value, it seems obvious that proof of their utterance would establish the giving of a warranty in accordance with his contention.

The defendant argues, however, that, even if these words were uttered by him, no reasonable man would understand that they were used with the intention of entering "into any contractual relation whatever," and that they could reasonably be understood only "as his expression in strong language that he believed and expected that as a result of the operation he would give the plaintiff a very good hand." It may be conceded, as the defendant contends, that, before the question of the making of a contract should be submitted to a jury, there is a preliminary question of law for the trial court to pass upon, i.e. "whether the words could possibly have the meaning imputed to them by the party who founds his case upon a certain interpretation," but it cannot be held that the trial court decided this question erroneously in the present case. It is unnecessary to determine at this time whether the argument of the defendant, based upon "common knowledge of the uncertainty which attends all surgical operations," and the improbability that a surgeon would ever contract to make a damaged part of the human body "one hundred per cent perfect," would, in the absence of countervailing considerations, be regarded as conclusive, for there were other factors in the present case which tended to support the contention of the plaintiff. There was evidence that the defendant repeatedly solicited from the plaintiff's father the opportunity to perform this operation, and the theory was advanced by plaintiff's counsel in cross-examination of defendant that he sought an opportunity to "experiment on skin grafting," in which he had had little previous experience. If the jury accepted this part of plaintiff's contention, there would be a reasonable basis for the further conclusion that, if defendant spoke the words attributed to him, he did so with the intention that they should be accepted at their face value, as an inducement for the granting of consent to the operation by the plaintiff and his father, and there was ample evidence that they were so accepted by them. The question of the making of the alleged contract was properly submitted to the jury.

The substance of the charge to the jury on the question of damages appears in the following quotation: “If you find the plaintiff entitled to anything, he is entitled to recover for what pain and suffering he has been made to endure and for what injury he has sustained over and above what injury he had before.” ... [T]he jury was permitted to consider two elements of damage: (1) Pain and suffering due to the operation; and (2) positive ill effects of the operation upon the plaintiff’s hand. Authority for any specific rule of damages in cases of this kind seems to be lacking, but, when tested by general principle and by analogy, it appears that the foregoing instruction was erroneous.

“By ‘damages,’ as that term is used in the law of contracts, is intended compensation for a breach, measured in the terms of the contract.” *Davis v. New England Cotton Yarn Co.*, 77 N. H. 403, 404, 92 A. 732, 733. The purpose of the law is “to put the plaintiff in as good a position as he would have been in had the defendant kept his contract.” 3 Williston Cont. § 1338; *Hardie-Tynes Mfg. Co. v. Easton Cotton Oil Co.*, 150 N.C. 150. The measure of recovery “is based upon what the defendant should have given the plaintiff, not what the plaintiff has given the defendant or otherwise expended.” 3 Williston Cont. § 1341. “The only losses that can be said fairly to come within the terms of a contract are such as the parties must have had in mind when the contract was made, or such as they either knew or ought to have known would probably result from a failure to comply with its terms.” *Davis v. New England Cotton Yarn Co.*, 77 N. H. 403, 404, *Hurd v. Dunsmore*, 63 N. H. 171.

The present case is closely analogous to one in which a machine is built for a certain purpose and warranted to do certain work. In such cases, the usual rule of damages for breach of warranty in the sale of chattels is applied, and it is held that the measure of damages is the difference between the value of the machine, if it had corresponded with the warranty and its actual value, together with such incidental losses as the parties knew, or ought to have known, would probably result from a failure to comply with its terms.... [citations omitted]

The rule thus applied is well settled in this state. “As a general rule, the measure of the vendee’s damages is the difference between the value of the goods as they would have been if the warranty as to quality had been true, and the actual value at the time of the sale, including gains prevented and losses sustained, and such other damages as could be reasonably anticipated by the parties as likely to be caused by the vendor’s failure to keep his agreement, and could not by reasonable care on the part of the vendee have been avoided.” *Union Bank v. Blanchard*, 65 N. H. 21, 23; *Hurd v. Dunsmore*, *supra*; *Noyes v. Blodgett*, 58 N. H. 502; P. L. ch. 166, § 69, subd. 7. We therefore conclude that the true measure of the plaintiff’s damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition,

including any incidental consequences fairly within the contemplation of the parties when they made their contract. 1 Sutherland, Damages (4th Ed.) § 92. Damages not thus limited, although naturally resulting, are not to be given.

