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AVOIDING INJURIOUS CONSEQUENCES*

CHARLES T. McCOR**

1. The General Rule.

Where one person has committed a tort, breach of contract or other legal wrong against another it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided.

Legal rules and doctrines are designed not only to prevent and repair individual loss and injustice but to protect and conserve the economic welfare and prosperity of the whole community. Consequently, it is important that the rules for awarding damages should be such as to discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts, or from actively increasing such loss where prudence would inquire that such activity cease. The machinery by which the law seeks to encourage the avoidance of loss is by denying to the wronged party a recovery for such losses as he could reasonably have avoided, and by allowing him to recover any loss, injury, or expense incurred in reasonable efforts to minimize his injury. It is the

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1 The following general references may profitably be consulted: RESTATEMENT OF THE LAW OF CONTRACTS (Am. L. Inst. 1930) tentative draft No. 8, § 327; 1 SEDGwick, DAMAGES (9th ed. 1920) c. 10; DECENNIAL DIGESTS, title Damages, § 62. See also GA. ANN. CODE (Michie, 1926) § 4398.

former, the negative rule, denying recovery for avoidable damages which we treat in this section, leaving the affirmative branch to be dealt with in a later section of this article.

The present rule is frequently described in the cases as a rule which imposes a "duty" to minimize damages, and the expression is a convenient one. However, it has been pointed out that the "duty", if it can be so called, is not one for which a right of action is given against the person who violates it. The penalty is merely the disallowance of damages for losses which a compliance with the "duty" would have avoided. It has been suggested that the person wronged should not be spoken of as under a "duty" to avoid damage but rather under a "disability" to recover for avoidable loss.  

Some judges and writers have considered the present rule as but an application of the principle which denies liability for injurious consequences which are not proximately caused by the defendant's wrongdoing.  

Under this theory, if the plaintiff could avoid the particular loss, it is the plaintiff's neglect, not the defendant's wrongdoing, which has caused it. Oftentimes, however, it is obvious that the defendant's wrongdoing is an active and substantial factor in producing the plaintiff's loss, even though that loss could have been avoided by activity on plaintiff's part. For example, this was true in a case where the drain-pipe on plaintiff's land was obstructed by the building of a road-fill by the defendant, but the plaintiff could lessen the damage to his crop by removing the obstruction.  

In such cases, it seems more realistic to recognize that denial of recovery for avoidable injury is really a doctrine restricting the limits of liability for the reasons of social and economic policy mentioned at the beginning of this section. To base it on the ground that the defendant's wrongdoing, though a substantial cause in the popular sense, is not the "legal" or "proximate" cause of the avoidable loss seems needlessly artificial, and likely to obscure the underlying motive for the rule.  

Having its source in the same motives of conservation of human and economic resources, is the doctrine of contributory

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2 See, for example, Key v. Kingwood Oil Co., 110 Okla. 178, 236 Pac. 596 (1925) and Taber v. Porter-Gildersleeve Co., 271 Pa. 245, 114 Atl. 773 (1921).  
3 See opinion of Burch, J., in Rock v. Vandine, 106 Kan. 588, 189 Pac. 157 (1920); and notes (1917) 28 YALE L. J. 827; (1921) 32 YALE L. J. 380; CRANE, CASES ON DAMAGES, 102, n. 1.  
5 Compare Jenkins v. Stephens, 262 Pac. 274 (Utah, 1928).  
6 See GREEN, THE RATIONALE OF PROXIMATE CAUSE (1927) chapters 1 and 6.
negligence. The contributory negligence rule finds application, however, at an earlier stage in the transaction than the rule of avoidable consequences. If the plaintiff by negligent action or inaction before the defendant’s wrongdoing has been completed has contributed to cause actual invasion of plaintiff’s person or property, the plaintiff is wholly barred of any relief. The doctrine of avoidable consequences comes into play at a later stage. Where the defendant has already committed an actionable wrong, whether tort or breach of contract, then this doctrine limits the plaintiff’s recovery by disallowing only those items of damages which could reasonably have been averted. For any injury or loss not thus avoidable, the plaintiff may still recover. If the only item of loss or damage sustained is thus barred under this principle, and the case is of the kind where “actual damage” must be shown, then probably the principle is properly asserted under the guise of “contributory negligence” rather than “avoidable consequences.” If, on the other hand, the action is one where a recovery of nominal damages may be had, even though no actual damage is recovered (as in trespass or breach of contract) then if the defendant eliminates all the plaintiff’s claims for actual damage by showing that the plaintiff by reasonable care could have avoided them, this does not go to the destruction of the cause of action, nor prevent a recovery of nominal damages. Consequently in cases where nominal damages are proper, which in-

7 In Dippold v. Cathlamet Lumber Co., 111 Ore. 199, 225 Pac. 202 (1924) the plaintiff sued for damage to timber from fire which spread from defendant’s land. Defendant sought a non-suit on the ground that the evidence showed that plaintiff was negligent in failing to aid defendant to prevent the spreading of the fire. The court, however, held that such a contention was one of contributory negligence, not open to the defendant because he had not pleaded it, and said: “Contributory negligence and avoidable consequences are two quite different things. The one is a bar to any action whatever, and must be stated as a defense. The other simply goes to the lessening of the damages caused by the acts of the defendant. Whether in all cases evidence on that point may be admitted under the general issues is not here decided. Contributory negligence acts concurrently with that of the defendant. They are synchronous in their operation. The carelessness or indifference of the plaintiff in the matter of lessening damages is successive and subsequent to the carelessness of the defendant. They do not take effect at the same time. The defendant’s negligence has spent its force and is past. It is succeeded by that negligence of the plaintiff which causes an enhancement of the damages. The two are not to be confounded, although in some instances the result—that is, the obliteration of damages—may be almost identical.”

8 See Hale, DAMAGES (2d ed. 1912) 96.
9 See SEDGWICK, DAMAGES (9th ed. 1920) c. 6, Nominal Damages.
10 Armfield v. Nash, 31 Miss. 361 (1856) (action against employer for breach of contract in wrongfully discharging plaintiff. Plea: that plaintiff could have avoided all damages in that he could have taken another position
cludes all cases of breach of contract, the principle must be asserted under the name of "avoidable consequences".

While this distinction may be a mere matter of using different labels for two sides of the same bottle, nevertheless, in the law as it is administered it is not wholly without practical significance. It is significant in that, as a matter of pleading, contributory negligence is to be asserted as a complete defense whereas the doctrine of avoidable consequences is not considered a defense at all, but merely a rule of damages by which certain particular items of loss may be excluded from consideration. Being thus a matter in "mitigation", it need not be specifically pleaded at all by the defendant.

Nevertheless, though by the better view, the defendant need not plead it, he does have the burden of proof. He must bring forward evidence that the plaintiff could reasonably have reduced his loss, or avoided injurious consequences and he must finally convince the jury of this in order to succeed on this issue.

\[\text{at equal wages. Held, not a sufficient plea in bar, as it does not defeat the action but only goes in reduction of damages).}\]

"The duty imposed on one to reduce or minimize his damages goes only to the amount of the recovery and cannot be an absolute defense to an injury already sustained." Bailey v. J. L. Roebuck Co., 135 Okla. 216, 275 Pac. 329 (1926).

\[\text{It must usually be specifically and affirmatively pleaded by the defendant, but a few jurisdictions allow it to be shown under a denial. Clark, Code}\]

\[\text{Pleading (1928) 209, 210, 425. But in either event, it is a complete defense.}\]

**Western Real Estate Trustees v. Hughes, 96 C. C. A. 658, 172 Fed. 211 (1909) (where plaintiff failed to remove part of his property from a building exposed by the collapse of defendant's wall, this did not bar a recovery for unavoidable injury to the rest of his property).**

Other recent cases in which the distinction has been noted are: Isenman v. Burnell, 195 Me. 57, 130 Atl. 868 (1925); Currie v. Davis, Agent, 130 S. C. 408, 126 S. E. 119 (1923); Jenkins v. Stephens, supra n. 5.

\[\text{This was clearly the common law view. Armfield v. Nash, supra n. 10;}\]

\[\text{Pomeroy, Code Remedies (5th ed. 1929) § 498. Even under the code procedure it seems the most convenient practice to permit defendant under a mere denial to show plaintiff's failure to minimize damages. Indianapolis Street Ry. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936 (1901) (personal injury); Swift & Co. v. Bleise, 63 Neb. 739, 60 N. W. 310, 57 L. R. A. 417 (1902) (personal injury). There is a substantial number of cases to the contrary, however, which require this to be specially pleaded. C. N. O. & T. P. R. Co. v. Crabtree, 30 Ky. L. 1209, 100 S. W. 318 (1907) (personal injury); Amarillo Oil Co. v. Ranch Creek O. & G. Co., 271 S. W. 145, 153, (Tex. Civ. App. 1925). The cases pro and con are collected in Decennial Digests, title Damages, § 155. Of course, under no view would it be incumbent upon plaintiff to allege that he had used reasonable care to minimize damages. Bader v. Mills & Baker Co., 28 Wyo. 191, 201 Pac. 1012 (1921) (damage to banks of irrigation ditch causing loss of crop).}\]

Illustrations of the Application of the Rule of Avoidable Consequences.

