THE DOCTRINE OF AVOIDABLE CONSEQUENCES IN DISABILITY INSURANCE

"In the sweat of thy face shalt thou eat bread till thou return unto the ground." —Genesis, Ch. III, 19.

The doctrine of avoidable consequences is of ancient vintage.[1] Its influence has colored deeply three major areas in the teeming legal tapestry of our societal life.

The law of contracts has employed it.[2] A promise of a breached contract may recover only for those losses which he, reasonably, could not avoid.[3] He is not under a *duty* to avoid

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1. See cases cited 17 CORPUS JURIS., p. 767 ff.

The theory is frequently denoted as the "mitigation of damage" rule. Volunteer Insurance Co. v. Weaver, 167 So. 268 (Ala., 1936); Assurance Society v. Merlock, 253 Ky. 596, 69 S.W. 12 (1934); Culver v. Insurance Co. (unreported decision, Circuit Court, County of Genessee, Mich., 1932); Jones v. Insurance Co., 175 S.E. 425 (S.C., 1934); British Westinghouse Electric Co. Ltd. (1912 A.C., p. 673). This phrase has, however, acquired the status of an expression of art in another phase of law. It has always related to the defendant and "generally to the character of his acts, *e.g.,* that a tort was not malicious."

SEDGWICK ON DAMAGES (8th ed.) Sec. 204: "Avoidable consequences," on the other hand, refers to a plaintiff's conduct. Preemption of a description for a pattern of fact should preclude other uses of it, if the law is to develop a scientific language. Loose language so often betrays loose thinking and, its corollary, logically incongruous results.

Cf. WILLISTON, CONTRACTS, Vol. 3, Sec. 1359, p. 2426, where he recognizes this confuced nomenclature. Then compare the headings of some of the subsequent sections with this classification. They seem inconsistent.

2. WILLISTON, CONTRACTS, Vol. 3, Sec. 1353. "The principle has wide application." RESTATEMENT OF THE LAW OF CONTRACTS, Vol. 2, Sec. 336. CORPUS JURIS., Vol. 17, p. 771, and cases cited therein.

3. RESTATEMENT OF THE LAW OF CONTRACTS, *supra,* note 2: " . . . if he (promisee) fails to make the reasonable effort with the result that his harm is greater than it would otherwise have been he cannot get judgment for the amount of this avoidable and unnecessary increase. The law does not penalize his inaction; it merely does nothing to compensate him for the harm that a reasonable man in his place would have avoided."

losses.[4] To imply a duty is to grant a corresponding right. But the promisee cannot be sued for his failure to check his damages. What occurs is that the law does nothing to compensate him for the losses which he reasonably could have escaped.

The principle has found application in the law of torts, particularly in the negligence cases. In this legal arena, the rule may be generalized[5] in somewhat this fashion: One who has been injured through the negligence of another should exercise ordinary care[6] under the circumstances in effecting

4. RESTATEMENT, *supra*, note 2; WILLISTON, CONTRACTS, *supra*, note 2. An interesting problem in the personal service cases arises when the employee becomes ill subsequent to his discharge. May he recover for the period of his disability? The supervening illness prevented him from seeking employment elsewhere and thereby avoiding the amount of his loss. The answer appears to be that he can unless it is possible for the "jury to find that such illness would have occurred had he not been discharged and if they so find, damages should be diminished accordingly as they should be if the servant died after his discharge and before the end of the term for which he was employed." WILLISTON, CONTRACTS, Sec. 1359, p. 2426.

5. The weakness of generalizations accepted.

6. "Ordinary care" ushers the mythical "reasonable man" onto the stage. Is he an abstract ideal? Or is he the usual compound of peccability and impeccability? The difference in viewpoint is very real. If the plaintiff be one of those timid, sensitive souls who suffer mentally many and excruciating deaths in the face of even a simple operation, he may find safety in the second theory but not in the first. The stern implacability of the abstract man standard admits of no peculiar sensitivities.

Cf. American Smelting and Refining Co. v. Industrial Commission, 290 Pac. 773 (Utah, 1930). "The Commission excused the refusal of Mr. Ofgren to have the finger treated because he was timid and probably over-sensitive to pain. Do such facts constitute an excuse for the refusal of Mr. Oftren to submit to the proposed treatment? The question must be answered in the negative. Doubtless some people are very timid and exceptionally sensitive to pain. A workable rule of law, however, would be general in its application and may not be varied to meet individual idiosyncrasies." To like effect, *Cf.* Palloni v. Commission, 215 A.D. 634 (N.Y., 1926). Thus the iron rule of abstractness.

The compassionate concept of the "reasonable man" is exemplified by the case of Collins v. City of Council Bluffs, 32 Iowa 324 (1871). To quote the pertinent language: "But she was required to exercise only the judgment and care which men and women in her condition are ordinarily capable of exercising."

a cure and preventing an aggravation of the injury. There can be no recovery for such portion of the total damages as result from a failure to comply with this rule.[7] It has been said that there is some opposition to this almost universal ruling.[8] However, a careful examination of these cases will disclose distinguishing features which might well shift them into the majority column or, at the very least, place them in the pale

The eclectic is with us also. It pays verbal homage to the abstract concept. But it drains the doctrine of much of its severity. Idiosyncracies are elements to be placed in the test tube of determination of the reasonable man. It is a realistic concession to human foibles. *Cf.* Brown v. Ice Cream Co., 150 La. 455, 90 So. 759 (1922). Plaintiff's aversion to treatment at a charity hospital was an element considered by the court in determining whether his conduct was reasonable.