The extent of the plaintiff's suffering does not measure this difference in value. The pain necessarily incident to a serious surgical operation was a part of the contribution which the plaintiff was willing to make to his joint undertaking with the defendant to produce a good hand. It was a legal detriment suffered by him which constituted a part of the consideration given by him for the contract. It represented a part of the price which he was willing to pay for a good hand, but it furnished no test of the value of a good hand or the difference between the value of the hand which the defendant promised and the one which resulted from the operation.

It was also erroneous and misleading to submit to the jury as a separate element of damage any change for the worse in the condition of the plaintiff's hand resulting from the operation, although this error was probably more prejudicial to the plaintiff than to the defendant. Any such ill effect of the operation would be included under the true rule of damages set forth above, but damages might properly be assessed for the defendant's failure to improve the condition of the hand, even if there were no evidence that its condition was made worse as a result of the operation.

It must be assumed that the trial court, in setting aside the verdict, undertook to apply the same rule of damages which he had previously given to the jury, and, since this rule was erroneous, it is unnecessary for us to consider whether there was any evidence to justify his finding that all damages awarded by the jury above \$500 were excessive.

\*\*\*

Defendant's request No. 7 was as follows: "If you should get so far as to find that there was a special contract guaranteeing a perfect result, you would still have to find for the defendant unless you also found that a further operation would not correct the disability claimed by the plaintiff." In view of the testimony that the defendant had refused to perform a further operation, it would clearly have been erroneous to give this instruction. The evidence would have justified a verdict for an amount sufficient to cover the cost of such an operation, even if the theory underlying this request were correct.

\*\*\*

**Notes and Questions**

1. Consult a legal dictionary or other resource for a definition of *assumpsit*. Could you explain that term to a non-lawyer friend or relative?
2. The Supreme Court of New Hampshire does not clearly describe the outcome of the surgery on George Hawkins, but indicates that it fell short of promised expectations. The surgery required grafting Hawkins's hand to his chest, and then surgically removing the hand with its new skin from the graft. It was a failure. In a case between Dr. McGee and his insurer, the federal Court of Appeals for the First Circuit noted that according to his complaint, Hawkins had been hospitalized for three months after the surgery: "[The] new tissue grafted upon said hand became matted, unsightly, and so healed and attached to said hand as to practically fill the hand with an unsightly growth, restricting the motion of the plaintiff's hand so that said hand has become useless to the plaintiff wherein, previous to said operation by the said defendant, it was a practical, useful hand..." *McGee v. U.S. Fid. & Guar. Co.*, 53 F.2d 953, 954 (1st Cir. 1931).
3. When a jury issues a verdict that the court concludes is excessive, but not so excessive as to indicate the jury was prejudiced against the defendant, the court may correct the error with remittitur. The court will offer the plaintiff an option between a smaller damages award and a new trial. Generally, remittitur should occur only if the jury's award is clearly incorrect, and if the court has sufficient information to estimate a proper damages award with reasonable certainty. See, e.g., *Jacobs Eng'g Grp. Inc. v. ConAgra Foods, Inc.*, 301 Neb. 38, 80 (2018). In *Hawkins*, the trial court offered remittitur to Hawkins, but the Supreme Court of New Hampshire concluded instead that the trial court's own formula for calculating damages was erroneous.
4. The court in *Hawkins* stated the expectation damages rule for breach of promise to sell a machine that meets a specified purpose as follows: "[T]he measure of damages is the difference between the value of the machine, if it had corresponded with the warranty and its actual value." Thus, if the value of the machine as warranted or promised would have been \$10,000, and the actual value of the machine as delivered was \$6,000, the damages measure would be \$4,000.
5. Thelonious owns an antique car with a dented body. The current value of the car is \$10,000. He would prefer to own a car with no dents, so he hires Ellington to remove the dents. Ellington agrees to remove the dents for \$4,000, which Thelonious prepays. Ellington breaches in the following ways (see 4.a.-c.), and Thelonious sues. At trial,

Thelonious's expert testifies the car with the dents properly removed would be worth \$15,000.

