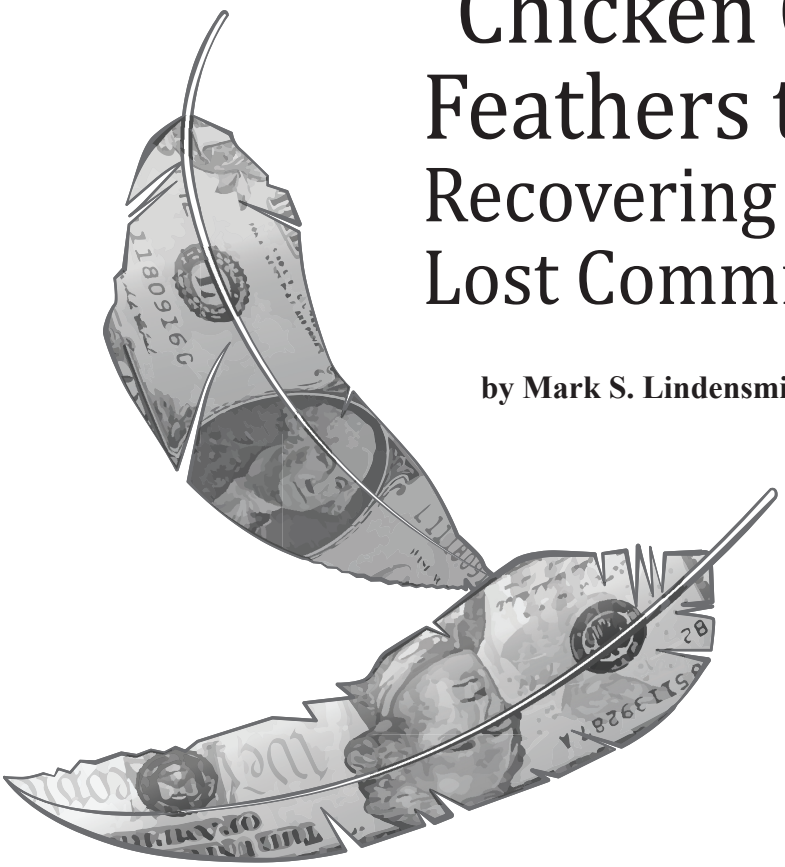
**Miscellaneous Torts**

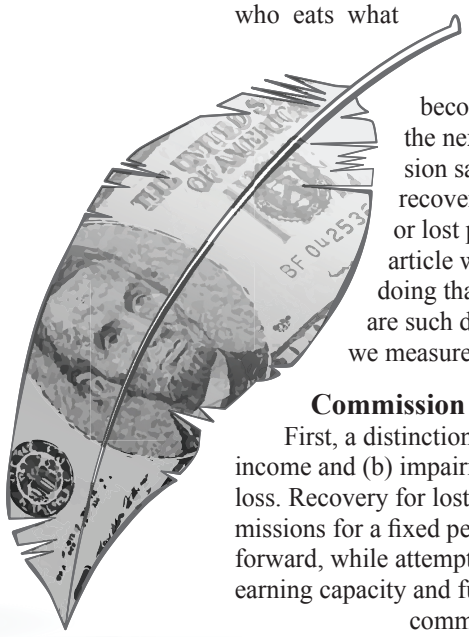
# "Chicken One Day and Feathers the Next"*
## Recovering Damages for Lost Commissions or Lost Profits

**by Mark S. Lindensmith**



In the requiem scene of *Death of a Salesman*, everyone is standing at Willy Loman's graveside (spoiler alert: the salesman dies; hence, the title), and his neighbor Charlie says: "Willy was a salesman. And for a salesman, there is no rock bottom to the life. He don't put a bolt to a nut, and he don't tell you the law or give you medicine. He's a man way out there in the blue, riding on a smile and a shoestring. And when they start not smiling back – that's an earthquake."[1]

Another kind of earthquake that reinforces the notion that there is no rock bottom to life is the seismic shift that takes place when a salesman, a small business owner, or anyone who makes her living at a non-hourly or non-salaried job gets laid low by a personal injury. A person who eats what she kills, so to speak, cannot eat if she cannot go out there and kill. For that person, things truly have become "chicken one day and feathers the next." Our job is to help that commission salesperson or small business owner recover as much of those commissions or lost profits as the law will allow. This article will examine how we might go about doing that job. Under what circumstances are such damages recoverable, and how can we measure and prove them?



** As told to me some 30 years ago by an old Mississippi lawyer, as a prelude to why he couldn't pay me much money for the vast amount of work he was about to ask me to do on a personal injury case, who said: "Now Mark, you know how this personal injury business is. It's chicken one day and feathers the next."*

### Commission salespersons

First, a distinction needs to be made between (a) lost income and (b) impairment to earning capacity and future loss. Recovery for lost income in the form of lost commissions for a fixed period of time is relatively straightforward, while attempting to establish impairment to earning capacity and future loss for a permanently injured commission salesman can be more complicated.[2] Some courts, including Virginia cases, have concluded that proof of future damages for a permanently

injured commission salesman (or a damaged business that depends on commission sales) is just too speculative, especially when the business involved is considered to be a "new business." The vicissitudes of the economy, the potential market for a product, uncertainties of expenses and costs, and the like, sometimes are just too unpredictable and would result in a verdict or judgment based on speculation and conjecture. *See ITT Hartford Group, Inc. v. Virginia Financial Associates, Inc.*, 258 Va. 193, 202-03 (1999) (breach of contract case in which plaintiff business sought lost commissions projected 17 years into the future; Supreme Court concluded that trial court had erred in permitting plaintiff's insurance expert to opine that plaintiff was entitled to a commission on future premiums on an insurance package for some 22,000 dentists it had negotiated that purportedly would generate premiums [and therefore commissions] over some 17 years).