For a similar approach: Lance v. Hoyt, 114 Conn. 590, 159 Atl. 575 (1932); Plaintiff was a Christian Scientist, a religious sect forbidding medical treatment. The court considered this fact in the scale of judgment.

Financial sacrifice or inconvenience: Pullman Co. v. Walton, 152 Ark. 633, 239 S.W. 385 (1922).

7. 17 CORPUS JURIS 769 and cases cited therein. Some additional cases are: O'Donnell v. Rhode Island Co., 28 R.I. 245, 66 Atl. 578 (1907); Wolf v. Third Avenue R.R., 67 A.D. 605, 74 N.Y.S. 336 (1902); Birmingham Light & Power Co. v. Anderson, 163 Ala. 72, 50 So. 1021 (1909); Texas & P. R. Co. v. Behymeyer, 189 U.S. 468 (1903); Bradford v. Downs, 126 Pa. State 622 (1889); American Realty Co. v. Thompkins, 37 App. D. C. 87 (1911); Stewart Dry Goods Co. v. Boone, 180 Ky. 199, 202 S.W. 487 (1918); Goshen v. England, 119 Ind. 368, 21 N.E. 977 (1889); Chicago Rwy. Co. v. Meech, 163 Ill. 305, 45 N.E. 290 (1896); Graney v. Oregon Short Line Rwy., 33 Pac. 359 (Idaho, 1934); Williams v. City of N. Y., 33 A D. 539 (1898); Blate v. Third Avenue R.R., 44 A.D. at 166 (1899); Britisr Westinghouse Electric & Manufacturing Co. Ltd. (1912 A.C. 673).

The application of this principle is sometimes confused with the doctrine of contributory negligence. It is true that, at times, these two dissimilar theorem produce results strikingly alike. But there is a sharp distinction between them. Contributory negligence is a complete defeat to the action itself. The rule of avoidable consequences can never produce this result. It finds application only in those situations in which a cause of action has arisen and the question is merely the extent of damages to be awarded; not whether the plaintiff can recover, but how much.

Cf. SEDGWICK, DAMAGES (8th ed.) Sec. 204; Casualty Co. v. Gehrmann, 96 Md. 633, 54 Atl. 678 (1903); Williams v. City of New York, 33 A.D. 539 (1898)

8. *New York Law Journal*, August 20-24, 1934.

of indeterminateness between unqualified acceptance and unpualified rejection of the rule.[9]

Under what circumstances, then, may medical or surgical treatment be prescribed? The conceptual mold into which the facts may be fitted is expressed clearly in an Iowa case.[10] This was an action for personal injuries. It was heard by the Appellate Court upon a refusal of the trial court to instruct the jury that: "If you find from the evidence that John Humpall's fingers at the place of amputation still cause him pain and that such pain can be obviated by a new amputation at small expense and without serious danger to said John Humpall, then you are instructed that it will be the duty[11] of said John Humpall to have such new amputation and he will, in no

9. *E.g.,* the leader of the minority group is cited as McNamara v. Metropolitan St. Railway Co., 133 Mo. App. 652, 114 S.W. 50 (1908), followed in Powelson v. R.R. Co., 263 S.W. 149 (Mo., 1924). But note this language in the former case: "He should be accorded the right to choose between suffering from the disease all his life or taking the risk of an unsuccessful outcome of a *serious surgical operation.* Certainly the defendant whose negligence produced the unfortunate result is in no position to compel the plantiff again to risk his life in order that the damage may be lessened." The disability involved was a hernia.

10. White v. Ryw. Co., 145 Iowa 408, 124 N.W. 309 (1910).

There are two features of this case which make it a weak supporter of a minority rule. The first is that the operation involved was a serious one (*Cf.* discussion *infra* text, p. 16, 33. The second is that the physician who was called by the defendant's counsel and who testified as to the desirability and propriety of the operation was compelled to admit upon cross examination that at the time of the trial he himself was suffering from a hernia and was wearing a truss for it. This admission struck a death blow at the credibility of the defendant's only evidence as to the feasibility of an operation. Therefore, the Appellate Court had little foundation for a contrary opinion. *Cf.* also, as superficial advocates of this minority rule: Gibbs v. Alstrom, 145 Minn. 35, 176 N.W. 173 (1920); Martin v. Pitt. R.R., 238 Pa. St. 528, 86 Atl. 299 (1913). The Pennsylvania rule is definitely a haze of uncertainty—Bradford v. Downs, 126 Pa. St. 622 (1889); also, Elwood v. North Eastern Mutual, 158 Atl. 257 (Pa. 1931), very indignant language in favor of the majority conception.

11. Here is the "duty" idea creeping into the tort cases. The upper court castigated the trial court for this error in reasoning. For similar error *Cf.* Michelson v. Fisher, 81 Wash. 423, 142 Pac. 1160 (1914)—82 A.L.R. 491.

event, be entitled to recover for any pain or suffering that such new amputation would prevent."

The Supreme Court of Iowa held this refusal to so instruct to be error. The pertinent language dealing with the criteria of treatment is: "But when pain may be obviated, and the condition of the injured member improved by an operation without injury and at small expense and slight inconvenience and with reasonable prospects of a cure, the person injured ought not to be recompensed on the theory that he will not avail himself of the benefits of modern surgery."[12] Danger, cost, suffering and cure are the four horsemen of judgment.