The cases which most obviously call for the application of the rule that the plaintiff cannot recover for such injury as he might by reasonable conduct have avoided, are those where the plaintiff by his own voluntary activity has unreasonably exposed himself to damage or increased his injury. Thus, where a vendor in a conditional sales contract unlawfully used unnecessary force in seizing the property, an automobile, then in possession of the debtor’s wife, and the wife sues therefor, she cannot recover for personal injuries caused by her insistence in remaining in the car on a cold night after it had been removed to the vendor’s garage. Similarly, where a purchaser of land learns that his vendor had no title to the irrigation ditch which he had purported to sell, and thereafter the purchaser proceeds to plant a crop, he cannot recover for the cost of planting and loss of the crop, due to the failure to secure water for irrigation. Likewise, a cropper who plants seed which he knows to be defective, furnished by the landlord who was bound by his contract to furnish good seed, is precluded from recovering for the inferiority of the crop. The buyer of a motion picture house, suing the seller for misrepresentations inducing the sale, is barred from recovering for loss incurred by continuing to operate the theater after he has run it long enough to discover that loss is certain. The plaintiff is not even permitted ordinarily to continue to perform services under a contract, where the other party repudiates. An oil-driller who continues to drill in reliance on his contract after the owner has repudiated it, cannot recover for the subsequent performance. Other illustrations of denial of recovery for dam-

12 Geissler v. Geissler, 96 Wash. 150, 164 Pac. 746, 166 Pac. 1119 (1917).
15 Harmon v. Dickerson, 184 S. W. 139 (Mo. App. 1916).
17 Craig v. Higgins, 31 Wyo. 166, 224 Pac. 668 (1924). Compare News Pub. Co. v. S. B. Barrett Rubber Co., 137 So. 749 (La. App., 1930). An advertiser signed a contract with a newspaper for the publication of his advertisement for twelve months. He repudiated the contract after a few months, but the publisher continued to publish it for the twelve months, and the court held that the publisher was not required to minimize damages by stopping the advertisement.
AVOIDING INJURIOUS CONSEQUENCES

age incurred by plaintiff's own voluntary activity are numerous.\textsuperscript{20} Perhaps even more frequent are the cases where the plaintiff's mere supineness and inactivity in a situation where active diligence to avert loss or harm are needed, bars his claim for resultant damage. In a New York case, it appeared that a creditor's attorney wrongfully allowed a judgment to be entered against the debtor after the debt had been paid and the attorney's receipt given therefor. The debtor's employer discharged him when he learned of the judgment and did not believe the debtor's assertion that it had been paid. The debtor, offended at this disbelief, did not display the attorney's receipt in proof of his statement. The court held him precluded by this failure from recovering damages for the discharge, in the action against the creditor for the wrongful entry of judgment.\textsuperscript{22} Where damage threatens through failure of warranted appliances or machinery to do the work, the purchaser must use reasonable steps to replace them with efficient ones and if he fails he cannot charge the seller with the consequent loss.\textsuperscript{23} Applications of the rule are as widely varying in character as are the different kinds of damage claims. Thus, where you know that another has negligently set fire to your fence, you may not recover for the escape of cattle when you by reasonable diligence could have prevented it.\textsuperscript{24} Again, one whose automobile has been damaged by the fault of another and who delays having it repaired, cannot recover for his loss of the use of the vehicle, after a reasonable time within which the repairs might have been com-

\textsuperscript{20} See for examples: Eastern Texas Electric Co. v. Reagan, 228 S. W. 366 (Tex. Civ. App., 1921) (on failure of interurban car to stop for him, plaintiff instead of going to hotel, walked ten or twelve miles to next town); Cedar Rapids, etc., Ry. & Light Co. v. Spaghetti Electric Co., 203 Ill. App. 424, affirmed 280 Ill. 386, 117 N. E. 461 (1917) (purchaser continues to use imperfect warranted article without repairing or requesting seller to repair, after knowledge of defect); Thompson v. De Long, 267 Pa. 212, 110 Atl. 251, 9 A. L. R. 1326 (1920) (landowner, being damaged by rain coming through opening in party wall prevents wrongdoer's servants from protecting the wall); Corcoran v. Des Moines, 305 Iowa 405, 215 N. W. 948 (1927) (owner on city's changing grade of street, thus damaging foundation of house, could have repaired but tore house down instead).


\textsuperscript{23} Cohn v. Bessemer Gas Engine Co., 44 Cal. 85, 186 Pac. 200 (1920) (gas engine for irrigation pump proved insufficient during first year; owner should replace with efficient engine thereafter, failing which he cannot recover for subsequent damage).

\textsuperscript{24} Wisconsin & Ark. Lbr. Co. v. Scott, 167 Ark. 84, 267 S. W. 780 (1925); but compare Freeman v. Mo. Pac. R. Co., 101 Kan. 516, 167 Pac. 1069 (1917) (owner of escaping cattle not required to go on right of way of defendant railway and repair cattle guard after defendant's refusal to do so).
pleted.\textsuperscript{22} Where the owner of a building sees an opening made in his boundary wall by his neighbor's wrongful acts, but allows his good to remain exposed to damage, he cannot recover for injury which a prompt removal would have avoided.\textsuperscript{23} In short, what the injured person can do at moderate expense or with reasonable exertions\textsuperscript{24} to minimize the loss or injury, he must do, or bear the risk of his inaction.\textsuperscript{25}

2. Only Reasonable Care Is Required.

While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the fact that it is always a conceded wrongdoer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen. Sometimes a reasonable man might consider that either active efforts to avoid damages or a passive awaiting of developments are equally reasonable courses. If so, a failure to act would not be penalized by the rule of avoidable consequences, even though it later appears that activity would have reduced the loss. It should not be assumed that only one course of conduct could reasonably

\textsuperscript{22} Hunter v. Quaintance, 69 Colo. 28, 168 Pac. 918 (1917); Rosenstein v. Bernard, \textit{etc.} Automobile Co., 192 Iowa 405, 180 N. W. 252 (1920).

\textsuperscript{23} Thompson v. DeLong, \textit{supra} n. 21.

\textsuperscript{24} Curtner v. Bank of Jonesboro, 175 Ark. 539, 299 S. W. 994 (1927) (loss of sale by failure to furnish abstract of title which could have been secured for $55).

\textsuperscript{25} To the examples in the text the following may be added: Southern R. Co. v. Pruett, 200 Ala. 675, 77 So. 49 (1917) (passenger caused to spend night in town, not her home, who declines offers of railroad's agents to take her to a hotel or send her home in an automobile, cannot recover for inconvenience or remaining in station all night); Central of Georgia R. Co. v. Williams, 200 Ala. 73, 75 So. 401 (1917) (where animal is killed, owner is charged with what he might have realized from utilizing carcass and hide); St. Louis, \textit{etc.}, R. Co. v. Tucker, 161 Ark. 140, 255 S. W. 553 (1923) (consignee must receive from carrier goods damaged in transit); Fulton v. Camo, 222 N. Y. 189, 118 N. E. 633 (1918) (where buyer repudiates contract to purchase milk, seller may not permit the milk to spoil in his hands without making effort to avoid loss); Gervis v. Kay, 294 Pa. 518, 144 Atl. 529 (1923) (when broker wrongfully disposes of customer's stock, within reasonable time latter must purchase similar stock and can recover no more than what the cost of so purchasing would be).

Since the standard of reasonableness is an indefinite one, extreme cases oc-
have been chosen by the party wronged. His conduct must be judged in the light of one viewing the situation at the time the problem was presented to him. Certainly, as a person wronged, he is not to be judged by the same standards as apply to one who has had presented to him the choice of whether he will adopt a course of conduct which will probably injure another. In other words, the standard of due care in determining liability in tort for negligence should be much stricter than the standard of reasonableness in choice of expedients to reduce or avoid damages applied against a person against whom a wrong has been committed.