In ruling that evidence concerning lost future premiums and commissions was too speculative, the Court in *ITT Hartford Group* stated in part:

> Expert testimony "cannot be speculative or founded upon assumptions that have an insufficient factual basis. Such testimony also is inadmissible if the expert has failed to consider all the variables that bear upon the inferences to be deduced from the facts observed." *Tittsworth v. Robinson*, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996) (citations omitted). *See* Code §§8.01-401.1 and -401.3.
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> And, a verdict based upon speculative expert testimony "is merely the fruit of conjecture, and cannot be sustained." *Stover v. Norfolk & W. Ry. Co.*, 249 Va. 192, 200, 455 S.E.2d 238, 243, cert. denied, 516 U.S. 868, 133 L. Ed. 2d 123, 116 S. Ct. 186 (1995).
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> In the present case, Redlich attempted to project the plaintiff's lost income for 17 years in the future in a new business enterprise. *When an established business, with a proven earning capacity is involved, evidence of the prior and subsequent record of the business is relevant to permit an intelligent and probable estimate of damages.* But when, as here, a new business is involved, the rule is not applicable because such a business is a speculative venture, the successful operation of which depends upon future bargains, the status of the market, and too many other contingencies to furnish a safeguard in fixing the measure of damages. *Commercial Bus. Sys., Inc. v. BellSouth Servs., Inc.*, 249 Va. 39, 50, 453 S.E.2d 261, 268 (1995). *See Clark v. Scott*, 258 Va. 296, 303, 520 S.E.2d 366, 370 (1999), decided today. The two-and-one-half-year history of the premium income from 1996 to May 1998 is insufficient in this case to qualify the business of marketing The Package as an established business.

258 Va. at 201-02 (emphasis added). *See also Moeller v. Harshbarger*, 118 Idaho 92, 794 P.2d 1148, 1149 (Ct. App. 1990) (personal injury to commissioned salesman; Idaho appeals court upholding ruling by trial court that salesman was not entitled to damages for lost commissions because evidence was insufficient for a court or fact finder to find that he had lost a particular amount; plaintiff testified as to his gross income from commissions before the accident, gross commissions from another employer when he returned to work after the accident, and gross commissions for part of year when he became self-employed; plaintiff never produced any evidence, however, regarding expenses which would be deducted from his gross commissions, so any damages award for the lost commissions would have been speculative).

There is Fourth Circuit and Virginia authority, though, that demonstrates that both lost income and impaired future earning capacity damages can be recovered for a salesperson who has been working in an established business (not a "new business"),[3] and therefore has a track record of earned commissions for a reasonable time before the injury or breach and afterward. *See Belk v. Wal-Mart Stores, Inc.*, 1997 U.S. App. LEXIS 1051 at *7-8 (4th Cir. 1997) (arising out of South Carolina); and *Beden v. Optimum Choice, Inc.*, 38 Va. Cir. 239, 246-47, 1995 Va. Cir. LEXIS 1308 (Fairfax Co. Cir. Ct. 1995 (Judge Dennis J. Smith) (denying defendant insurance companies' motion to set aside verdict for plaintiff commission salesmen in breach of contract action as speculative, where plaintiffs presented evidence of their track record of selling similar insurance products to similar groups, and, therefore, the jury "had sufficient facts and circumstances to make an intelligent and reasonable estimate of the amount of damages").

In the *Belk* case out of the Fourth Circuit, for example, the plaintiff was a delivery salesman who was delivering cases of beer to a Sam's Club when an employee of Sam's Club/Wal-Mart crushed his arm with a forklift. In ruling that there had been sufficient evidence to justify a verdict which, among other things, awarded the plaintiff $76,000 in future lost commissions or wages, the Fourth Circuit stated:

> Belk testified that his injury had caused him to work slower, that he was paid on a commission basis and that since his work included physically handling heavy cases of beer, his income would be reduced by approximately $4,000 per year. Belk's

> income tax returns indicate that his income was indeed reduced by an amount of some $4,000 during his first full year back at work. . . .
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> Because Belk was paid on a commission basis, the jury could reasonably have concluded that he could not have been as active after the accident as he was before. Under South Carolina law, "the guiding light for future damages is that they need not be exact, as long as they have a reasonable basis." *City of Greenville v. W.R. Grace & Co.*, 640 F. Supp. 559, 569 (D.S.C. 1986), *aff'd*, 827 F.2d 975 (4th Cir. 1987). The record discloses that Belk made $20,577 for eight months of work in 1993, or $30,860 on an annual basis. In 1994 [after his injury], Belk made only $26,721, a reduction of almost $4,000 from 1993. From our review of the record, we are satisfied that there was substantial evidence before the jury for it to have found that Belk had sustained a loss of $76,000 in future wages.
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> 1997 U.S. App. LEXIS 1051 at *7-8 (footnote omitted).