With their typical lump concept thinking, a good many of the courts have not followed this particularized reasoning. Some hide behind the verbal screen: "simple operation."[13] Kentucky at one moment marches under the banner of the *White* case[14] and then at another emphasizes merely the danger criterion.[15] In many cases dealing with this problem, the language is so amorphous as to defy any insight into the criteria they observe.

At any rate, in determining whether the medical or surgical treatment is in order, the question is one of fact.[16] This is fair enough. Varying circumstances may make an operation sauce at one time and poison at another.

The rationale for this rule seems rarely to be stated.[17] The

12. Belhop Comedians v. Sweeney, 238 Ky. 277, 37 S.W. 43 (1931).

13. Poikanen v. Thomas Furniture Co., 226 Mich. 614, 198 N.W. 252 (1924).

14. *Supra,* note 12.

15. L. & N. R. Co. v. Kerrick, 178 Ky. at 491, 199 S.W. 44 (1917). The danger test is also exemplified in Blate v. Third Avenue R.R. Co., 44 A.D. at 166 (1899). CORPUS JURIS., Vol. 17, p. 779.

16. See cases cited *supra,* note 7, for support of this statement.

17. Shall we become cynical and chant:

"If I the reason well devine
There are just five for drinking wine.
Good wine, a friend, or being dry,

authorities who have felt the need for clarification of their conclusions may be identified in three camps. Some judges and writers have ridden the hobby-horse of proximate cause as a basis for delimiting damages. Their theory is: compensate the plaintiff for his injuries; but if the plaintiff could avoid the loss in question, then it is plaintiff's neglect and not the defendant's wrongful actions which produced this result.[18] This chain of thought seems highly artificial and legalistic. Proximate cause is the rabbit in the hat of the legal magician—now you see it, now you don't.[19] If you rely on this explanation you obfuscate the roots of a doctrine which lie definitely in the soil of social action and societal well-being.

McCormick in his book on *Damages,*[20] states a much more convincing rationale. "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 propriety 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

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Or lest you should be by and by,
Or any other reason why."

18. 1 SEDGWICK, DAMAGES (9th ed.), p. 202; WILLISTON, CONTRACTS, Vol. 3, p. 1353: "It is usually said that the plaintiff is under a duty to mitigate damages but the truth seems rather to be that damages which the plaintiff might have avoided, without loss to himself are not really caused by the defendant's wrong and therefore are not to be charged against him.

Cf. White case, *supra,* note 10; Blate case, *supra,* note 15: "The party who claims to have suffered damage by the tort of another party is bound to use reasonable and proper efforts to make the damage as small as practicable, and that he is not entitled to recover for any damage which, by the use of such efforts, might have been avoided, because they are not to be regarded as the natural result of the tort."

To the same effect, 8 AM. & ENG. ENCYCLOPEDIA OF LAW (2nd ed.), p. 605.

19. What this doctrine can do in the confusion line of "What Is a Fire"—UNIVERSITY OF NEWARK LAW REVIEW, June 1937.

20. p. 127 ff.

from passively suffering economic loss which could be averted by reasonable efforts or from actively increasing such loss where prudence would require that such activity cease."

The third viewpoint is broadly conceptualistic. It would probably be the same as the second logic base if it were amplified, as it is no more than the ubiquitous public policy.[21]

If there be a minority rule, it might call to its support the majestic *dictum* of Judge Cooley: "The right to one's person may be said to be a right of complete immunity to be let alone."[22]

There are two minor but interesting questions to raise before bidding *adieu* to the tort cases. Must an injured claimant decide upon the course of his medical treatment at his own risk? If so, a wrong choice is a double loss. He is out of pocket for the medical treatment and out of the avoidable damages from the wrongdoer. An investigation revealed only one case[23] dealing squarely with the question. The decision avoids a clear-cut solution. It hides in the wilderness of the "reasonable man" doctrine rather than state unequivocally a standard of action. "But when he has determined what treatment to take, it will yet be for the jury to say if, in making that determination, he used the means that reasonably prudent man would take to cure himself of his injury. If he did, he is entitled to recover for his damages as they are presented to the jury. If he did not and the jury can say that some other treatment would have brought about a cure, and that treatment was one that a reasonably prudent man would have submitted to, then they must say that he has not used the care which a reasonably prudent man would use to reduce the damages and must take that into consideration in reaching

21. Poikanen v. Thomas Furniture Co., 226 Mich. 614, 198 N.W. 252 (1924).
22. COOLEY, TORTS, p. 33.
23. Blate v. Third Avenue RR., *supra*, note 15.

their verdict." Therefore, under this approach, an injured claimant is faced with several problems: (1) Have his lawyer determine which test of reasonableness applies in his state; (2) ascertain, as best he can, how such a person would act under the circumstances; (3) choose the particular medical treatment and pray that the jury agrees with him. This rule might be acceptable if it merely precluded self-medication or treatment by a quack. But it seems only fair that once one consults a licensed medical practitioner[24] and follows his advice, one should be relieved of any further encumbrances. At least, it appears to be more realistic.