He cannot be expected to incur unusual, unwarranted, or disproportionate expense in his efforts to avoid damages. Where the defendant has wrongfully filed for record a mortgage on plaintiff’s land, thus defeating a sale of the land, the defendant cannot escape liability for the loss by showing that plaintiff could have secured a release of the mortgage by paying to defendant’s agent a wholly unwarranted commission upon a loan which was never made. In a recent Michigan case the plaintiff who had casionally arise which seem near or beyond the borderline. In Adams v. Clover Hill Farms, 86 Ore. 140, 167 Pac. 1015 (1917) the plaintiff sued for nuisance in that his neighbor permitted polluted surface water to come upon plaintiff’s swampy land, thus rendering the standing water unwholesome for plaintiff’s cattle. It was held that plaintiff must set barrels in the swamp so that the water could be purified by percolating into the barrels. The plaintiff’s own conduct, it is true, had been obstinate and contumacious in refusing to sell a right of way across his land for a drain. Also, in Bear Cat Mining Co. v. Grasselli Chem. Co., 159 C. C. A. 380, 247 Fed. 286, L. E. A. 1918 C, 907 (1917) the sub-lessee of a mine agreed with his lessor to pump the water from the mine continuously. The head lease required continuous pumping on penalty of forfeiture. The sub-lessee wrongly ceased pumping and notified his lessor. The head-lease was forfeited, and the sub-lessee sues the sub-lessee for this loss. Recovery for this item of damage was denied on the ground that the plaintiff could itself have pumped the mine and avoided the forfeiture at reasonable expense. And it has been held that where plaintiff’s chattle have been wrongfully caused to be seized under attachment or like process, the aggrieved person must, if he is able, make a bond and repay the property thus wrongfully seized, from the sheriff’s hands or must attempt to rent other property in its place, and only if these expedients fail can he recover for loss of use. Lawson v. Brokman, 116 Kan. 102, 226 Pac. 282 (1924); McCauley v. McElroy, 199 S. W. 317 (Tex. Civ. App., 1917) (writ of error refused by Supreme Court); W. B. Moses and Sons v. Lockwood, 54 App. D. C. 115, 255 Fed. 936 (1924).

Compare Den Norwike Amerikalinje, etc., v. Sun Printing & Pub. Ass’n., 226 N. Y. 1, 125 N. E. 483 (1919); Crane, Cases on Damages, 122, 123 n. 9, where it was held that a corporation which was libeled might recover the cost of publishing a denial in a newspaper, though it might not have been required thus to minimize damages.

purchased land from defendant sued for defendant’s deceit in representing that he owned the land, whereas in fact he had only a contract to purchase. Plaintiff lost the land by being evicted by the fee-owners and sued for its value. Defendant’s contention was that plaintiff should have bought the title piecemeal from the various fee-owners, and cleared it by litigation with strangers. The court rejected this contention. "Under these circumstances," the court said, "it was not the duty of plaintiff to hazard the payment of money upon such uncertainties, in an attempt to minimize a loss to them occasioned by defendant’s active fraud."

In another case, a railroad’s water pipe-line leaked, thereby flooding plaintiff’s basement. The court held that plaintiff need not avoid damage by paying out $250 for the construction of a drain from the basement into the public sewer. Where the damage could be avoided by "the expenditure of a comparatively small amount of money", however, the plaintiff must incur the expenditure or stand the loss himself.

The expenditure of unreasonable effort or exertion is not required of the person wronged. In an unusual federal case in Illinois, a cement plant discharged hot water into a stream above the ice-fields of a company which harvested ice. The hot water partially melted the ice-fields, but a greater amount of ice than the plaintiff actually secured could have been harvested if the ice company had built a pontoon-bridge across the open space melted in the ice by the hot water. Because of the uncertainty and risk of life involved in that method, the court held that the plaintiff was not required to build the bridge. Again, the owner of a pecan orchard, to whom young trees were shipped which were negligently permitted by the express company to freeze, was not required to plant all the frozen and damaged trees to see if some of them would grow. So also, where plaintiff’s lands were flooded by defendant’s obstructing a creek, and the only evidence showed that the building of a dam to prevent the flooding would have involved unusual effort and expense, the plaintiff could not be charged with that burden.

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omission of attachment lien from abstract, was bound to pay off lien, to prevent loss of land by sale under attachment foreclosure).


\(^{26}\) American Railway Express Co. v. Judd, 213 Ala. 242, 104 So. 418 (1925).

\(^{27}\) Taylor v. Steadman, 143 Ark. 486, 220 S. W. 821 (1920).
Likewise, inconvenience or financial sacrifice which would be entailed in attempts to avoid or minimize damage may obviously bear upon the reasonableness of adopting such a course. Thus, where plaintiffs, one of whom was an invalid, were refused sleeping-car berths for which they had contracted, they were not required to suspend their journey, half-way to their destination, until berths should be available the next day. In another case, a contractor made a bid upon public works in reliance upon the agreement of certain sub-contractors to furnish the plumbing. When the sub-contractors repudiated their contract, the contractor did not withdraw its bid to the state, and, when sued, the sub-contractors contended that plaintiff should have minimized damages by such withdrawal. The court held, however, to the contrary and said: "It was not under an obligation to sacrifice any substantial right of its own in order to minimize the loss of the defendants . . . . It was not required to take a course that would subject it to the loss of profits on its own part of the bid, and which as the trial court has in effect found, would to a material extent adversely affect the good-will of its business."

Application of the Principle to Particular Types of Cases—Proper Treatment of Personal Injury.

One who has sustained a personal injury or any bodily ailment through the fault of another must, if the situation is one which calls for and admits of medical assistance, use reasonable care to select a competent doctor, and must submit himself to the care and treatment prescribed by the latter. Any part of his suffering or disability which could have been thus avoided is not recoverable. The courts, however, are cautious about insisting that due care requires submission to an operation. If the operation is simple and not dangerous, a failure to submit when advised to

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58 Frederick Raff Co. v. Murphy, 110 Conn. 234, 147 Atl. 709, 712 (1929).
59 Flint v. Conn. Hassam Paving Co., 92 Conn. 576, 103 Atl. 840 (1918), and cases collected in DECENNIAL DIGESTS, title Damages, § 62 (2). But even an unlicensed doctor may serve, if a regular physician is unavailable. H. T. Whitson Lumber Co. v. Upchurch, 198 Ky. 127, 248 S. W. 243 (1923). Of course, if plaintiff makes due effort to get a doctor and fails, he cannot be penalized. Gibson v. Midland V. R. Co., 117 Kan. 673, 233 Pac. 116 (1925) (semble). And the failure to secure a physician is immaterial if the plaintiff took the same measures that a competent doctor would have advised. Alfred v. Orth, 206 Cal. 494, 274 Pac. 955 (1929).
do so, will be deemed unreasonable." But a "major"; "danger-
ous" or "serious" operation, especially where the results are
"problematical" involves so critical a choice between the danger
of the operation and the danger of the injury or the disease, that
most courts seem to hold as a matter of law that a refusal to under-
go such a danger is not ground for reducing damages. Whether,
and to what extent a person shall submit his body to physical
mutilation is so peculiarly personal that the law does not allow a
jury or court to decide this for the individual." A recent
commentator pertinently suggests that as surgical science pro-
gresses and the results of operations become more predictable,
reason conduct may in future be held to require that the advice
of physicians be followed even as to serious operations.

3. Further limitations upon the doctrine: (a) One need never
take steps in advance to avoid the consequence of a future,
threatened wrong.

If a person of known firmness should threaten to commit a
tort, as for example a personal assault, against you, reasonable
prudence might well dictate that you should avoid for a time the
neighborhood where the threatener sojourns. But the law imposes
no such requirement upon you and, if pursuing your lawful oc-
casions undaunted by the threat, you are assaulted by the person
who made it, the doctrine of "avoidable consequences" will not
reduce your recovery. It is only damaging consequences of past
wrongful conduct, that must be avoided or minimized by the vic-
tim. The policy against aiding a wrongdoer to exert by a mere
threat pressure upon other persons to mold their conduct on his
desires, prevails over the policy of keeping economic losses at a
minimum. For instance, where the owners of a vessel could have

44 Hendler Creamery Co. v. Miller, 153 Md. 264, 138 Atl. 1 (1927); Potts
45 Stokes v. Long, 52 Mont. 470, 159 Pac. 28 (1916).
46 Louisville & N. R. Co. v. Kerrick, 178 Ky. 486, 100 S. W. 44 (1918);
1930).
50 Comment in (1930) 14 MINN. LAW REV. 294 on Uphagraff v. City of
Ottumwa, 226 N. W. 928 (Iowa, 1929).
51 Plaintiff need not anticipate a wrong. 1 SEDGWICK, DAMAGES (9th ed.,
1920) § 224, and cases in n. 50, 51, infra.
52 In case of a threatened breach of contract somewhat different consider-
tations come into play. Such a threat, if it amounts to a repudiation does en-
title and require the other party to the contract, so far as he reasonably may,
to mold his conduct accordingly, so as not to enhance the damages. Clark
AVOIDING INJURIOUS CONSEQUENCES

avoided a threatened and unauthorized fumigation of the cargo by a member of the Board of Health by unloading the vessel ahead of time, failure of the owners to do so, does not reduce their damages.\(^5\) Similarly, a passenger who is entitled to ride to his destination by virtue of his mileage book, when threatened with ejection by the conductor unless he shall pay a fare, need not pay the fare before being actually put off, but may act on the assumption that the threat is a \textit{brutum fulmen}.\(^6\) A federal court in 1918 decided that the captain of the Lusitania was justified in embarking on the fatal voyage despite the threats of the German Government that the vessel was "liable to destruction" by submarines.\(^7\)