Note that the same "guiding light" for future damages that applies in South Carolina likewise applies in Virginia. It is well-established in Virginia that the plaintiff's burden of establishing the amount of damages with reasonable certainty does not require proof with mathematical precision as to the exact sum of his damages; all that is required is that he furnish evidence of sufficient facts and circumstances to permit an intelligent and probable estimate thereof. *See* 4 Virginia Practice Series – Jury Instructions at §23:3 (2007); *Martin v. Moore*, 263 Va. 640, 561 S.E.2d 672, 679 (2002); *Thomas P. Harkins, Inc. v. Reynolds Associates*, 221 Va. 1128, 277 S.E.2d 222, 224 (1981) ("We have long been committed to the view that damages are not required to be proved with mathematical exactness"); and *Gwaltney v. Reed*, 196 Va. 505, 84 S.E.2d 501, 507 (1954).

The rather sparse Virginia case law on injuries to commission salesmen can be supplemented by any number of on-point cases from other jurisdictions that outline the circumstances and evidence that will justify an award for loss of income or impairment of earning capacity.

For instance, in *Tifton Brick & Block Co. v. Meadow*, 92 Ga. App. 328, 88 S.E.2d 569, 574 (1955), the Georgia appeals court ruled that evidence of a traveling salesman's average earnings from commissions prior to the injury, and the smaller amount he earned after the injury, was admissible to prove his loss of earnings from the time of injury to the time of trial and for reduction of earning capacity in the future to the extent the injury was shown to be permanent, the court stating: "A salesman who is paid a percentage of his gross sales, like a lawyer, doctor, or other professional man, can show his ability to labor and earn only by proof of what his average earnings were for a reasonable period prior to the time such evidence is offered." 88 S.E.2d at 574.

And in *Getz v. Freed*, 377 Pa. 480, 105 A.2d 102, 104-05 (1954), an insurance salesman suffered a head injury when he was hit in the head by a golf ball. He suffered recurrent headaches and dizziness that caused him to be unable to attend to his business at all for seven weeks. He was thereafter only able to attend to the business a few hours a day for the next six weeks, and then for the entire year of 1952 was only able to devote a portion of time to the business because of the headaches and dizziness. He estimated that he devoted about 50 to 60 percent of the time to the business as he would have in 1952 if he had not been injured. After his condition improved, he was able to work full time in 1953. He was paid commissions for his sales, and he produced company records which showed his quarterly commissions and sales for the period of his incapacity and for approximately $1\frac{3}{4}$ years prior to the injury. In ruling that this evidence was sufficient to establish the salesman's lost income due to the injury, the court stated in part as follows:

> Defendant contends that plaintiff's business is of such a nature that commissions necessarily fluctuate and therefore evidence of commissions earned for the period prior to plaintiff's incapacity afforded no legal basis for ascertaining damages or losses resulting from this injury. We disagree with the defendant's contention. While the exact amount of loss of commissions or fees or earnings from personal services can rarely ever be proved with certainty, it is indisputable that plaintiff suffered some loss of earnings. *The best and probably the only evidence which plaintiff could have possibly produced was the record of his prior earnings and under such circumstances that is sufficient.*
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> In *Betterman v. American Stores Co.*, 367 Pa. 193, 80 A. 2d 66, this Court, quoting from *Lach v. Fleth*, 361 Pa. 340, 352, 64 A. 2d 821, said (p. 207): "'The law does not require that proof in support of claims for damages or in support of claims for compensation must conform to the standard of mathematical exactness. . . .'"
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> 105 A.2d at 104-05 (emphasis added).

Note again that this same rule applies in Virginia – the law does not require a showing of mathematical exactness. It only requires evidence of sufficient facts and circumstances to permit an intelligent and probable estimate of damages by the trier of fact.

This "before and after" method of proving lost commissions or lost income is common, but the length of time covered by the earnings prior to the injury varies, with no clear bench mark as to what amount of time prior to injury is sufficient. *See, e.g., Stewart v. St. Louis Public Service Co.*, 233 S.W.2d 759, 767 (Mo. Ct. App. 1950) (damages award to commission salesman who was injured while passenger on a bus upheld where he introduced evidence of his commission earnings for six weeks prior to the injury; the defendant argued that such testimony was speculative and too conjectural to show lost earnings, but the court disagreed, noting that the fact that the plaintiff had only been employed six weeks at the sales job "might lessen the value of the evidence as a guide to the jury in determining the issue, but it should not render the evidence inadmissible," and the jury was "at liberty to give it such value and weight as in their judgment it deserved"); *Franklin v. Byers*, 706 S.W.2d 230, 232 (Mo. Ct. App. 1986) (commission salesman injured in automobile collision in September of 1983 put into evidence his W-2 forms for years 1981 through 1983, with the 1983 form showing a decrease of $6,000 in commissions earned, down from the averages earned in 1981 and 1982; defendant argued that such evidence was insufficient to establish and measure the lost commissions, but the appeals court disagreed, citing *Stewart v. St. Louis Public Service*, and stating that "testimony of 'average earnings' by a commission salesman is admissible to prove lost income by reason of personal injury").[4]

Some courts have used a slightly more specific measure of damages in determining lost commissions due to an injury. In the New York case of *Neuman v. Metropolitan Tobacco Co.*, 20 Misc.2d 1013, 189 N.Y.S.2d 600, 605 (Sup. Ct. 1959), for example, the plaintiff commission salesman was injured in an automobile accident. There, the Court held that, in the absence of proof of specific losses, the proper measure of lost earnings by the salesman would be determined by multiplying the time lost by the difference between his average net earnings for the applicable time period in the years prior to the injury, during which time he had been engaged in the same business, and his average net earnings for the same time period in the year or years during which his disability continued.