The second question is even more interesting. Suppose the first operation does not take for some unaccountable reason? Has the injured party done his stint? Must he undergo a second operation? An interesting case which called a halt after the first operation is *Crawford v. Tampa Steamship Co.*[25]

The third major arena in which the doctrine of avoidable consequences is part of the dichotomy of standards is that of the workmen's compensation cases. The legal pattern resembles strongly the tort situation. The direct source of the rule is, however, different. In the tort cases the principle is the product of the judicial mill. In the workmen's compensation cases, it is the product of the legislative mill.[26]

To state the rule—in compensation cases an injured employee will be denied compensation benefits for any incapacity which may be reasonably removed by medication or surgical treatment.[27] There is slight dissent from this rule.[28]

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24. Osteopath or chiropracter included?

25. 155 So. 409 (La. App, 1934).

26 SCHNEIDER, WORKMEN'S COMPENSATION, Sec. 4886.

27. 'A sampling of the cases: So. Cal. Edison Co. v. Industrial Accident Commission, 75 Cal. App. 709, 243 Pac. 455 (1925); Swift & Co. v. Industrial Commission, 302 Ill. 38, 134 N.E. 9 (1922); Whittika v. Industrial Commission, 322 Ill. 368, 153 N.E. 708 (1926); Meyers v. Wadsworth Mfg. Co., 214 Mich.

The circumstances under which an operation may be refused in the compensation cases are different, however, than in the tort cases. Here there are but two tests.[29] Is the operation a minor one? Will it reasonably effect a cure? Cost and inconvenience are eliminated as criteria. The reasons for this divergence are explainable. The medical cost is generally borne by the compensation insurance carrier which is ample justification for the removal of the cost test. But the reason for the removal of the inconvenience standard has a more tangled root. The only answer which seems plausible is that since workmen's compensation benefits are created by legislative fiat and since they presumably offer greater concessions to the worker than did the common law or the employers liability acts, then a more rigorous, more severe test may be created for the passing out of benefits.

If there be a serious difference of medical opinion as to the outcome of the operation or its danger, then the injured employee may refuse to undergo treatment.[30]

638, 183 N.W. 913 (1921); Ritchie v. Rayville Coal Co., 33 S.W. 154 (Mo. App., 1931); Sun Coal Co. v. Wilson, 147 Tenn. 118, 245 S.W. 547 (1922); American Smelting & Refining Co. v. Commission, 290 Pac. 770 (Utah, 1930); Woodward Iron Co. v. Vines, 217 Ala. 369, 116 So. 514 (1928); O'Donnell v. Fortuna Oil Co., 2 La. App. 462, 10 La. App. 599, 120 So. 789 (1925); Ruddy v. London, Midland & S. R. Co., 22 D. W. C. C. 138 (1929).

28. *E.g.*, Dekeville v. Canadian Ry. Co., 34 Rev. de Jur., p. 111 (Can.).

29. Baltimore & C. S. S. Co. v. Morton, 30 F. 271 (1929); Zant v. U. S. F. G. Co., 40 Ga. App. 38, 148 S.E. 764 (1929); Gugliono v. Hope Coal Co., 125 Kan. 581, 264 Pac. 1051 (1929); Bryant v. Texas Pipe Line Co., 1 La App. 42 (1924); Snooks case, 264 Mass. 92, 161 N.E. 892 (1928); Mietkiewski v. Wayne County Road Commission, 227 Mich. 227, 198 N.W. 981 (1924); Dosen v. East Butte Copper Mining Co., 78 Mont. 579, 254 Pac. 880 (1927)—but apparently in conflict *Cf.* Utah Copper Co. v. Industrial Commission, 69 Utah 452, 256 Pac. 397 (1927); Simpson v. N. J. Stone & Tile Co., 93 N.J.L. 250, 107 Atl. 36 (1919); Grant v. Commission, 102 Ore. 26, 201 Pac. 438 (1921); Fred Cantrell Co. v. Goosie, 148 Tenn. 282, 255 S.W. 360 (1923).

30. Gulf States Steel Co. v. Cross, 214 Ala. 155, 106 So. 870 (1926); General Accident v. Industrial Commission, 77 Cal. App. 314, 246 Pac. 570 (1926);

Again the rule of reasonableness is a question of fact. But the burden of proof is upon the employer or his representative.[31]

How many operations must the injured claimant submit to? A paucity of authority, but the indications are that the employer's surgeon must be successful on the first try.[32] As the court said in *Insurance Co. v. Jones*:

> "It was not the intent of the law that the insurer should continue to experiment upon the body of appellee (claimant) against his wishes on the expert testimony of physicians, no matter how eminent, that another operation would be successful."

Any other view would make of an injured claimant an unwill-

Consolidated Coal Co. v. Crislin, 217 Ky. 371, 289 S.W. 270 (1926); James v. Hillyer, Deutsch, Edwards, 130 So. 257 (La. App., 1930); Beaulieu's Case, 124 Me. 83, 126 Atl. 376 (1924); Snooks Case, 264 Mass. 92, 161 N.E. 892 (1928); Mietkewski v. Wayne County Road Commission, 227 Mich. 227, 198 N.W. 987 (1924); Massotti v. Newburgh Shipyards, 210 A.D. 538, 206 N.Y.S. 382 (1924); Moran v. Okla. Engineering & Machinery & Boiler Co., 89 Okla. 185, 214 Pac. 913 (1923); Kingsport Silk Mills v. Cox, 161 Tenn. 470, 33 S.W. 90 (1931); Earl FitzWilliams Collieries v. Crossley, 133 L.T.N.S. 495, 18 B.W.C.C. 109 (1925).