- a. Ellington tries and fails to fully remove all dents. The expert testifies that the car post-repair is worth \$13,000.
- b. Same as above, but Ellington accidentally removes the roof from the car. At trial, Thelonious' expert testifies the car with dents and no roof is worth only \$8,000.
- c. Instead, Ellington makes no repairs whatsoever. The car, as returned, is worth \$10,000.

In the three hypotheticals above (4.a., 4.b., 4.c.), what are Thelonious' expectation damages?

6. The trial court in *Hawkins* instructed the jury with the following damages calculation: "If you find the plaintiff entitled to anything, he is entitled to recover for what pain and suffering he has been made to endure and for what injury he has sustained over and above what injury he had before." That included (1) Hawkins' pain and suffering from the operation and (2) positive, i.e., measurable ill effects on Hawkins' hand.

On appeal, the Supreme Court categorized the trial court's measure as one erroneously based on "what the plaintiff has given the defendant or otherwise expended." We might call that a reliance-based remedy – the measure considers how much the promisee spent in reliance on the promisor's assurances.

Consider again hypotheticals 4.a., 4.b., & 4.c. What are Thelonious's damages under the trial court's reliance calculation?

We will consider the reliance measure in more detail later.

7. The court in *Hawkins* stated its damages rule as follows: "[T]he true measure of the plaintiff's damage in the present case is the difference between the value to him of a perfect hand or a good hand, such as the jury found the defendant promised him, and the value of his hand in its present condition, including any incidental consequences fairly within the contemplation of the parties when they made their contract." We will discuss incidental and consequential damages in later modules.

\*\*\*

**Crabby's Inc. v. Hamilton**

244 S.W.3d 209 (Missouri Court of Appeals, Southern District 2008)

GARY W. LYNCH, Chief Judge.

**Factual and Procedural Background**

Fred and Carolyn Billingsly are the shareholders of a Missouri corporation called Crabby's, Inc. ("Seller"), which owned and operated Crabby's restaurant in Joplin, Missouri, for several years. In 2003, Seller listed the restaurant and accompanying real property with Dee Kassab of Pro 100 Realty. The original listing price was \$325,000, and Seller rejected an initial purchase offer for \$275,000. James Hamilton, through his real estate agent Kent Eastman of Pro 100 Realty, then offered to purchase the property for \$290,000, and this offer was accepted on May 17, 2003. Hamilton thereafter assigned his interest in the contract to Paragon Ventures, L.L.C. ("Paragon"), a business that Hamilton and Richard Worley set up to operate a restaurant. Hamilton also remained as an individual buyer on the contract. Hamilton and Paragon are hereinafter referred to collectively as "Buyers."

\*\*\*

Immediately prior to July 30, 2003, all documentation was in place at the title company and ready for closing on August 1, 2003.... According to the closing statement prepared by the realtor, after payment of mortgages, real estate taxes, and liens, Seller was to receive a cash balance of \$1,757.72 when the transaction closed.

On July 30, 2003, Buyers sent a letter to the realtor and Seller stating their intention not to close the transaction. In this letter, Buyers claimed "items, which we consider fixtures, have been taken from the premises." ... Buyers made no mention of any inability to obtain satisfactory financing. Buyers failed to appear for closing as scheduled on August 1, 2003.

On August 5, 2003, Paragon offered to buy a building at 520 Main Street in Joplin, Missouri, for the purpose of establishing a restaurant. This offer was accepted by those sellers on August 6, 2003 and closed September 22, 2003....