Establishing lost income or impaired future earning capacity from lost commissions is not conceptually different from establishing lost wages or earnings for other kinds of workers. There must be at least some meaningful evidence to point to. Guess work and speculation are not sufficient. For example, in *McCracken v. Stewart*, 170 Kan. 129, 223 P.2d 963, 968 (1950), the Kansas court held that the testimony of the injured commission salesman (who was in partnership with his wife in selling janitor supplies) was not sufficient and was too speculative to prove loss of earnings and impairment to earning capacity, where he testified from "memory and recollection" concerning his average daily sales and commissions prior to the accident, stating that his average income before the wreck was $25 per day. He could not produce any records to show this $25 a day average, however, because he testified that about a year before the trial, a tornado had blown the roof off his house, taking his income tax records with it. In concluding that his proof concerning loss of commissions was insufficient to justify a jury award on that element of damages, the court pointed out that : (1) he did not testify that the records he lost were a part of those which he kept concerning income, (2) he testified merely from his recollection that his average daily income was about $25 a day, but he did not disclose the period of time prior to the date of the accident during which his income was $25 a day, and (3) there was nothing in the record to indicate whether this was gross or net income or whether it was partnership or personal income. 223 P.2d at 968. This was just too speculative for the court.[5]

In short, the plaintiff must produce evidence of "sufficient facts and circumstances that will permit a jury to make an intelligent and reasonable estimate of the amount [of damages]." *Commercial Business Systems v. BellSouth Services*, 249 Va. 39, 49 (1995). Showing average net income from commissions (less expenses and costs incurred in obtaining the commissions) for a reasonable period of time before and after the injury usually will suffice.

**The small business owner and lost profits.**

The same "before and after" method of measuring lost profits can be used in obtaining lost income damages for a small business owner/operator who has been injured and can't work at or contribute his personal skills and effort to the business. *See Lester v. Corsat*, 260 N.C. 92, 131 S.E.2d 897-98 (1963) (where the business is small and the income which it produces is principally due to the personal services and attention of the owner, the earnings or profits of the business "may afford a reasonable criterion of the owner's earning power"). *See also Julias v. Moyers*, 44 Va. Cir. 256, 259, 1998 Va. Cir. LEXIS 1 (Rockingham Co. Cir. Ct. 1998) (both before and after the accident and injury, the plaintiff was engaged in the operation of a small business). Evidence of lost profits in this situation is really a species of evidence of lost income or, in the case of permanency, impairment to future earning capacity. As noted by the Missouri Supreme Court in one of the leading cases on the issue of recoverability of lost profits by an injured sole proprietor or small business owner:

> It has often been said that the plaintiff in a personal injury action may not recover, as special damages, a loss of business profits, for the reason that such profits are wholly speculative, or because such

> profits arise, in whole or in part, from elements other than his personal efforts and earnings. . . . In the facts of those cases, generally, the elements of invested capital, employed labor, and other variable factors in the plaintiff's business predominated over the element of personal service and earnings of the plaintiff himself. In other cases, where the element of personal service predominated and the elements of capital, labor, etc., were not so material, it has been held that evidence of a loss of profits may generally be shown as an aid in determining the pecuniary value of plaintiff's loss of time or impairment of earning capacity. . . . *Probably, the true rule is that evidence of loss of profits is admissible where it would have a material bearing on the actual value of plaintiff's own services and work in the business and the pecuniary value of his lost time, but not as proof of a distinct element of damage in and of itself*. 25 C.J.S., *Damages*, §86, pp. 618-619; 15 Am. Jur., *Damages*, §96, pp. 506-507.
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> *Seymour v. House*, 305 S.W.2d 1, 4 (Mo. 1957) (emphasis added; some citations omitted).

A threshold question then, is whether the injured person has a sufficiently small business that is dependent on the effort, personal attention, and services of the plaintiff so as to justify using the lost profits of the business as evidence of the lost income or earning capacity of the plaintiff due to injury, or whether some other measurement of lost earnings should be used – such as the cost of employing a substitute to do the injured person's work. *See Lester v. Corsat*, 131 S.E.2d at 899 ("The business was predominantly a personal matter, depending for its life on the defendant's presence, services and personality. When he was injured and could not attend to the business profits ceased. In our opinion the evidence of profits was admissible as an aid (considered with other evidence) in determining the pecuniary value of defendant's loss of time or loss or impairment of earning capacity").[6] And although research has not revealed any on point Virginia Supreme Court cases that flesh out a specific method for establishing lost earnings or income through evidence of lost profits for an injured person who owns/operates a small business, there is Circuit Court authority that lines up with authority from elsewhere – and would allow evidence of lost profits from a personally run, closely held business in establishing the loss of past and future earnings of the injured person. *See Julias v. Moyers*, 44 Va. Cir. at 259 (plaintiff owned/operated a car detailing business before the accident, which left him with physical impairments that prevented him from doing that work, and was part owner and operator of a small retail business after the accident).[7]

Once you determine that you have an injured plaintiff who runs the kind of business where lost profits might be used as a measurement of his or her lost earnings, you'll have to establish that there is a sufficient track record of those profits so the evidence concerning the damages won't be considered too speculative.[8] In the absence of on point Virginia authority involving injured individuals and sole proprietors or small businesses, the cases dealing with proof of damages for lost profits involving larger businesses might be used as guidance as to what proof is required and when lost profits are considered too speculative. *See Lockheed Information Management Systems Co. v. Maximus, Inc.*, 259 Va. 92, 109-10 (2000) (in action for tortious interference with contract, Maximus claimed lost profits that would have been realized from contract with Department of Social Services to collect past-due child support; even though Maximus had no previous contracts with Virginia DSS, it had conducted similar businesses in other states; damages based on projected lost profits of over $2 million allowed and were not considered too speculative).