\textit{Nuisance and continuing trespasses.}

Does this doctrine that one need not anticipate a wrong apply to cases of nuisances and trespasses of a continuing sort? It is clear that it does apply in such cases so long as the defendant has as yet done nothing at all except to threaten a nuisance or trespass. The prospective victim need take no steps in advance to guard against injury.\(^8\) Suppose, however, that the defendant has established a situation which results in a continuing nuisance or trespass. As to past and completed invasions of his property, already caused by the defendant, of course the plaintiff must do what he reasonably may to reduce the damage. But may he passively assume that the defendant will desist from his unlawful conduct before further harm results, even though it is apparent that defendant has no such intention, and equally apparent that a slight and reasonable expenditure of time, effort, and money by the plaintiff will avoid or reduce the future damage? The broad generalization has frequently been made that the doctrine which denies recovery for avoidable consequences has no application to nuisance and other continuing torts.\(^9\) It will be observed, however, that in most of

\(^5\) Marsiglia, \textit{supra} n. 19; 3 WILLISTON, CONTRACTS (1920) §§ 1298-1301.
\(^6\) RESTATMENT OF THE LAW OF CONTRACTS (Am. Law Inst. 1930) tentative draft no. 8, § 327.
\(^8\) Harvey v. Atlantic Coast Line R. Co., 153 N. C. 567, 69 S. E. 627 (1910).
\(^9\) The Lusitania, 251 Fed. 715 (S. D. N. Y., 1918).
\(^10\) Flummer v. Penobscot Lumbering Ass'n., 67 Me. 363, 367 (1877) "The plaintiff was not bound to take notice of the declared purpose of the company to swing a boom across the river. Such declaration imposed no additional duty upon him. Nos condatur that the wrongful act threatened would be committed. It is sufficient for him if he exercised ordinary care in the preservation of his logs after he had knowledge that the wrong was done."
\(^11\) Champa v. Washington Compressed Gas Co., 146 Wash. 190, 262 Pac. 228 (1927); American Smelting & Ref. Co. v. Riverside Dairy & Stock Farm,
the cases where this generalization has been made, the efforts, expenditure, or sacrifice which the plaintiff would actually have had to incur in order to avoid injury were such as could not reasonably have been expected of a prudent person under the circumstances. In one case, the owner of a dairy, whose pasture-land was being poisoned by the smoke from defendant's smelter would have had to shut down the dairy in order to avoid further injury if the nuisance should continue. Of course, it would be unreasonable to hold it incumbent upon the owner to abandon the enterprise. In another, the defendant's factory near the plaintiff's home emitted gas and noxious odors so as to affect the health and comfort of the plaintiff. An instruction that plaintiff should have minimized damages "even by removal from the premises, if necessary," was held erroneous, but this result would likewise have followed from the rule that the plaintiff was only required to take reasonable steps to avoid injury. In still another recent case, the defendant was unlawfully flowing sewage into a stream which bisected plaintiff's farm. To prevent his stock from being injured by drinking the polluted water, plaintiff would have had to divide his farm by fencing on each side of the stream—obviously an unreasonable requirement. Undoubtedly also, the deliberate and intentional, rather than merely inadvertent or negligent character, of most continuing torts, naturally arouses a feeling of indignation in the victim, and properly enters into the consideration of how far the victim may be required to undergo trouble and expense to avoid future injury which the defendant could himself avoid by ceasing his wrongful conduct. On the other hand, railway embankments or city culverts causing over-


American Smelting & Ref. Co. v. Riverside Dairy & Stock Farm, supra n. 54.

Galva v. City of Johnson, supra n. 54.

It is sometimes said that the doctrine of avoidable consequences does not apply at all to cases of deliberate and intentional wrongs. Dan Norske, etc., v. Sun Printing & Pub. Ass'n., 226 N. Y. 1, 122 N. E. 463 (1919); Champa v. Washington Compressed Gas Co., supra n. 54. While as above indicated the wantonness of the wrong is a factor bearing upon the victim's mental state, and what he may reasonably be expected to do, he should still within reason be expected to avoid unnecessary harm. See Crance, Cases on DAMAGES, note p. 123, citing Power Mfg. Co. v. Linley, 286 S. W. 653 (Tex. Civ. App., 1927).

In Price v. High Shoals Mfg. Co., 132 Ga. 246, 64 S. E. 87 (1909) the court, in an action by a lower against an upper owner for diverting water from a stream to the detriment of plaintiff's mill, held that it was error to
AVOIDING INJURIOUS CONSEQUENCES

flows, factories polluting streams or the air, and other like nuisances are
themselves incidental to important civic or business enter-
prises, and until the particular condition has actually been decreed
to be unlawful it is often a matter of some doubt in advance of a
jury’s finding, whether the plaintiff’s rights have actually been in-
vaded, even though a damaging situation has been created. This
being so, it seems not improper to apply the usual rule and to hold
that where plaintiff knows that a continuing nuisance, or other
damaging situation, such as the pollution or diversion of a stream,
or a dam or embankment threatening recurrent overflows, has been
created, the plaintiff cannot recover for injurious consequences
which by reasonable efforts, after the beginning of the wrong, he
could have prevented.29 This view finds strong support in a recent
Alabama case.30 In that case a railway embankment was so con-
structed as to divert a stream so that it from time to time flooded
the plaintiff’s mine and greatly injured it. At a cost of $100 or
less, the plaintiff could have constructed a small levee which would
undoubtedly have caused the floods to flow away from the mine
and through a culvert under the embankment. The court denied
recovery for injury from floods which such a levee would have pre-
vented and said: “It is the legal duty of a party, threatened with
injury by conditions due to the wrongful act of another, to min-
imize his damages. What is reasonably required depends upon the
extent of threatened injury as compared with the expense of
remedying the situation, and the practical certainty of success in
preventive effort.”

Other obvious restrictions upon the application of the doc-
trine of “avoidable consequences” follow from the general limita-
tion that only reasonable conduct is required of the victim.31 For
example, if plaintiff neither knows nor has reason to know of the
need for taking steps to avert damages, his failure to take such
steps will not prejudice him.32 Clearly, likewise, if plaintiff is

charge on avoidable consequences, in view of a Georgia statute (Code 1895,
§ 3803) which provided that the doctrine should not apply “in cases of posi-
tive and contumacious torts.”

29 Such seems to be the prevailing view in cases of obstruction of streams.
A. (N. S.) 579 (1907) (overflowing of land caused by a railroad; ploughing
of a furrow by plaintiff would have avoided); Sweeney v. Montana C. Ry. Co.,
19 Mont. 163, 47 Pac. 791 (1907) and other cases cited in note 22 L. R. A.
(N. S.) 884. Compare Adams v. Clover Hill Farms, supra n. 28, which would
seem to support the same view.

31 See the next preceding section.

32 Clinchfield Coal Corporation v. Hayter, 130 Va. 711, 108 S. E. 854 (1921)
branding by defendant of trees on plaintiff’s land; refusal to charge on
financially unable to do what is necessary to minimize damages, the rule does not apply.\(^8\) Again, the plaintiff’s failure to act to guard against injury will not affect his recovery where such failure was due to assurances given by the defendant himself.\(^4\) Moreover, the victim cannot reasonably be expected, in order to minimize damages, to act unlawfully or in violation of his duties to third persons.\(^9\)

4. **Must the victim comply with unjustifiable demands of the wrongdoer, if this will minimize damage?**

It sometimes appears in cases where the plaintiff sues for breach of contract by defendant, or for violation of some duty owed to plaintiff as a member of the public, that the defendant offered or was willing to carry out a part of the bargain or duty upon modified terms. For example a defendant who has agreed to sell on credit, offers to sell for cash. Again, a plaintiff is about to be wrongfully ejected from a railway train because the conductor refuses to believe that he has already surrendered his ticket, and the plaintiff knows he can prevent his expulsion by paying his fare a second time. If the plaintiff in the one case declines thus to reduce his injury by dealing with the contract-breaker, or in the other declines to submit to the railroad’s unjustified exaction, can he recover for damage which results, but which could have been forestalled by such compliance? Realistic economic considerations avoidable consequences in respect to plaintiff’s failure to sell trees promptly, where plaintiff did not know that branding would cause worms to injure trees, defendant having assured him branding would not hurt them).

\(^8\) W. B. Moses & Sons v. Lockwood, 54 App. D. C. 115, 295 Fed. 936 (1924) (wrongful attachment of automobile, owner must secure possession by filing bond unless financially unable to do so); Pratt Consol. Coal Co. v. Vinston, 204 Ala. 185, 85 So. 502 (1920) (breach of contract to mine coal.

\(\ldots\) plaintiff could not have been required to build a spur track at a cost of $400 or $500 \(\ldots\) unless he had the means to do so \(\ldots\)."