After Buyers refused to close the sale with Seller on August 1, 2003, Seller's realtor continuously tried to sell the property. However, no offers were received until May of 2004, when J and A Café of Kansas, L.L.C., offered to purchase the property for \$235,000.00. Sellers accepted this offer, and the transaction closed on July 15, 2004.

Seller thereafter filed suit against Buyers for breach of contract. As part of its damages, Seller claimed the difference in sales price between Buyers' \$290,000 contract price which should have closed on August 1, 2003, and the \$235,000 price actually obtained when the property subsequently sold eleven and one-half months later on July 15, 2004. Seller also claimed real estate and personal property taxes, utilities, and mortgage interest accruing during that period as damages.

The trial court entered judgment in favor of Seller and against Buyers in the total amount of \$95,547.30. Buyers timely appeal this judgment....

[The court affirmed the trial court's finding that the buyers breached the contract.]

### Discussion

\*\*\*

#### **The Trial Court's Determination of Fair Market Value is Supported by Substantial Evidence**

[Buyers claim] that the trial court's judgment is not supported by substantial evidence of the fair market value of the property as of the date the contract was breached by the Buyers—August 1, 2003—in that Seller did not offer any direct evidence of the fair market value of the property on that date. Buyers contend that the actual sale price of \$235,000.00 received by Seller on July 15, 2004, is not substantial evidence of the fair market value of the property on August 1, 2003 for two reasons: first, being eleven and one-half months after the relevant date, it is too remote in time; and, second, it was the product of a distress sale in that the Seller was compelled to sell the property in that transaction. We disagree with both contentions.

A seller's measure of damages for a buyer's breach of a contract for the sale of land with a structure on it is the difference between the purchase price and the fair market value of the property on the date of breach. *Wooten v. DeMean*, 788 S.W.2d 522, 527–28 (Mo. App. 1990). That is, the measure of damages is the difference between the contract price and the fair market value of the property on the date the sale should have been completed. *Leonard v. American Walnut Co., Inc.*, 609 S.W.2d 452, 455 (Mo. App. 1980). “An essential element of the seller's case is proof of market value, and if he does resell within a reasonable time after the breach, the price obtained is some evidence of market value.” *Id.* Conflicts in the evidence concerning real estate values are for resolution by the fact finder. *State ex rel. Kansas City Power & Light Co. v. Salmark Home Builders, Inc.*, 375 S.W.2d 92, 100 (Mo. 1964). It is sufficient if the



value set by the fact finder is “within the range” of the evidence. *City of Lee’s Summit v. Hinck*, 618 S.W.2d 719, 721 (Mo. App. 1981).

\*\*\*

Seller points us to *Hawkins v. Foster*, 897 S.W.2d 80 (Mo. App. 1995), where we held that the price obtained in a subsequent sale which occurred a little over eleven and one-half months after the date of the buyer’s breach of a real estate contract supported an award of damages in favor of the seller based upon the fair market value of the property. Buyers have failed to distinguish how the time period approved by us in *Hawkins* materially differs from the essentially same time period in the instant case. Thus, Buyers have not convinced us that we should depart from our holding in *Hawkins*. Based upon that holding, the subsequent sale by Seller in the case at bar on July 15, 2004, occurred within a reasonable time after the date of Buyers’ breach of the contract, such that it provided substantial evidence to support the trial court’s determination of the fair market value of the property on the date of Buyer’s breach of the contract. See also *Hoelscher v. Schenewerk*, 804 S.W.2d 828 (Mo. App. 1991) (subsequent sale approximately nine months after date of breach).

Buyers next contend that the subsequent sale price received by Seller is not substantial evidence of the fair market value of the property as of the date of the breach because the subsequent sale was a distress sale in that Seller was “compelled” to sell the property. Buyers claim that because fair market value is defined as “the price which property will bring when it is offered for sale by an owner who is willing but under no compulsion to sell and is bought by a buyer who is willing or desires to purchase but is not compelled to do so[.]” *Turner v. Shalberg*, 70 S.W.3d 653, 659 (Mo. App. 2002) (quoting *Carter v. Matthey Laundry & Dry Cleaning Co.*, 350 S.W.2d 786, 794 (Mo. 1961)) (emphasis added), and because Seller was compelled to sell the property, then the sale price could not, by definition, reflect the fair market value of the property....