As of what date must the operation be simple and reasonably calculated to cure? See So. Calif. Edison v. Industrial Commission, 75 Cal. App. 709, 243 Pac. 455 (1925).

31. Swift & Co. v. Commission, 302 Ill. 38, 134 N.E. 9 (1922); Beaulieu's Case, 124 Me. 83, 126 Atl. 376 (1924); McCulloch v. Restino, 152 Md. 60, 136 Atl. 54 (1927); Snook's Case, 264 Mass. 92, 161 N.E. 892 (1928); Ritchie v. Rayville Coal Co., 33 S.W. 154 (Mo. App., 1931); Frost v. U. S. F. G. Co., 109 Neb. 161, 190 N.W. 208 (1922); Palloni v. Transit Co., 215 A.D. 634, 214 N.Y.S. 430 (1926); Moran v. Boiler Co., 89 Okla. 185, 214 Pac. 913 (1923); Grant v. Commission, 102 Ore. 26, 201 Pac. 438 (1921); Glotfelter Erection Co. v. Smith, 156 Tenn. 268, 300 S.W. 6 (1927); Utah Copper Co. v. Commission, 69 Utah 452, 256 Pac. 397 (1927); Fife Coal Co. v. Cant, 124 L.T.N.S. 545 (1921).

32. Indemnity Ins. Co. of N. A. v. Jones, 299 S.W. 675. (Tex. Civ. App., 1927); Massotti v. Newburgh Shipyards, 210 A.D. 538, 206 N.Y.S. 383 (1924).

ing but coerced guinea pig; the plaything of the surgeon's knife.

Avoidable consequences has surreptitiously inveigled itself into, at least, two other fields of legal control. It may prove shocking to traditional nomenclature to so describe its presence, but the net results were as though the doctrine operated. Therefore, why violate that sound admonition familiarly known as Occam's razor: not to multiply entities needlessly.

The first is a principle of equity. Equity will not decree specific performance which would involve excessive judicial supervision[33] or the cost of performing which is disproportionate to the value derived from its performance by the promisee.[34]

The second is a *theorem* in the law of Domestic Relations. There is some authority that if a person refuses to submit to medical or surgical treatment which, with reasonable certainty, and without risk to life or health will cure a condition of impotency, then that condition may be regarded as incurable and a divorce will be granted.[35] The recognized rule is that impotency as a ground for divorce must be both permanent and incurable. If the defendant refuses to submit to an operation, under the circumstances outlined previously, then the defect will be regarded as incurable and permanent and the divorce will be granted. Notice there is no duty upon the defendant to submit to surgical treatment. But to refuse means the loss of a defense. Unfortunately as stated in the notes, this is the minority view. The majority opinion freezes the aggrieved

33. WILLISTON, CONTRACTS, Vol. 3, p. 1423, and cases cited.

34. WILLISTON, CONTRACTS, Vol. 3, Sec. 1425; WALSH, EQUITY, p. 331; Sanitary Dist. of Chicago v. Martin, 227 Ill. 260, 81 N.E. 417 (1907); Gardner, *Inquiry Into the Principles of Contracts,* 46 HARV. L. R. at p. 32.

35. 116 A.S.R. 243; L.V.S. 7 P.D. 16. There is authority to the contrary. The nose-counting technique would place the rule mentioned in the text in the minority classification. *Cf.* 38 CORPUS JURIS., p. 1289; 9 RULING CASE LAW, p. 39, and cases cited therein.

party to a disagreeable marital status. Society is the greatest loser of a barren unhappy marriage.

Thus stood the ledger of the avoidable consequence doctrine. The case of *Cody v. Insurance Company*,[36] decided in

36. 111 West Va. 518, 163 S.E. 4 (1932). The Cody case claims for itself the position of pioneer in the application of this principle to disability insurance: "No cases directly in point are cited and we find none." In a qualified sense, this is true. The Cody case was first in attracting the attention of the insurance world and the legal profession to the potentialities of this doctrine. Prior to it, insurance and legal literature seem not to have recognized this possibility.

As a case, it was not first in point of time. In 1867, the case of Potter v. Accident Insurance Co., 29 Ind. 210, recognized the principle. That its decision was not directly on the point; that it offered no rationalization; that it did not sense its pioneer position, is all true. But it did raise the problem. Therefore, it annot be denied the first position, temporally speaking.

The question involved was one of total disability. The pertinent remarks constitute a quotation by the Court of the testimony of one of the medical witnesses: "Such a hernia as this does not necessarily prevent a man from attending to his business. By wearing a truss, properly adjusted, he could go about and attend his business."

In 1893, the case of McMahon v. Supreme Council, 54 Mo. App. at p. 473, discusses the problem. Specifically the question was whether a truss to reduce hernia was relevant in determining a person's disability. Testimony was adduced that because of the size of the hernia, a truss might endanger the plaintiff's life. The trial court instructed the jury that if the plaintiff could reduce his hernia by a truss so as to enable him to pursue an occupation for a livelihood without serious injury or inconvenience to him, then they should find for the defendant.

The defendant appealed. It assigned as error that part of the charge referring to serious injury or inconvenience. The Appellate Court sustained the charge. It attacked the defendant's position forcefully. "The plaintiff ought not to be required to endanger his life or render his existence intolerable in order to save the defendant a few hundred dollars."