\(^a\) Clinchfield Coal Corporation v. Hayter, supra n. 62; Florence Fish Co. v. Everett Packing Co., 111 Wash. 1, 188 Pac. 792 (1920) (breach of contract to furnish boat to assist plaintiff in fishing; plaintiff not required to secure boat elsewhere where defendant did not refuse, but repeatedly promised to comply); Taylor v. Sturm Lumber Co., 90 W. Va. 530, 111 S. E. 481, 484 (1924) (Damages for breach of a logging contract, in that defendants delayed in taking logs. Plaintiff not required to build additional skidways where defendant promised to relieve the delay); Kaufmann v. Delafield, 224 App. Div. 29, 229 N. Y. Supp. 545 (1928) (plaintiff who might have sold stock without loss may recover damages from retaining it on faith of defendant’s reassurances); Eastern Adv. Co. v. Shapiro, 263 Mass. 228, 161 N. E. 240 (1928) (plaintiff contracting to furnish bill boards, where advertiser failed to furnish posters need not re-let space where advertiser said he would take care of matter).

would prompt us to say to the plaintiff that he must do even this to minimize his loss, but "red-blooded" emotional reactions all impel us to the view that the plaintiff need not thus humiliate himself by coming to new terms with one who has already violated his duty to plaintiff. This conflict between realism and emotion finds reflection in the decisions, which reach varying results in the different situations in which this problem presents itself. In the railroad cases, where the second or additional fare is wrongfully demanded, a minority of courts deny damages for expulsion to the passenger who having the money available, fails to pay, but the majority and the trend of the recent decisions is to the contrary.\(^6\) Where the seller of goods having agreed to deliver on credit, declines to abide by his promise to extend credit but offers to deliver for cash, and the buyer thereupon refuses to deal further with the seller, but purchases the goods elsewhere at greater expense, is the buyer limited in his damages to the loss he would have sustained if he had submitted to the demand for cash? An eminent text-writer,\(^7\) supported by a few cases,\(^8\) says yes. The greater number of courts which have passed on the question say no.\(^9\) The latter result is

\begin{quote}
N. Y. 480 (1872) (defrauded purchaser need not re-sell worthless stock, even though by concealing its worthlessness he might have disposed of it). Nor a breach of contract: Earl, Ch. J., in Leonard v. N. Y. Etc. Tel Co., 41 N. Y. 554, 566 (1870) sited in SEDGWICH, supra. This principle seems to have been erroneously disregarded in Western U. Tel. Co. v. Southwick, 214 S. W. 987 (Tex. Civ. App. 1919). It that case, "owing to mistake of defendant in transmitting plaintiff's order, he became bound to a contract to sell land for $800 less than he intended and it was shown to be worth. The contract contained a liquidated damage clause, under which he could have been compelled to pay, in event of his breach, only $500. His damages against the telegraph company were held to be limited to $500, though he in fact performed. See criticism, 33 HARR. LAW REV. 728.\(^3\) CRANE, CASES ON DAMAGES, p. 129, note.


\(^7\) 3 WILLISTON, CONTRACTS, §1385; 2 WILLISTON, SALES (2d. ed. 1924) §5999. See also 1 SEDGWICK, DAMAGES (9th ed., 1920) §222.


\(^9\) Coppola v. Marden, Orth, Hastings Co., 282 Ill. 281, 118 N. E. 499 (1917) ("... it comes with an ill grace from a party who has refused to perform an agreement to demand that the other party who has not been at fault, should do something contrary to the terms of the contract to mitigate or lessen the damages resulting from the refusal to perform the contract."). Louis Cook Mfg. Co. v. Randall, 63 Iowa 244, 17 N. W. 507 (1883); Frohlich v. Indep. Glass Co., 144 Mich. 278, 107 N. W. 889 (1900); Coxe v. Anoka Waterworks Co., 87 Minn. 56, 91 N. W. 285 (1902).
obviously correct, under any view, if the buyer is unable to secure the cash, or if the seller expressly or impliedly demands that the buyer surrender his rights under the original contract—a sacrifice that the doctrine of avoidable consequences does not call upon him to make. If the buyer is able to pay, and the seller does not insist upon his surrendering his right of action for the breach of the promise to give credit, it would seem that business prudence would require that he minimize damages, even by thus feeding from the hand that has struck him. The refusal of most courts to reduce damages accordingly may perhaps be defended on the supposition that even among most business men of ordinary prudence, the belief would prevail that, where credit promised is refused, the person wronged may well fling away prudence and follow pride.

Some recent cases illustrate the wide range of situations where the problem may arise. In an action in the federal court at New Orleans a steamship line sought damages against a longshoremen’s union for breach of contract to unload a ship. The men had demanded a higher rate of wage than the contract wage. The court held that for demurrage and delay which could have been avoided by paying the increased rate the plaintiff could not recover. The decision seems questionable in view of the probable effect that such yielding might have upon future wage negotiations. In a California case a vineyard owner had contracted for water with an irrigation company and under the contract he was obligated to pay fifty-eight dollars on September first. The company, however, some months beforehand demanded that he pay the money in advance by installments, one-half on February first, and one-half on July first, and based the demand on a rule of the Railroad Commission, which apparently had the function of regulating irrigation rates. The plaintiff declined to do so and the company cut off the water until payment should be made, and in consequence the plaintiff lost his crop, worth several thousand dollars. The court pointed out that the plaintiff by paying in advance would have suffered a loss of only one dollar and fifty-three cents, the interest on the advance payments, and it denied recovery for the loss of the grapes. It said: “When there is such inconsequential difference between the

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32 Nederlandsch, etc. v. Stevedores’, etc., Society, 265 Fed. 397 (E. D. La., 1920).
parties the law expects the one who has great interest at stake to yield in order to save excessive damages and costs. . . . The plaintiff may pride himself upon his firmness in insisting upon what he conceived to be his rights, and he is entitled to whatever satisfaction that may bring him, but the law does not permit such pride to prevent the payment, although not due, of less than $2 in order to save the loss of possibly thousands of dollars."

In Washington, the purchaser, under a conditional sales contract of a dairy sued for damages for conversion by the seller of the personal property used in operating the dairy. Among other claims he sought damages for the interruption of the business and loss of profits. The defendant had offered to return the personal property to the plaintiff if the latter would pay all the agreed installments in cash, less a six per cent discount, at once. He contended that the plaintiff could and should have accepted this offer and thereby have avoided the interruption of the business. The court overruled this contention and sustained a verdict for the lost profits of the business, and said: "We do not think that Seeley was under any obligation to put himself out to that extent in order to minimize or do away with the damages suffered by him. It was not a question of Seeley paying out a small sum or slightly inconveniencing himself with a view of minimizing his damages. It was a question of submitting himself to an entirely new contract sought to be forced upon him by Peabody, to the end that Peabody might avoid the damaging results of his own unwarranted act."

It is suggested that the matter is not reducible to a rule that the doctrine of avoidable consequences always, or never, requires submission to unjustified demands or acceptance of offers which modify the original obligation, tendered by the party at fault. Even economic realism must take account of the human distaste for concessions or further dealings with one who has dealt unjustly, and where the interests at stake are not too large, it may well be deemed reasonable to wash one's hands of the wrongdoer and decline to traffic further with him even to minimize damages. But where a "'hands-off'" policy dictated by indignation or resentment would imperil interests of a magnitude out of all proportion to the slight humiliation which might proceed from the concession, then the person aggrieved should be required to swallow his pride and cooperate with the wrongdoer in reducing the loss."

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74 Seeley v. Peabody, 139 Wash. 382, 247 Pac. 471, 475, rehearing denied, 141 Wash. 696, 250 Pac. 469 (1926).
75 In the recent Oklahoma case of Key v. Kingwood Oil Co., 110 Okla. 178, 236 Pac. 598 (1924) this dilemma was presented in striking fashion. Key was
5. Benefit to victim from wrongdoer's breach of duty.

Closely akin to, but not entirely identical with, the doctrine of avoidable consequences is the principle that in arriving at damages for defendant's wrongful conduct, if any benefit or opportunity for benefit appears to have accrued to the plaintiff by reason of defendant's breach of duty, a balance must be struck between benefit and loss, and the defendant should be charged only with the difference—the net loss.\(^7\)

This principle is illustrated in cases of damage to land. It is a trespass for the defendant to pile dirt on plaintiff's land, or to dig drains therein without authority, but in arriving at damages in each instance the resulting benefit will be off-set against the injury.\(^8\)

It is constantly applied in contract cases as a necessary corollary of the fundamental canon that the damages, as near as may be, should be such as will put the plaintiff in the position he would have been in if the contract had been fully performed. If it was incumbent upon plaintiff to undergo expense in performing covenants or conditions before he should be entitled to full performance by defendant, then if plaintiff before performing himself, sues for defendant's failure to perform, plaintiff is saved the expense of performance. Consequently, he recovers the value of defendant's promised performance but from that must be deducted the cost which plaintiff would have been put to in carrying out his part of the bargain.\(^9\) This is well exemplified in the case of construction

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\(^7\) While this principle is one of general application, it is not without exceptions. Thus, in actions for death or personal injuries, the wrong-doer cannot claim credit for the benefit accruing to the plaintiff from life or accident insurance policies. Again, in some states, where a landlord sues a tenant for the rent of premises wrongfully vacated the tenant cannot claim credit for the amount for which the landlord might have re-rented the premises.