Buyers fail to cite to any authority for the proposition that a sale in which the seller is highly motivated or badly wants to sell, as opposed to being compelled to sell, eliminates that sale from being considered as a fair market value sale of the property. Their reliance on *Carter*, 350 S.W.2d 786, is misplaced. In *Carter*, the sale was made pursuant to a plan of liquidation which had to be completed within a one-year period under a provision of the tax code, and, in addition, the property was under the threat of condemnation which would have compelled a forced sale. *Id.* at 794. While Seller here was financially motivated to sell and was highly desirous of selling the property at the time of the subsequent sale, it was not compelled to sell as was the seller in *Carter*.

\*\*\*

### Decision

The trial court's judgment is affirmed.

BARNEY, P.J., and BARNES, SR., J., concur.

### Notes and Questions

1. The measure of damages stated by the court in *Crabby's* is "the difference between the purchase price and the fair market value of the property on the date of breach." That would be easy to calculate if Seller found a replacement buyer shortly after breach. Imagine a counterfactual case where the actual sale price of the property was the same \$235,000.00 but received a mere forty-five days after Buyer's breach.
2. The court in *Crabby's* concluded that Seller's subsequent sale price, nearly one year after Buyer's breach, provided relevant evidence of the market price at the time of breach. Other courts have expressed concern about deriving market value at the time of breach from a similarly subsequent sale. In *Barry v. Jackson*, 309 S.W.3d 135, 141–42 (Tex. App. 2010), the Texas court noted the burden was on the seller to establish that the final sale price was probative of the value at the time of breach. The *Barry* court noted some uncertainty about a resale coming more than one year after breach due to rapid upheaval in the real estate market beginning in 2008, after the breach and subsequent sale but before the appeal was argued and the case decided.
3. What evidence would you gather to try to help a non-breaching seller establish market value of the home at the time of breach? In one recent case, plaintiff seller attempted to establish the value of his property using a print-out of a home value estimate from real estate website Zillow. The court excluded the evidence, holding in part that "the manner in which home value estimates on Zillow are prepared is unknown.... There is simply no way for the reliability of Zillow estimates to be tested without accompanying testimony from an individual with specialized knowledge, making the estimate akin to impermissible opinion testimony." *Dorvil v. Nationstar Mortg., LLC*, No. 17-23193-CIV, 2020 WL 9065875, at \*2 (S.D. Fla. Feb. 13, 2020).
4. The court in *Dorvil* noted, however, a general rule in Florida, embraced in other states as well, that "an owner of property, including an owner of real property, may generally express an opinion as to its value. But such an owner, like any other witness, must be

shown to be competent to testify about valuation. Mere ownership, without more, is not enough.” *Dorvil*, 2020 WL 9065878, at \*2 (citing, inter alia, *Soltero v. Swire Dev. Sales, Inc.*, 2010 WL 11506701, at \*8 (S.D. Fla. Apr. 19, 2010), *aff’d*, 485 Fed. Appx. 377 (11th Cir. 2012)).

5. Article 2 of the Uniform Commercial Code (UCC) governs the sales of goods in forty-nine of the fifty United States. (Louisiana’s legislature did not pass Article 2 into law.) UCC § 2-708(1) provides that calculating seller’s damages for buyer’s non-acceptance or repudiation of goods begins by taking “the difference between the market price *at the time and place for tender* and the unpaid contract price....” (emphasis added). The seller may instead choose to resell the goods under § 2-706(1). If that sale is made in “good faith and in a commercially reasonable manner,” calculating the seller’s recovery starts by taking “the difference between the resale price and the contract price....” Commentary to § 2-706 clarifies that evidence of market price “at any particular time or place is relevant only on the question of whether the seller acted in a commercially reasonable manner in making the resale....” UCC § 2-706, Comment 3.

We will dive deeper into the calculation of damages under the UCC in a later module.