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Damages--Some Situations in Which the Plaintiff is Not Required to Minimize Damages

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DAMAGES—SOME SITUATIONS IN WHICH THE PLAINTIFF IS NOT REQUIRED TO MINIMIZE DAMAGES

Is one who has been harmed, by an intentional, or positive and continuing tort, or a nuisance, under a duty to use reasonable care to avoid the consequences and reduce the liability of the wrongdoer?

Generally speaking, when one is injured by the wrongful or negligent act of another, whether as the result of a breach of contract, or as the result of a tort, such person is bound to exercise reasonable care and diligence to avoid the loss or to minimize or lessen the resulting damage. If he fails to exercise such reasonable care and diligence, he can not recover for the unreasonable enhancement of damages.[1]

The nature and extent of this duty requires that the injured party use only such care and diligence as the ordinary prudent man would use under the circumstances. He need not commit a wrongful or criminal act, nor trespass,[4] nor break his contract with a third person, nor sell property over which he has no control,[6] nor incur large expense.[7]

The problem of wilful injury is not so well settled that one may reach a definite conclusion, as to the duty of the wronged person to use reasonable care to avoid the consequences of the defendant's wrongful act. However there are some cases which have held that the plaintiff need not minimize damages where the wrong was intentional[8] or a continuous tort or a nuisance.[9] Mr. McCormick in his book on damages states that the courts reached this result because the undertaking on the part of the plaintiff, to avoid the consequences would have placed an unreasonable burden on the plaintiff.[10] For this reason McCormick believes that the

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[1] Kern v Friedrich, 220 Ala. 581, 126 So. 857 (1930), Louisville and N. R. Co. v Cooper, 164 Ky 489, 175 S.W 1034 (1915) Hall v Paine, 224 Mass. 62, 112 N. E. 153 (1916), De Carli v O'Brien, 150 Ore. 35, 41 P 2d. 411 (1935) McCormick, Damages (1935) 127.

[2] Lexington v Chenault, 151 Ky 774, 152 S.W 939 (1913) Hall v. Paine, 224 Mass. 62, 112 N.E. 153 (1916).

[3] Wabash R. Co. v Campbell, 219 Ill. 312, 76 N. E. 346 (1905).

[4] Wolf v St. Louis Independent Water Co., 15 Cal. 319 (1860)

[5] Des Arc Oil Mill v Western Union Telegraph Co., 132 Ark. 335, 201 S.W 273 (1918)

[6] Spicer v Hincks, 113 Conn. 356, 155 Atl. 508 (1931)

[7] Paragould v Arkansas Light and Power Co., 171 Ark. 86, 284 S.W 529 (1926).

[8] Heaney v Heeney 2 Den. 625 (N. Y. 1846)

[9] Johnston v City of Galva, 316 Ill. 598, 147 N. E. 453 (1925).

[10] McCormick, Damages (1935) 139.

courts invoked the rule that the duty of avoiding the consequences does not apply to nuisances and continuing torts.

It is submitted that had the court been seeking merely a desirable result, it could have relied upon the general rule set out earlier, that one is not required to make a large outlay of capital, or do any act which an ordinarily prudent person would not do under the circumstances. Applying this rule, the plaintiff would not have been required to make the expenditure and the defendant would have been liable for the full amount of the damages suffered.

In an early New York case it appeared that the plaintiffs tied their boat to the defendant's wharf. The defendant cut the boat loose and allowed it to drift out to sea. The plaintiff shortly afterward came upon the scene and saw his boat adrift. With small expense and due diligence the plaintiff could have retrieved the boat but he failed to do so. The boat was washed against the shores of Staten Island and rendered nearly worthless. It was held that "The injury complained of was voluntary, and if wrongful, the plaintiffs are under no obligation legal or moral, to take any steps to mitigate the consequences "[11]

In an Illinois case the facts showed that the city of Galva, Illinois, was emptying refuse into a stream which flowed by the plaintiff's farm. The plaintiff's cattle upon drinking water from the stream became ill. The plaintiff sued the city of Galva for the injury to his livestock. The city alleged by way of defense that the plaintiff failed to take measures to minimize his damages, by constructing a fence along the stream. It was stated that no duty rested upon the plaintiff to enclose the stream, as the rule which requires the injured party to protect himself from the consequences of the defendant's wrongful act by the exercise of ordinary care, effort, and expense on his part, does not apply in cases of nuisance.[12]