In the *Lockheed Information* case, for instance, the Court addressed the "new business" rule and concluded that it did not bar the plaintiff's claim for lost profits under the facts before the Court. The Supreme Court stated:

> In *Mullen v. Brantley*, 213 Va. 765, 768, 195 S.E.2d 696, 699-700 (1973), we stated that evidence of the prior and subsequent earning record of a business can be used to estimate damages, in the case of an established business with an established earning capacity. But, *where a new business is involved the rule is not applicable for the reason that such a business is a speculative venture, the successful operation of which depends upon future bargains, the status of the market, and too many other contingencies to furnish a safeguard in fixing the measure of damages*. (Citations omitted.) *Id*. at 768, 195 S.E.2d at 700. This principle has become known as the "new business rule." *Commercial Business Systems, Inc. v. BellSouth Services, Inc.*, 249 Va. 39, 50, 453 S.E.2d 261, 268 (1995).
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> 259 Va. at 109-10 (emphasis added).

In concluding that the trial court had not erred in refusing to treat Maximus as a "new business" in allowing evidence of lost profits, the Court pointed to the fact that Maximus had operated similar businesses in other states, and there was evidence of the collection of certain amounts by the DSS. Thus, the Court stated:

> Where the wrongdoer creates the situation that makes proof of the exact amount of damages difficult, he must real-

> ize that in such cases "juries are allowed to act upon probable and inferential, as well as direct and positive, proof." . . . Applying this rationale, the trial court concluded that Maximus introduced sufficient evidence upon which "a reasonable estimate of Maximus' lost profits could be made."
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> *Id*. at 110-11 (citations omitted).

In 2002, apparently in response to the "new business" rule as it had been applied in business torts cases, Virginia enacted Va. Code §8.01-221.1, which provides that "[d]amages for lost profits of a new or unestablished business may be recoverable upon proper proof." The statute specifically provides, however, that such lost profits damages "for a new or unestablished business *shall not* be recoverable in wrongful death or personal injury actions." (emphasis added). Thus, at least with regard to a personal injury action involving an injury to a small business owner/operator, the plaintiff will still have to establish a track record of profits, and the fact that she is operating a "new or unestablished business" could still preclude the plaintiff from recovering lost profits because those damages are considered too speculative, as per the Virginia "new business" cases. Moreover, even with regard to contracts or business torts cases that would be covered by the 2002 statute, it is unclear what "proper proof" would be required to take the projected lost profits out of the realm of speculation.

There are numerous Virginia cases dealing with breach of contract or business torts (such as tortious interference) where the courts have been called upon to decide whether evidence of lost profits was too speculative and whether the "new business" rule would preclude a damage award for lost profits.[9] Examining those cases should give you guidance concerning whether your injured small business owner has a sufficiently established business and a sufficiently established record of profits to prevent the evidence from being considered too speculative.

There are also a number of Virginia and Fourth Circuit cases deciding whether the allegedly damaged business was an established business or whether it came within the "new business" rule.[10] There is no hard and fast rule, though, as to what evidence will be considered too speculative.

Finally, in calculating lost profits, there will have to be evidence of and reduction for any direct non-fixed or variable expenses incurred in attempting to generate profits or in attempting to carry out the lost transaction (in the case of particular lost job or contract, for example). This will show the lost "net profits" that can be used for measuring lost earnings of the business owner.[11] Fixed or unabsorbed overhead costs, however, do not need to be deducted from gross profits to arrive at net profits.[12] In other words, fixed or unabsorbed overhead expenses that could not be recouped in any other way during the time of disability and loss of earnings due to injury are not deducted from gross profits and are recoverable as part of the business owner's damages for lost profits. These fixed costs would be included as part of the damages for lost profits in a small business because no matter how much you sell or don't sell or produce or don't produce, you still have to pay these fixed costs as a small business owner during your down-time due to injury.

## Conclusion

Although there are some gaps in Virginia law regarding specific on point authority for recovery of lost commissions or lost profits of a salesman or small business operator, the various authorities from other states offer guidance, along with the well-established admonishment under Virginia law that the plaintiff's burden of establishing the amount of damages with reasonable certainty does not require proof with mathematical precision as to the exact sum of his damages; all that is required is that he furnish evidence of sufficient facts and circumstances to permit an intelligent and probable estimate thereof. And that's at least better than being out there in the blue on a smile and a shoestring.