For a case, apparently in conflict with this philosophy, in the same jurisdiction, see Banta v. Casualty Co., 134 Mo. App. 222, 113 S.W. 1140. Maryland Casualty Co. v. Gehrman, 96 Md. 633, 54 Atl. 678 (1903) also points up the doctrine. Unfortunately the court's train of reason was deflected in its path to the correct determination by the irrelevant principle of contributory negligence. *Cf. supra,* note 7.

The plaintiff had submitted a claim for disability benefits under an accident policy. One of the grounds of defense proposed by the defendant was that the "plaintiff prematurely left his house and went upon the street, thereby bringing on a hemorrhage of the knee to which his subsequent disability must be attributed.

1932, marked the grand debut[37] of this principle in a comparatively new and peculiarly specialized field of contract law—disability insurance.

The action was one "on a total disability and waiver of premium clause of a life insurance policy." The plaintiff was awarded a judgment in the trial court. The insurer appealed. Several grounds were offered as the basis of the appeal. But "the most serious question presented on the record is this: Is

. . ." Therefore, the defendant refused to pay for this subsequent period of disability.

Because of this nebulously worded defense, the court was not directed in the path of the real question: avoidable consequences. That the defendant had such an idea vaguely gyrating about in the ether of the subconscious there seems little doubt.

The court said, in answer to this defense: "Its (defendant's) 8th and 9th prayers were both properly rejected because the doctrine of contributory negligence which they invoke is not applicable in this case."

For a clear exposition of the temporal distinction between contributory negligence and avoidable consequences, see Dippold v. Timber Co., 111 Ore. 199, 225 Pac. 202 (1924). Contributory negligence comes to rule at an earlier stage in the jural relationships between people, *i.e.*, before the defendant's wrongdoing. Then the plaintiff by his negligent action or inaction contributes to the cause of his injuries.

Avoidable consequences rules the roost after the wrong has been committed. Then the plaintiff by unreasonable conduct lets the damages spread.

Liberty Life Ins. Co. v. Downs, 112 So. 484 (1927). In this case the trial court charged that if the assured's disability could be stopped by an operation which he is able, reasonably, to undergo, you cannot say that he is totally and permanently disabled. The correctness of this charge was not challenged by the plaintiff. Therefore, the question was not an issue in the appeal.

But the upper court discussed the charge and indicated an approval of it. See Young v. Insurance Co., 13 Atl. 896 (1888) *dicta*. "It is the duty of the insured towards the insurer to use all due care and pursue the proper course to effectuate a cure, so that the loss of time for which he is to receive indemnity may be no greater than is reasonably necessaary."

The crescendo of evidence against the bald claim of the court in the Cody case grows embarrassingly loud and persistent. It bursts full upon the ears of the West Virginia court in Titsworth v. Insurance Co., 6 Tenn. App. 206 (1927) discussed *infra* note 25.

37. At p. 4 of S. E. REPORTER.

the plaintiff estopped[38] from recovery because of his delay in taking proper treatment for his ailments after having been advised by competent physicians as to what he should do?"

The plaintiff had been informed by his doctor that he had a toxic condition of the blood. This condition was laid at the door of a badly abscessed tooth, infected gums and tonsils. The plaintiff was urged to have these removed. He delayed acting upon this recommendation for about ten months. When he did, his condition improved.

The court answered the question propounded in the affirmative. This is the majority view.[39] There is a small but minority group.[40]

38. Again, a word of art is employed with careless disdain. Sown in the field of amorphous language, it was soon to produce an unrecognizable offspring.

39. Assurance Society v. Merlock, 253 Ky. 596, 69 S.W. 212 (1934) *dicta.* Kentucky soon repudiated this stray aside and aligned itself with the minority. *Cf. infra,* note 40; Decikter v. Insurance Co., 12 Fed. Supp. 183 (Dist. Court, W.D. Pa., 1935); Assurance Society v. Singletary, 71 Fed. (2nd) 409 (C.C.A. 4th, 1934); Prevetti v. U. S. 68 Fed. (2nd) 112 (C.C.A. 4th, 1934); Prickett v. U. S. (C.C.A. 5th, 1930); 70 Fed. (2nd) 895; U S. v. Cower, 71 Fed. (2nd) 366 (C.C.A 10th, 1934) *dicta;* U. S. v. Anderson, 76 Fed. (2nd) 337 (C.C.A. 4th, 1935); Smith v. U. S., 5 Fed. Supp. 475 (Dist. Court, Ky., 1933); U. S. v. Clapp, 63 Fed. (2nd) 793 (C.C.A. 2nd, 1933); Eggen v. U. S. (C.C.A. 8th, 1932); 58 Fed. (2nd) 616; U. S. v. Steck (C.C.A. 4th, 1933); 62 Fed. (2nd) 1056; Insurance Co. v. Sanders, 93 S.W. (2nd) 141 (Ark., 1936); *dicta* in a poorly reasoned case, Casualty Co. v. Chew, 122 S.W. 643 (Ark., 1909); Boughton v. Insurance Co., 165 So. 140 (La., 1934) doubtful; Costella v. Insurance Co., 161 So. 344 (La., 1935); Young v. Insurance Co., 13 Atl. 896 (Me., 1888) *dicta;* Culver v. Insurance Co. (unreported—Circuit Court, Genessee County, Mich., 1932); Perkins v. Insurance Co., 73 S.W. (2nd) 415 (Mo., 1934) doubtful; Reinish v. Insurance Co., 274 N.W. 572 (Neb, 1937), again, a case which chameleon-like defies a categorical analysis; Kordulak v. Insurance Co., 15 N.J. Misc. 242, 190 Atl. 325 (1937), lip service to the majority, practically with the minority. Finkelstein v. Insurance Co., 270 N.Y.S. 598, *rev'd,* 273 N.Y S. 629, *aff'd,* 277 N.Y.S. 938 (1935); Gates v. Insurance Co., 240 A.D. 444 at 446; Jones v. Assurance Society, 175 S.E. 425 (S.C. 1934) doubtful; Insurance Co. v. Davis, 78 S.W. (2nd) 358 (Tenn., 1934); Insurance Co. v. Dunn, 71 S.W. (2nd) 1103 (Texas Civ. App., 1934).