\(^8\) Mayo v. Springfield, 138 Mass. 70 (1884) (piling dirt); Burtraw v. Clark, 103 Mich. 383, 61 N. W. 552 (1894) (drain); 1 Sedgwick DAMAGES (9th ed. 1920) §63.

\(^9\) 3 Williston, CONTRACTS (1920) §1350. AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW OF CONTRACTS (Am. Law Inst. 1930) tentative draft No. 8, §326.
contracts, repudiated by the owner before completion of the work. The contractor recovers the contract price less what it would have cost him to complete the job."

Another familiar example is the rule which requires the seller who sues the buyer for breach of his contract to accept the goods, to credit against the contract price the market value of the goods. In other words, if title has not passed and the article has not been delivered, the plaintiff recovers the excess only of the contract price above the amount which the plaintiff can secure elsewhere for such goods. To earn the full price he would have had to deliver goods of a certain value, and defendant's breach has relieved him from parting with that value, and enables him to realize upon it by a sale to others. He should therefore credit what others will pay, which is what he has gained by the breach. If a seller has not made such a gain by the breach, due to exceptional circumstances, then the result should be different. For example, an automobile dealer sues a customer for refusal to carry out a contract to purchase a car. The market value of a new car is the fixed standard retail price of that model, but defendant's breach has not increased the possibility of finding a new customer for such a car. From the agent's point of view the supply of new cars from the factory is unrestricted but the supply of new customers is strictly limited. Finding a customer is not simply a matter of offering the article upon a ready and practically unlimited market, as it is in the case of wheat, cotton, or the like. It requires elaborate advertising, expensive demonstrations, and continued solicitation. The plaintiff recovers, then, the agreed price less what he has really been saved, that is, less the cost of the car from the factory."

Finally, the most obvious and frequent instance of the application of this principle is in cases of contracts of one person to devote his personal services exclusively for all or part of his time during a given period, to a certain employment for another. When the employer wrongfully terminates the service, and is sued therefor by the person employed, the latter must give credit for what he earned elsewhere, or with reasonable diligence might have earned elsewhere, during the contract period. But for the breach, plaintiff could not have secured the other employment.

78 2 WILLISTON, SALES (2nd ed. 1924) § 599.
79 Torkomian v. Russell, 90 Conn. 481, 97 Atl. 760 (1916); Stewart v. Hansen, 62 Utah 281, 218 Pac. 959 (1923); BERRY, AUTOMOBILES (6th ed. 1929) § 1737.
80 See § 6 herein, dealing with damages in employment contracts.
6. If in case of a breach of contract by defendant, there becomes available to plaintiff an advantage which would have been available to him even if the contract with the defendant had been carried out, then the defendant is not be credited with such advantage.

As has just been seen where a contract of B to work exclusively for A is repudiated by A, such repudiation has made it possible for B to seek other employment during the contract period which would not otherwise have been open to him. If B finds such employment or could have done so, A is entitled to credit for what was or might have been thus earned. Similarly, if it were a contract to work exclusively for A in the mornings only, with no inhibition on working elsewhere at other times in the day, here it would seem that if A repudiates and B secures or might secure other morning employment, B must give credit therefor, but not if he secures other employment in the afternoons, for this he might have done even though B had not discharged him. If the contract is for part-time personal services not allocated to any particular times or hours, then it would seem that the employer could not claim credit for any earnings for work done elsewhere, or available elsewhere, unless and only so far as he can show, that it would have trenched upon the time necessary for the original employment. If the contract is one that does not require B’s personal service in the actual performance of it, but permits B to employ others to do the work, then obviously no credit can be claimed by A, when he repudiates the contract, for earnings thereafter made by B from other sources. B could have made these earnings if A had not freed him by repudiation from the obligation to carry out the contract with A. Consequently, it often becomes material to determine whether contracts of many different sorts call for the personal services of the party who sues for its breach. While obviously in contracts of almost any type the exclusive personal services of a party may be stipulated for, the typical contracts of the following kinds (when made with “contractors” rather than laborers) usually do not so provide, and consequently usually do not entail reduction of dam-

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See Allegheny v. Rutherford, 45 S. W. 628 (Tex. Civ. App. 1898) (night earnings after discharge do not go in reduction of damages for wrongful discharge, where employee could have worked elsewhere at night without interfering with employment from which he was discharged).

Galveston County v. Dusie, 91 Tex. 665, 45 S. W. 798 (1898) (county physician, with understanding that he could take private practice); Jaffray v. King, 34 Md. 217 (1870) (city salesman, not required to give his full time to the business).

See the extensive note (1921) 15 A. L. R. 751.
AVOIDING INJURIOUS CONSEQUENCES

ages for earnings elsewhere; contracts for construction, logging, teaming and hauling, mining, and manufacturing. It is true that all this class of contracts do contemplate and require for their performance the expenditure of extensive human efforts and services. The point is, however, that it is understood and agreed that the person or corporation undertaking the work will carry it out by employing other persons—any other persons the contractor may choose—to do the actual labor of high and low degree. Theoretically at least, the contractor could, in addition to and along with the particular contract, carry on an indefinite number of similar contracts. Consequently, if the particular contract is repudiated by the other person, the latter should take no credit for profits earned or earnable by the contractor on other jobs. On the other hand, it is equally clear that in carrying out the particular contract it would ordinarily be necessary for the contractor, if an individual, to expend valuable time in supervising the work, or if a corporation to employ the time of its officers in supervision. In suing for damages for the frustration of the contract, it must, as we have seen, give credit for any costs which it would have incurred in completing the contract. A proper reckoning must include among those costs the value of the time of the contractor or the supervising agents, unless it should appear that the shut-down of the work on this contract has necessarily caused the contractor, if an individual, to remain idle, or if a corporation, to pay its officers without having work for them to do. Thus, our principle of credit for benefits to plaintiff from defendant's wrong reappears in another form, in the form of credit for the saving of the time of plaintiff through the abandonment of the contract.

This distinction between a contract calling for the exclusive personal services of the contractor himself, and a contract for the completion of work which may be done by the contractor through others

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61 Allen v. Murray, 87 Wis. 41, 57 N. W. 979 (1894).
65 See n. 78, supra.
66 Columbus Mining Co. v. Ross, 218 Ky. 98, 290 S. W. 1052, 50 A. L. R. 1394 (1927), with note.
68 See comment of the learned annotator, (1927) 50 A. L. R. 1397, 1399.
is illustrated by the facts of a recent North Carolina case, wherein it is believed that the distinction was not observed by the court. In that case a corporation, the Durham Construction Company, contracted to superintend the construction of a building for defendant and to buy the material therefor and keep account of the laborers' time, all for a commission of seven per cent of the cost of material and labor. It was contemplated that the supervision should be done by the two active members of the corporation who were experienced in construction work. The defendant refused to permit the plaintiff to carry out the contract, and the plaintiff sues for the profits it lost thereby. The court, relying on the fact that the services of the two members of the plaintiff corporation were contemplated and contracted for, held that in assessing the damages the jury ought to have been instructed to deduct from the contract price not only the expenses of performance, but also the amount that it would have earned during the contract period in such other employment as it could have secured by the exercise of proper diligence. It is believed that the court overlooked the fact that exclusive employment of the corporation or its members on defendant's work was not contemplated, that plaintiff could have carried on defendant's work and other jobs at the same time, and that all that defendant was entitled to was that in computing the net profit of which plaintiff was deprived, the value of the time of the members of the plaintiff corporation which would have been expended on this work, should be counted as a part of the cost of completion.

The present problem is frequently presented in connection with contracts for the farming of land on shares, a type of arrangement which is especially prevalent in the South. If the share-cropper is wrongfully prevented by the landlord from carrying out the contract, is the landlord, when sued by the cropper for damages for the breach, entitled to credit for what the cropper earns or could earn in similar operations on other land available in the vicinity? Here again the answer depends upon the terms of the contract. If its terms contemplate that the cropper must personally devote all or a given portion of his time and services to the care of the particular crops, then the landlord is entitled to credit for earnings which the cropper earns or can earn elsewhere in the vicinity in similar operations and which he could not have earned if the original contract had been performed. This is most frequently the effect of such

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contracts. On the other hand, if the share-cropper's contract is simply for the making of the crop and he is not required by its terms to devote any definite part of his own time to the work, then since the abandonment of the contract has not freed him for other work, since he was never tied — then the landlord is entitled to no such credit.