## Endnotes

1. For some reason, this line about "riding on a smile and a shoestring" is often quoted (or misquoted) as "riding on a smile and a shoeshine." The copy of the play I have sitting on my shelf at home, however, from L. Perrine, *Literature* (Harcourt, Brace 1970), which purports to be a reprint of the 1949 version from Viking Press, the year the play was first produced, says "riding on a smile and a shoestring." I can't remember offhand how the line was delivered in the couple of productions I've seen, and it's possible it has been changed from time to time according the taste or whim of a particular director or actor. But I'm going with "on a smile and a shoestring." For one thing, it sounds more like something Arthur Miller would say. For another, the *Webster's New World Dictionary* (1964), defines the phrase "on a shoestring" as meaning "with little capital and resources." *Id*. at 1347. That's spot on for a salesman like Willy Loman, and that's the way I've read it since I was a teenager. So as far as I'm concerned, it's "shoestring," although there could be scholarly opinion to the contrary. Where's a good originalist when you need one?
2. For instance, in addition to establishing a permanent injury, there will have to be evidence of a past record for the amount of lost commissions, and if there were non-fixed costs to the salesperson involved with the production of the commissions (i.e., costs that could have been avoided or recouped in some other way), those typically will have to be deducted from the gross commissions to establish the net income lost by the

salesperson. The problem of what to do with fixed and non-fixed expenses is addressed further in Section 2, below, dealing with lost profits. If the plaintiff's future earning capacity is impaired because of permanency, the person's age should be considered along with his or her history of earning commissions and the length of time the plaintiff would have pursued that occupation. *See, e.g., Sykes v. Brown*, 156 Va. 881, 888 (1931) (in action for injuries by plaintiff who was in her 70s, it was error for the trial court to refuse the following instruction on earning capacity: "The court instructs the jury that if they find from the evidence that the plaintiff suffered any financial damage by reason of her not being able to work, they shall, in determining the amount of such damages, take into consideration the amount earned by the plaintiff prior to her injury, *keeping in mind the plaintiff's age and the possibility that her earning capacity would have diminished, regardless of her injuries, as her years advanced*.") (emphasis added). Query whether this same calculation (diminishment of productivity of salesman due to advancing years) should be taken into account the way it is for some workers whose earnings from manual labor will diminish as they get older. *See Chesapeake & Ohio Railway v. Arrington*, 126 Va. 194, 222 (1919) ("If in estimating the plaintiff's damages they failed also to take into consideration that he was forty-two years of age, and that his earnings from manual labor would naturally diminish because of his advancing years long before he lived out his life expectancy, then they also erred"). Furthermore, some courts will require that the future lost commissions or future lost profits be reduced to present value.

3. The cases are less than clear and consistent on what constitutes a "new business" for purposes of establishing lost profits or lost business income and whether the proof will be considered too speculative. That problem is discussed further below in the section dealing with damages for lost profits of small business owners/operators. As discussed further below in Section 2, a Virginia statute, apparently enacted in response to this "new business" rule, Va. Code §8.01-221.1 (effective 2002), *does not apply* to "wrongful death or personal injury actions other than actions for defamation." Therefore, the statute allowing for lost profits damages to a new or unestablished business "upon proper proof," applies to breach of contract, tortious interference with contract, business defamation cases, and the like – *but not* to personal injury cases involving injury to a small business owner.
4. *See also Maus v. Scavenger Protective Association*, 2 Cal. App.2d 624, 39 P.2d 209, 212 (1934) (commission salesman injured in automobile collision; he was injured in October 1931, and was disabled for a period of time, during which his sales and commissions in his territory decreased; he presented evidence that his sales and commissions during the corresponding period for the years 1928-1930, at the same commission rate, were some $1,200 higher; court found that the evidence showed with a reasonable degree of certainty the loss of commissions that the plaintiff suffered due to the injury); and *Kablitz v. Hoeft*, 25 Wis.2d 518, 131 N.W.2d 346, 351 (1964) (portrait salesman who worked on commissions was hurt in an automobile accident, and jury awarded him damages for past and future wage loss based on his decreased commissions after the collision; award upheld on appeal based on evidence showing his commissions for two years prior to the injury, and for two years after the injury, during which time "house calls" he could make decreased from 50 to 60 calls a week to only 20 to 35 per week; the defendant argued that just the average monthly earnings during the nine months before the accident should have been used as the bench mark period, but the court disagreed, stating that "a period of nine months is not fairly representative of this past average income and precludes the possibility of increased portrait sales due to the Christmas season, which would raise his overall earnings average").
5. *See also Dowden v. Jefferson Insurance Co.*, 153 So.2d 162, 165 (La. Ct. App. 1963) (testimony of injured plaintiff who sold insurance part time that he had six or seven policies that he "felt" he could have closed on within the next week but for his accident and injuries was too speculative to allow recovery for lost commissions, the court stating in part: "[T]he record discloses that plaintiff is a student who engaged in the selling of insurance on a part time basis between school terms, and that he did not produce any records of past earnings from the sale of insurance policies, if in fact he ever sold any insurance prior to his accident. In our opinion, plaintiff's expectations as to possible sale of certain insurance policies were at best speculations as to future income, which are not recoverable").
6. *See also Coca-Cola Bottling Co. v. Jones*, 226 Ark. 953, 295 S.W.2d 321, 323 (1956) (injured plaintiff was owner/operator of small grocery business; he was allowed to show lost profits as measure of his damages, the court stating: "We have said that 'profits derived from the management of a business may properly be considered as measuring the earning power. This is especially true where the business is one which requires and receives the personal attention and labor of the owner.' *St. Louis, I. M. & S. Ry. Co. v. Eichelman*, 118 Ark. 36, 175 S. W. 388. Much to the same effect is the statement that the damages are to be measured by the value of the proprietor's services during the period of his injury. Rest., Torts, §924, Comment c"); *Houser v. Eckhart*, 506 P.2d 751, 756 (Colo. Ct. App. 1972) ("Houser introduced substantial evidence as to his past earnings before the accident, his earnings after the accident, and his projected future earnings after the trial. He approximated the loss of time from his self-employed, one-man air-conditioning business, and he testified as to the amount per hour that he charged his customers. Loss of time was a proper element of plaintiff's damages, and in view of the evidence presented in support thereof, the court did not err in denying defendant's motion to strike this claim"); *But see, e.g., Gibson v. Safeway Stores, Inc.*, 284 Ore. 211, 585 P.2d 694, 696 (1978) (injured plaintiff, the owner/operator of a auto service station and repair shop who employed full and part-time employees as mechanics, could not recover for lost profits of his business while he was unable to perform work for the business; the court stating: "It is our conclusion, despite the testimony produced