40. Insurance Co. v. Weaver, 232 Ala. 224, 167 So. 268 (Ala., 1936); Marsh v. Insurance Co., 133 Kan. 191, 299 Pac. 934 (1931) doubtful; Roderick

How did the majority get to the Rome of its results? The paths are devious and separate; the vehicles diverse. Unanimity exists only at the junction of result.

Let the *Cody* case[41] be the spring-board for the projection of our study of the rationales. The result can gain full approbation only if its reason foundations sink deep and firmly into the soil of logic and societal welfare.

The Cody case erects consciously two pillars of reason to support its result. It vaguely intimates a possible third support. The first two represent the familiar arguments by analogy.[42] The tort cases support the avoidable consequence doctrine. So do the workmen's compensation cases. Therefore, why not apply the doctrine in the disability cases?[43] The position of the courts in the region of opinion is directly stated in the *Culver* case:[44]

> "The plaintiff contends that a different rule applies in his case than applies in tort actions or compensation cases, because of the fact that his claim is based upon a contract of insurance, . . . and because of the fact that

v. Insurance Co., 98 S.W. (2nd) 983 (Mo., 1936); Titsworth v. Insurance Co., 6 Tenn. App. 206 (1927); Temples v. Insurance Co., 79 S.W. 608 (1935) *dicta;* Insurance Co. v. Brasier, 260 Ky. 240, 84 S.W. (2nd) 43 (1935); Insurance Co. v. Hurst, 254 Ky. 603, 72 S.W. (2nd) 220 (1934); Insurance Co. v. Wells, 254 Ky. 650, 72 S.W. (2nd) 33 (1934); Insurance Co. v. Staggs, 255 Ky. 638, 75 S.W. (2nd) 214 (1934).

41. *Supra,* note 36.

42. Other cases following the path of reason blazed by the Cody case: Casualty Co. v. Chew; Culver v. Insurance Co.; Insurance Co. v. Davis—all *supra,* note 39.

43. SALMOND, JURISPRUDENCE (7th ed.) p. 203: "New rules are very often merely analogical extensions of the old. The courts seek as far as possible to make the new law the embodiment and expression of the spirit of the old—of the ratio juris as the Romans called it. The whole thereby becomes a single and self-consistent body of legal doctrine, containing within itself an element of unity and of harmonious development."

44. *Supra,* note 39.

> no limitation was placed in the contract as to operation and corrective or remedial or surgical treatment, that it is not incumbent upon the plaintiff before he can recover under the policy to submit to the recommended treatment.
>
> "It is the opinion of the court that the rule applicable to tort actions and compensation cases applies with equal force under the insurance policy in question. If the plaintiff had deliberately incapacitated himself could there be any question that he would have no right to recover under the policy?"

Does this tell us why the analogy should apply? Is not the court stating a mere conclusion? Nowhere does it reveal the tortious caverns of intermediate thinking through which this legal mind wandered before it came to the announced result. Nor is the deliberate injury case persuasive. For the courts in that type of case use an entirely different tact of reasoning. They brush aside the compromise tactics of analogy and rest their opinion on the prevailing mores.[45] No man shall profit by his own wrong. To compensate a self-inflicted disability would be to violate that rule of conduct.

Analogy is often a good servant but more often it is a bad master. Before its use, it should be examined carefully in the light of the lamp of logic. Are the circumstances in the

45. *Cf., e.g.,* Elwood v. Insurance Co., 158 Atl. 257 (Pa., 1931). The assured attempted suicide. He failed but permanently disabled himself in the task. A claim for disability benefits was made under his life insurance policy. The company denied liability. In the ensuing action, the defendant company was victorious.

The court in support of its judgment called upon the long line of suicide cases in life insurance law and their views on public policy and self-inflicted death. This language of the court seems appropriate to the present discussion: "Had the plaintiff instead of attempting to kill himself, intentionally blinded or maimed himself in one of the particulars mentioned in the policy for the purpose of seeking recovery from the company and then asserted a claim against it for $100 a month for the rest of his life, it would shock one's sense of justice to permit him to acquire the money."

two factual set-ups so similar as to permit a natural extension of the rule? But even if the analogy is perfect, there remains the more crucial question: why do we use it? As Salmond has stated:

> " . . . it must be remembered that analogy is lawfully[46] followed only as a guide to the rules of natural justice.[47] It has no independent claim to recognition. Whenever justice so requires, it is the duty of the courts, in making new law, to depart from the ratio juris antiqui rather than servily follow it."