Analogous considerations come into play in cases of breaches of contracts by advertisers. When the advertiser fails to take space contracted for in the newspaper, magazine, street-car, or the like, the question arises, has the advertiser been assigned certain particular space by the contract? If not, has the publisher or person letting the advertising only a limited amount of such space available so that when the particular advertiser cancels, the other party’s opportunity to sell advertising is thereby increased? If either of these questions is answered yes, then the space freed by the advertiser’s breach must be re-let if it can be by reasonable efforts, and the advertiser must be given credit for the proceeds which have been or could have been thus realized when damages against him are assessed. On the other hand, if as is usually the case, the advertiser merely contracts to use a certain amount of space generally, and the publisher or advertising agency can expand the space available indefinitely to meet the demands of other customers, then the advertiser’s default has resulted in no benefit to the seller of space and no credit for similar space sold to others should be allowed.

A recent federal case presents a close and interesting question of the application of this principle of credit for benefits. The contractor agreed to install a sprinkler system in a factory. The owner of the factory, when the sprinkler installation

8 Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702, 706, 111 N. W. 343, 112 N. W. 708 (1907) ("24 inches on inside front page cover" of weekly paper); Barron G. Collier v. Women's Garment Store, 152 Minn. 475, 189 N. W. 403 (1922). But the advertising agent need not re-let the vacant space at less than the regular rates. Barron G. Collier v. Kindy, 146 Minn. 279, 178 N. W. 584 (1920); Western Grain Co. v. Barron G. Collier, 163 Ark. 369, 258 S. W. 979, 35 A. L. R. 1534 (1924). Nor need he make special efforts to induce his customers to take the vacated space rather than other space which he has available for sale. Ware Bros. Co. v. Cortland Cart & Carriage Co., 210 N. Y. 132, 103 N. E. 890 (1913). The burden is on the advertiser to show that the lessor could have disposed of the space, though the proof about this matter would seem more readily available to the other party. Ware Bros. Co. v. Cortland Car & Carriage Co., supra.
was only three-fourths completed, became bankrupt. Bankruptcy is, in effect, a repudiation of the bankrupt's contracts. The factory was sold in the bankruptcy administration to a new owner. The contractor instituted a claim against the bankrupt's estate for the profit which it would have made if the original contract had been carried to completion. In answer to this claim, it was shown that the contractor had made a new contract with the new owner of the factory for the completion of this same sprinkler system, and that under this, he had made the same profit that he would have secured from the completion of the work under the original contract. This contention prevailed in the lower court, but the Circuit Court of Appeals reversed the decision, and allowed the claim for profit lost. It held that the "duty to mitigate damages" applies only in cases of personal service contracts and cases where the subject matter of the contract is in the possession of the plaintiff. It is manifest, however, that the profit that the contractor earned by completing the work under the contract with the new purchaser, is one that he could by no possibility have made if the original contract had been fully performed, and it is arguable that if the court had considered the principle of credit for benefits rather than confining its attention to the cognate doctrine of avoidable consequences, it might have found itself in agreement with the trial judge.\footnote{See comment on the case in (1925) \textit{34 Yale L. J.} 553.}

7. \textit{Recovery for expense or injury incurred in efforts to minimize loss.}

The law serves its end of fostering the conservation of the human and material resources of the community, and discouraging unnecessary waste, in two ways. The first way, that of denying recovery for avoidable damage, we have covered in the earlier part of this chapter. Correlative and complementary to this is the device of encouraging the injured party to avert loss by allowing him to recover for expense or injury incurred in the course of his efforts in that direction.\footnote{Morrison v. Queen City Electric Light \& Power Co., 193 Mich. 604, 160 N. W. 434 (1916); Den Norske, etc. v. Sun Printing \& Pub. Asso., 226 N. Y. 1, 123 N. E. 463 (1919); DECENNIAL DIGESTS, DAMAGES, §§ 42-46, 117, 208 (5); 1 SEDGWICK, DAMAGES (9th ed. 1920) §§226a-226o; CONTRACTS RESTATEMENT (Am. L. Inst. 1930); § 327 (2).} Just as we saw that the negative side of the doctrine of avoidable consequences denied recovery only when the loss could have been prevented by reasonable effort, so here also the law gives recovery for expense or injury only where incurred as a
356 AVOIDING INJURIOUS CONSEQUENCES

part of endeavors which are reasonable and prudent. ¹⁰³ The amount of the expenditure must likewise be reasonable,¹⁰⁴ but the fact that the plaintiff has actually paid the money is prima facie evidence that the outlay is a reasonable one.¹⁰⁵

Among the familiar instances of the application of the doctrine are the recovery of reasonable expense for medical and surgical attendance, nursing, and drugs incurred by the plaintiff in alleviating a personal injury inflicted by defendant;¹⁰⁶ the recovery of similar expenses in the care of animals injured,¹⁰⁷ and the allowance of the cost of recovering, repairing, or protecting property damaged by defendant’s wrong.¹⁰⁸ Likewise, as damages for breach of contract, the plaintiff may, if the threatened injury were reasonably foreseeable by the defendant when the contract was made,¹⁰⁹ recover the cost of prudent efforts to avert or reduce such threatened loss.¹¹⁰ Such efforts may include the expense of securing a substitute for defendant’s performance which has failed. For example, where the seller of timber agreed that he would erect a saw-mill on the land and plane the timber at a certain rate, but failed to do so, the buyer was held entitled to recover the expense of hauling the timber to another saw-mill.¹¹¹ Again, when a sub-contractor

¹⁰³ Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066 (1904) (plaintiff placed decayed potatoes, furnished by defendant, with good ones; instead of removing them at once, he sorted the good from the bad from time to time; held, an unreasonable method of trying to save them, and the expense of sorting not recoverable); Le Blanche v. London & N. W. Ry., L. R. 1 C. P. Div. 286 (1876) (plaintiff who by defendant’s fault had missed a connection engaged a special train which got him to destination only an hour earlier than next regular train; held, expense of special train not recoverable).

¹⁰⁴ Tuchy v. Columbia Steel Co., 61 Ore. 527, 122 Pac. 36 (1912) (no recovery for expenses for medical treatment without showing of reasonableness).

¹⁰⁵ Hachne Ditch Co. v. John Flood Ditch Co., 76 Colo. 500, 233 Pac. 167 (1925) (cost of procuring substitute outlet for water which defendant agreed to permit to flow through its ditch); Alt v. Konkle, 237 Mich. 264, 211 N. W. 661 (1927) (medical expenses).


¹⁰⁷ Even when the injury eventually proves incurable, and the animal worthless, so that the owner recovers its full value, he may in addition recover the reasonable expense of prudent efforts to effect a cure. Central Texas Telephone Co. v. Allmand, 246 S. W. 676 (Tex. Civ. App. 1922). See also note 123, infra.


¹⁰⁹ Hadley v. Baxendale, 9 Exch. 341, 156 Eng. Reprints 145 (1854); RESTATEMENT OF CONTRACTS, supra n. 102.


¹¹¹ Gilliland v. Hawkins, 216 Ala. 97, 112 So. 454 (1927).
delayed in putting glass in the windows of a building, and it became necessary for the principal contractor to put muslin in the windows to protect the interior until the glass could be installed, the expense of this was recovered from the sub-contractor.\textsuperscript{112} Similarly, where one who leased premises was put to the necessity of erecting partitions and making other changes essential to enable him to occupy the premises, by reason of the lessor’s failure to deliver all of the space contracted for, the court held that such expense so far as it was a reasonable outlay made to minimize damages was a proper element of recovery against the lessor.\textsuperscript{113}

Not only may expense be allowed, but if one reasonably endeavoring to escape or minimize the injurious effects of a wrong, sustains injury to person or property in the effort, he may recover for such injury as an item of damages flowing from the wrong. Accordingly, where a person who has sustained a personal injury selects with reasonable care a physician to treat his injury, and such physician through mistake or negligence inflicts a further injury upon the patient the original wrongdoer is liable for this added injury too.\textsuperscript{114} Similar considerations apply when the plaintiff to avoid the effects of a fire negligently caused by defendant, sets a back-fire and thereby burns his own property,\textsuperscript{115} or sustains personal injury in fighting the fire.\textsuperscript{116} Likewise, cases are frequent where railway passengers who are wrongfully ejected before reaching their destinations, or are taken past it, and who sustain injuries in attempting to escape the effects of exposure by seeking a place of shelter. With fair uniformity the courts allow these injuries, incident to such attempts, to be compensated as an element of damages.\textsuperscript{117}

\textsuperscript{112} Elias v. Wright, 276 Fed. 908 (C. C. A., N. Y., 1921).
\textsuperscript{113} Nunnally Co. v. Bromberg & Co., \textit{supra} n. 110.
\textsuperscript{115} McKenna v. Baessler, 86 Iowa 197, 53 N. W. 103, 17 L. R. A. 310 (1892).
\textsuperscript{117} Yazoo & M. V. Ry. Co. v. Aden, 77 Miss. 382, 27 So. 385 (1900); Schumaker v. St. Paul & D. R. Co., 46 Minn. 39, 48 N. W. 559, 12 L. R. A. 257 (1891); \textit{contra}: Fowlks v. Southern Ry. Co., 96 Va. 743, 32 S. E. 464 (1899). A similar holding was made in a case where failure to deliver a telegram resulted in plaintiff’s inability to secure a railway ticket and he suffered from ex-
AVOIDING INJURIOUS CONSEQUENCES