by plaintiff, that the work involved was not personal in nature but is of the kind that is usually performed by automobile mechanics. Plaintiff's damages are the cost of hiring competent help to perform the services he previously performed – not the profits lost by his business").

7. The Rockingham Circuit Court in the *Julias* case stated:

> To the extent that the facts evolve at trial that the Plaintiff, prior to the accident, was operating a closely-held business and that, subsequent to the accident, he opened a different sole proprietorship which engages in a different line of commerce, that does not render evidence concerning his ability to earn an income from his new retail establishment irrelevant to the jury.
>
> The jury will be required in this case to make the always difficult assessment of what, if any, earning capacity has been lost by the Plaintiff. Given the situation that both before and after the accident the Plaintiff has been engaged in operating a small business, the evidence concerning what he is able to earn in his new line of work is something that can be considered by the jury in arriving at a determination of what, if any, loss of earning capacity he has suffered as a result of the accident.

44 Va. Cir. at 259. *See also Bradshaw v. Trover*, 1999 Del. Super. LEXIS 170 at *8 (Super. Ct. 1999) (evidence of lost profits admissible where it would have a material bearing on the actual value of plaintiff's own services and work in the business and the pecuniary value of his lost time, but not as proof of a distinct element of damages); *but see Terry v. Houk*, 639 S.W.2d 897, 900 (Mo. Ct. App. 1982) ("Warren's [plaintiff's] evidence and proof of the claimed loss of business profits fails for two reasons. First, the evidence [virtually no documents and primarily based on plaintiff's estimates and memory] which was admitted was wholly insufficient as to the amount of loss. Second, he failed to meet the requirement of a substantial showing that the success of his business was predominantly dependent upon his personal service, initiative and effort, and that capital investment and labor were relatively insignificant").

8. *See, e.g., Love v. Hunt*, 17 N.C. App. 673, 195 S.E.2d 135, 137 (1973) (injured plaintiff was self-employed in the used car business; the court held that he could not use lost profits from his car business as a measurement of his lost income, because he had only been in business for two months prior to the accident, and he had no record of profits or losses prior to that date).

9. *See R.K. Chevrolet, Inc. v. Hayden*, 253 Va. 50, 57 (1997) (car dealership presented evidence of profits both before and after defendant sales manager's departure; financial records showed dramatic drop in sales and decline in gross profits; evidence of lost profits was not too speculative); *Jefferson Standard Life Insurance Co. v. Hedrick*, 181 Va. 824, 835 (1943) (lost profits from delay in start of construction were not too speculative; increased costs for labor and material were established, and the proof was not merely uncertain and speculative). *But see Hop-In Food Stores, Inc. Serv-N-Save, Inc.*, 247 Va. 187, 190 (1994) (there may be no recovery for loss of future profits when it is uncertain whether there would have been any profits at all; plaintiff's evidence failed to show that, but for the alleged wrongful removal of certain equipment from the property, plaintiff ever would have sold gasoline again on the property; evidence of lost profits was too speculative); *Techdyn Systems Corp. v. Whittaker Corp.*, 245 Va. 291, 298-99 (1993) (evidence of lost profits too speculative and uncertain where there was no evidence showing that plaintiff would have been successful bidder, or that missing employees had any history of attracting new projects, and no evidence why alleged delay prevented plaintiff from obtaining other proposals); *ADC Fairways Corp. v. Johnmark Construction, Inc.*, 231 Va. 312, 318 (1986) (evidence of lost profits was too speculative and lost profits should not have been awarded in the case; evidence was nothing more than testimony about what profit plaintiff "hoped to make at the time of the bid;" damages for lost profits are available "only to the extent that evidence affords a sufficient basis for estimating their amount in money with reasonable certainty"); *Boggs v. Duncan*, 202 Va. 877, 883-84 (1961) (evidence not sufficient, and lost profits too speculative where Duncan alleged that he had been wrongfully prevented from carrying out a logging contract; the Court noted: "[T]here is no evidence upon which the alleged loss of profits can be ascertained or calculated with reasonably certainty. There is no showing as to the estimated cost of removing the remaining timber on the land, the price or prices at which it might probably be sold, the expenses of such sale, and the net profit to be derived from the operation. We have merely the opinion of [Duncan] himself, supported by that of another witness"); and *BWT Management, Inc. v. Gayle*, 45 Va. Cir. 48, 49, 1997 Va. Cir. LEXIS 511 (Norfolk City Cir. Ct. 1997) ("Where a party merely estimates expenses and presents the total costs, any claim for lost profits is speculative").