In a recent Washington case the defendant was engaged in hydraulic mining and the waste from washing was allowed to flow upon the land of the plaintiff for a period of about one year. The defendant alleged that the plaintiff failed to take measures to minimize his damages. The court said,

> "While we do not think the above contention is strictly true, for the reason that as to the crops there is testimony to the effect that there was nothing respondents could do to save their crops, and as to the damage to the freehold there is testimony that they tried to keep the water away from their house but were unable to do so, but be that as it may and ad-

[11] Heaney v. Heeney, 2 Den. 625, 627 (N. Y. 1846).
[12] Johnston v. City of Galva, 316 Ill. 598, 147 N. E. 453 (1925).

> mitting for the sake of this contention of appellant that respondents might have made more of an effort than they did to protect both their crops and house, the requirement of minimizing damages does not apply to cases of nuisances or in cases of intentional or continuing torts. There is sufficient evidence in this record to show that the tortious acts of appellant continued from the early spring of 1942 until the first trial in the spring of 1943. This being true, it was not necessary for respondents, in order to recover in this action to show that they had made a reasonable effort to minimize the damages."[13]

In an interesting case involving a suit against a labor union, the plaintiff, a union member was wrongfully and without trial or assessment of penalty fined and suspended from membership. He brought an action against the labor union for damages sustained as the result of his inability to find employment without union membership. The labor union as a defense alleged that the plaintiff should have paid the fine wrongfully assessed against him and thus cut down liability of the union. The court after setting out the general rule as to the duty on the part of the plaintiff to minimize damages, decided that it was not applicable in this case and it substantiated its position by quoting from a previous case which asked the following question:

> "But does this rule apply to the case of wilful injury? We are of opinion that it does not. Since one who has committed an assault and battery upon another can not urge in his defense that the plaintiff might by the use of due care have avoided the battery, we think where the injury is intentional he should not be permitted to say, in reduction of the damage, that the plaintiff might have prevented them, at least in part, by careful conduct on his part."[14]

The question of avoidable consequences has also arisen in the relation of landlord and tenant when the tenant abandons the leased premises before the end of the term of the lease and declines to pay any more rent. The question then arises as to the duty of the landlord to re-enter the abandoned property and try to rent it to another tenant and to avoid so far as he can the consequences of the breach of the tenant's contract.

In *Abraham* v. *Gheens*,[15] a Kentucky case, the tenant held over for four months beyond the period of the lease. By statute, if a tenant holds over for more than three months, the term is extended for an additional year, and both the tenant and the landlord are

[13] Desimone v. Mutual Materials Co. —Wash.—, 162 P 2d. 808, 812 (1945)

[14] Smith v International Printing Pressman and Assistant's Union of North America, —Tex.— 190 S.W 2d 769, 775 (1945).

[15] 205 Ky 289, 265 S.W 778 (1924)

bound.[16] The tenant abandoned the premises at the end of the four months, and at the end of the term the landlord brought suit for the eight months rent which was unpaid. From a peremptory instruction of a verdict for the landlord, the tenant appealed. The appellant contended that after he vacated the premises, appellee should have used diligence in procuring another tenant. He alleged further that the trial court was in error in not allowing him to plead the defendant's failure to do so in his amended answer. In denying the appeal the Kentucky Court of Appeals said: "To this we can not agree no legal duty devolved upon appellee to supply a tenant for the premises vacated by the appellant."[17]

It is believed that where the wrong committed by the defendant consisted of an intentional, or a continuing tort, or a nuisance, and in some situations a breach of contract,[18] there is no duty placed upon the plaintiff to use reasonable care to avoid the consequences and thus minimize the liability of the defendant.

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[16] Ky. R. S. (1946) 383.160.
[17] Abraham v. Gheens, 205 Ky. 289, 293, 265 S.W 778, 780 (1924).
[18] *Ibid.*