While there are decisions to the contrary, the better opinion would seem to be that under the present principle the plaintiff may properly claim as an item of damages the value of his own personal time and services expended in prudent efforts to reduce the loss resulting from defendant's wrongdoing.\(^9\)

The principle of credit for benefits, discussed in the next previous section, has some interesting applications in cases where the party wronged undergoes expense for the purpose of lessening the injury. It sometimes happens where defendant has failed to perform a contract, that the substitute secured by plaintiff is more valuable than the defendant's performance would have been. Clearly he cannot charge defendant then for the whole cost of the substitute, or if he does the defendant must have credit for the difference in value between the substitute and the thing promised.\(^10\) Similarly, in a North Dakota case the defendant who had promised to thresh the plaintiff's flax, delayed in doing so, and this made it necessary for the plaintiff to stack the flax for its protection. The plaintiff sued for the cost of stacking, but it appeared that the stacking would greatly lessen the cost of threshing, and consequently it was held that this saving of ultimate expense in threshing should be deducted from plaintiff's claim for the cost of stacking.\(^11\)

Naturally enough, the courts do not require unerring foresight in one who seeks to avoid or minimize damage. We have seen that he is held to no more than reasonable prudence, in determining whether he is barred from recovering avoidable damages.\(^12\) If they were avoidable only by extraordinary efforts or acumen, he is not barred. Likewise, if the expedient by which it is claimed the plaintiff might have lessened the injury was apparently of such debatable efficacy that a reasonable man might either have adopted it or not, if plaintiff does not adopt it, his right of recovery is not diminished. In this latter case where a reasonable person in the

\(^9\) Mitchell v. Burch, 36 Ind. 529, CRANE, CASES ON DAMAGES, 326 (1871); (plaintiff's time spent in hunting for his hogs, proper item of damages in action for their detention); St. Louis & S. F. Ry. Co. v. Sharp, 27 Kan. 134 (1882) (value of plaintiff's services in driving out intruding cattle recoverable). Contra: Spencer v. Murphy, 6 Colo. 453, 41 Pac. 841 (1895) (services in putting out fire). See 1 SEDGWICK, DAMAGES (9th ed., 1920) § 2261. Compare n. 92, supra.

\(^10\) Erie Co. N. G. & F. Co., Ltd. v. Carroll, (1911) A. C. 105. See 1 SEDGWICK, op cit, supra n. 118., § 226h, criticizing an earlier English case of a contrary tenor.


\(^12\) See § 2, supra.
light of the situation before him, might either have undertaken the expense of attempting to lessen injury or might have decided against doing so, if the plaintiff does decide to incur such expense, he may recover it from defendant. An unusual recent New York case furnishes a striking illustration. During the Great War, the defendant newspaper published a false statement that the plaintiff, the Norwegian owner of a line of vessels, had falsified certain shipping documents to enable it to transport a large supply of copper to Norway so that it might later find its way to the Central Powers, with whom we were at war. In an effort to minimize the damage to its business and credit from this report the plaintiff at a cost of $2,722 published denials in various newspapers. The court held that, conceding that a failure by plaintiff to publish such denials would not have been a ground for denying recovery for damages suffered which could thus have been avoided, the publication was nevertheless a reasonable expedient for the purpose of lessening the injury and the defendant was liable for the expense.\textsuperscript{122} Moreover, since the plaintiff’s conduct is to be judged only from the standpoint of one reasonably trying to exercise foresight, and not by the standard of “hind-sight” after the event, the plaintiff may recover the costs of prudent attempts to reduce damages, even though such efforts prove unsuccessful.\textsuperscript{123}

A doctrine that “expenses” of minimizing loss may be recovered, suggests that costs do not become “expenses” until they have been paid, and defendants sometimes seek to escape liability on this ground. It is well settled, however, that if the plaintiff has become legally liable for a given service, as for example for doctors’ charges, he may recover the cost just as readily as if he had paid it.\textsuperscript{124} It is occasionally declared, however, that such costs may not be recovered unless the plaintiff has either paid or become liable to

\textsuperscript{122} Den Norske, etc., v. Sun Printing & Pub. Ass’n., 236 N. Y. 1, 122 N. E. 463 (1919), Crane, Cases on Damages, 122.

\textsuperscript{123} Thus, a client whose attorney negligently advised the purchase of a leasehold which proved to be unmarketable, attempted to clear the title by bringing suit to validate the lease, but the suit failed. The court, nevertheless, held that the client in an action against the attorney could recover the expense of the abortive suit, which had been prudently undertaken. Ninth Ave. and 42nd St. Corp. v. Zimmerman, 217 App. Div. 498, 217 N. Y. Supp. 125 (1926). And money reasonably spent in seeking to cure an injured horse, though it prove useless, is recoverable, in addition to the value of the horse. Southern Hardware & Supply Co. v. Standard Equipment Co., 158 Ala. 596, 48 So. 357 (1909); Central Texas Telephone Co. v. Allmand, supra n. 107.

\textsuperscript{124} Alabama Power Co. v. Edwards, 219 Ala. 162, 121 So. 543 (1929) (medical services); Menefee v. Raisch Improvement Co., 78 Cal. App. 785, 248 Pac. 1031 (1926) (cost of repairs of automobile). But if plaintiff has merely become liable he should so allege, and should not plead that he has paid it. Fisk v. Poplin, 46 Cal. App. 587, 189 Pac. 722 (1920).
pay them.\textsuperscript{125} There seems little reason to support such a generalization. On the contrary, if certain services are necessary to lessen plaintiff’s damages, and third persons are willing to perform them gratuitously for the plaintiff, such willingness seems no ground for permitting the defendant to escape liability for an item of damage for which he would normally be responsible, namely the amount which such a service would ordinarily cost.\textsuperscript{126} In addition, the generalization does not take account of the frequently occurring situation where it is apparent that as a result of the defendant’s completed wrong, it will become necessary in future for plaintiff to make outlays for the purpose of preventing greater damage. Without doubt where the reasonable certainty of their future occurrence can be established, such prospective expenses may be recovered in advance as part of the complete damages for the wrong.\textsuperscript{127} Finally, even if the time for making the outlay has past, but the expense was one that was reasonably required to prevent a greater loss, and the plaintiff failed to make the expenditure but submitted to the greater and avoidable loss, the plaintiff may still recover for the expense that it would have been necessary to incur in order to hold the damage to a minimum. This was the holding in an Arkansas case where the defendant in flooding his rice field inundated the plaintiff’s land and ruined his crop of hay, a result which plaintiff could have prevented at reasonable expense. The court held that while the plaintiff could not recover for the hay, he could recover the amount that it would have cost to protect it. ‘‘In other words,’’ the court said, ‘‘the reasonable cost of the means which the injured party is bound to adopt to lessen the damages, whether adopted or not, will measure the compensation he can recover for the injury or the part of it that such means have or would have prevented.\textsuperscript{128}

\textsuperscript{125}Wicks v. Cuneo-Henneberry Co., 319 Ill. 344, 150 N. E. 276 (1926) (medical expense). In Missouri Pac. Ry. Co. v. Quallis, 120 Okla. 49, 250 Pac. 774 (1926) the court, accepting this as the rule as to personal injuries, held that it did not apply to the case of damage to an automobile. In such case the court held that the amount which it would reasonably cost to repair could be recovered, though the repairs were not made.

\textsuperscript{126}Roth v. Chatlos, 97 Conn. 282, 116 Atl. 332, 22 A. L. R. 1554 (1922).


\textsuperscript{128}Lisko v. Uhren, 134 Ark. 430, 204 S. W. 101 (1918). Compare Curtner v. Bank of Jonesboro, 175 Ark. 639, 229 S. W. 994 (1927) where the purchaser of land lost a profit of $3,500 on a resale by reason of not having an abstract, which the original seller had agreed to furnish. It was held that since he could have secured an abstract himself for $65, he could only recover that amount against the original seller. Compare 1 SUTHERLAND, DAMAGES (4th ed. 1916) § 88.
This last holding tends to support the view expressed in the first section of this article that the so-called "duty to minimize damages" is not a duty in any strict or technical sense. It would be hard to support the recovery of an amount which it was the plaintiff's duty to expend, but which in violation of that duty he failed to pay out. It is believed that our survey of doctrine of avoidable consequences has made it clear that the law is here trying to influence men's conduct toward the avoidance of loss and waste by a carefully devised plan of allocating certain risks to the party wronged if he fails in such a standard of conduct. Likewise, it rewards him correspondingly if he measures up to this standard by apportioning the risk upon the wrongdoer of the expense of the other's efforts.