10. *See, e.g., Commercial Business Systems, Inc. v. BellSouth Services, Inc.*, 249 Va. 39, 50 (1995) ("new business" rule did not apply; plaintiff was an established business with a prior track record of repairing equipment that was the subject of the contract, and there was evidence of underlying revenue and costs records of similar prior business undertakings by plaintiff); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 690 (4th Cir. 1989) (arising out of W.D. Va.) ("new business" rule did not apply to bank that had been in operation as bank for six months; thus, "there exists in this case an operating business at the time of the injury;" evidence concerning future lost profits was properly allowed); *PBM Products, Inc. v. Mead Johnson & Co.*, 174 F. Supp.2d 424, 428 (E.D. Va. 2001) (in false advertising action brought in 2001 against Mead Johnson alleging lost profits and lost future profits from the sale of baby formula, plaintiff formula company was not a "new business," and would not be precluded from claiming lost profits; PBM [plaintiff] had been in business since 1997 and sold more than $2 million of infant formula that year, with sales and profits expanding

significantly from 1998 to 2001 – the time of the action); *but see Mullen v. Brantley*, 213 Va. 765, 768, (1973) (plaintiff's new Shakey's Pizza parlor on Duke Street in Alexandria was considered a new business, and potential lost profits based on breach of contract were too speculative; amount of business plaintiff would have had at the Duke Street location, and anticipated profits therefrom, could have been based only on speculation and conjecture); and *Perry v. Scruggs*, 17 Fed. Appx. 81, 87, 2001 U.S. App. LEXIS 18553 (4th Cir. 2001) (from E.D. Va.) (expert testimony from economist about potential lost profits from royalties to be paid to landowners in joint venture to build and operate a golf course was too speculative to be allowed into evidence in a breach of contract action; evidence of projected rounds of golf from golf course that was eventually built by different joint venture was barred by the "new business" rule; economist had to make too many key assumptions about projected royalties per round of golf, number of rounds per year to be played, and plaintiff's actuarial lifetime).

11. *See, e.g., Lockheed Information Management Systems Co. v. Maximus, Inc.*, 259 Va. at 115-16; *Morley-Murphy Co. v. Zenith Electronics Corp.*, 142 F.3d 373, 382 (7th Cir. 1998); and *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 773-74 (1st Cir. 1996). Note that the loss of profits cases talk in terms of net profits, which would include a deduction from gross profits for any variable or "saved expenses" that are not incurred during the down-time due to injury or breach. *See John A. Cookson Co. v. New Hampshire Ball Bearings, Inc.*, 147 N.H. 352, 787 A.2d 858, 865 (N.H. 2001) (abandoned office lease was "saved expense" that would be deducted from lost profits where the office was closed and eliminated). Note also that, in Virginia, when recovering lost earnings or income for an injured wage earner, evidence is limited to "gross earnings," and the defendant is not allowed to introduce evidence of payroll deductions, such as taxes, social security withholding, and travel expenses. *See Hoge v. Anderson*, 200 Va. 364, 368 (1958). If the measurement of lost earnings for your client, however, is his lost profits from his small business (and not lost payroll wages), certain variable or absorbed costs will have to be deducted to arrive at his recoverable lost profits, but any income taxes or social security taxes he pays will not be deducted to arrive at a figure for his lost earnings, as per cases such as *Hoge*. For a recent case setting forth the Virginia Court's calculation for lost profits in a case involving tortious interference with a contract, *see: Preferred Systems Solutions, Inc. v. GP Consulting, LLC*, 284 Va. 382, 399-400 (2012).

12. *See Lockheed Information Management Systems Co.*, 259 Va. at 115-16; *Fairfax County Redevelopment & Housing Authority v. Worcester Brothers Co.*, 257 Va. 382, 387-88 (1999); *Morley-Murphy Co.*, 142 F.3d at 382; and *Cambridge Plating Co.*, 85 F.3d at 773-74. *See also Ricky Smith Pontiac, Inc. v. Subaru of New England, Inc.*, 14 Mass. App. Ct. 396, 426, 440 N.E.2d 29, 48 (1982) ("The prevailing rule is that damages for such profits must be reduced by any direct expenses that would have been incurred in making the lost sales, but fixed overhead expenses need not be deducted unless they were, or would have been, changed by the receipt of the lost business"); and *see generally* R. Dunn, *Recovery for Lost Profits* at §6.5 (6th ed. 2005) ("The weight of authority . . . holds that fixed overhead expenses need not be deducted from gross income to arrive at the net lost profits properly recoverable").

*Mark S. Lindensmith of Marks & Harrison is a native of Missouri, and he is a 1976 honors graduate of Missouri Western State College. He received his law degree from the University of Nebraska in 1979 and was admitted to the Nebraska State Bar in 1979. He has been a member of the Virginia State Bar since 1981, and he is a member of the American Association for Justice and VTLA.In his spare time, he has written award-winning fiction, including numerous short stories for various magazines and literary journals, has been a resident fellow in fiction writing at the Virginia Center for the Creative Arts, and he was the recipient of a grant from the Virginia Commission for the Arts for a novel-in-progress.*