In terms of fitting the contours of this newly created litigation area into the old mold less difficulty is experienced with the tort analogy than with the workmen's compensation one. Yet even in the tort transplantation the weeds of distinction mar the symmetry of the result. In both the tort and disability cases there are injuries which have produced disabilities, in both cases the disability can be avoided by medical attention, in both cases the courts must create a rule to settle the threatened disbiosus. It might be argued even further that if our courts are willing to be so tender and solicitous in their treatment of a tort feasor certainly they should be willing to extend an equal hand of support to one who comes into court with clean hands. The wrongdoer should not be preferred to the law observer.

Does not the analogy seem persuasive? But, the joke! May we apply a tort analogy to a contract case? Must not a contract be interpreted in terms of its own phraseology? Is this not particularly true of insurance contracts?[48]

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46. *Supra,* note 43. Can you have an *unlawful* analogy?

47. Shades of a more stentorian, more pholix age. What is natural justice? Is it, perhaps the accepted mores of a community at a stated time interval?

48. *Infra,* text p 24.

The workmen's compensation analogy seems definitely mismated. The rule in these cases derives its life blood from explicit statutory direction.[49] The courts are merely observing a legislative prescription. There is no problem of choice.

The more salient question: why adopt the analogy? The courts are silent. Yet if the reasons for the adoption were exposed, the analogy would no longer be necessary.[50] Perhaps, man bound with fetters of brass to the accustomed can deal with the new only in the language of yesterday. He may need the illusion of gradual change to mask the revolution of his deeds.

The *Cody* case mentions in one word a third support for the rule—estopped. No further clue is furnished as to the how and why of the application. But even a hint, *sotto voce,* is not ignored. Cases seized upon it avidly.[51] In *Perkins v. Assurance Society,* the defendant alleged in its answer that:

> "If the plaintiff is disabled within the meaning of said policy provisions, plaintiff could have been cured or his disability prevented prior to the time alleged proofs

49. *Cf.* SCHNEIDER, WORKMEN'S COMPENSATION, Sec. 4886. In this section are found the state statutes requiring operative or medical treatment.

But *Cf.* the surprising language in Costello v. Insurance Co., 161 So. 344 (La., 1935): "If there were any distinction between the claim under this policy of health insurance, it would be that, possibly, plaintiff is under a greater obligation under the terms of the insurance policy voluntarily entered into than he would be in the compensation cases under a state statute for the benefit of employees." This is perplexing language. On the one hand we have a statute precisely dictataing operative treatment; on the other hand a contract silent on the question of operative treatment. Yet it is easier to find justification for operative treatment in the latter case than in the former. Is this a sequitur?

50. As Justice Holmes has so trenchently remarked: "The very considerations which judges must rarely mention and always with an apology are the secret root from which the law draws all the juices of life." THE COMMON LAW, p. 35.

51. *E.g.,* Roderick v. Insurance Co., 98 S.W. (2nd) 983 (Mo., 1936); Perkins v. Assurance Society, 73 S.W. (2nd) 415 (Mo., 1934).

> are claimed to have been furnished, by reasonable treatment and his alleged condition, if any, cured; that plaintiff is therefore estopped to contend herein that he is disabled within said policy requirements."

The court refused to pass on the propriety of the estopped plea. But all the language in the decision indicated that estoppel was never really eliminated from the case.

The equitable estoppel found in insurance litigation bears little resemblance to this estoppel. Is the Missouri court heaping a new burden on the harassed head of this over-worked doctrine? The bare essentials of an equitable estoppel are: (a) that a false representation was made as to some fact material to the contract; (b) that such representation was made with the expectation that it would be acted upon; (c) that the claimant, in good faith, acted upon it, (d) to his detriment.[53] What is the false representation in these cases? We are stopped at the very outset in fitting this doctrine into the estoppel compartment.

Another sapless logic form to substantiate the majority runs somewhat in this fashion—The policy provides for total and permanent disability benefits; the word "permanent" is synonomous with the word "incurable"; since the plaintiff can cure his disability through medical attention, he is not permanently disabled.[54] Given the premise, the answer must fol-

53. VANCE, INSURANCE, 2nd ed., p. 514.

54. U. S. v. Clapp; Prevetti v. U. S.; Deakter v. Insurance Co.; Insurance Co. v. Singletary—all *supra*, note 39. In the Singletary case the court said: "Total and permanent disability cannot be predicated upon such a condition; for even if it be viewed as total while it continues, it cannot be viewed as permanent when admittedly curable."

Culver v. Insurance Co. *supra*, note 39—"Under the terms of the policy in question the disability must be permanent and it can hardly be considered as permanent if proper corrective measures might alleviate it." Compare this language with a previous statement in the opinion: "There is no contention or dispute in this case that the disability is not total and permanent at this time."

low. But does permanency mean incurability?

Most of the total and permanent clauses contain provisions permitting the company to re-examine the assured periodically. If permanency means incurability why this safeguard? Further, how often can the diagnosis "incurable" be applied? While there is life, there is hope. Miraculous recoveries are not unheard of. New treatments often cure cases, once hopeless. Again, the word "permanent" refers to disability; the word "incurable" refers to the disease. The policy protects against total and permanent disability.[55] Finally, if incurability and permanency are interchangeable, then the logical implication is that any curable operation, whether major or minor, will be a condition precedent to a claim for benefits. This would be a more Draconian rule than even the tort and compensation rules. It seems that this rationale is too much an armchair philosophy and too little a realistic one. It strains and distorts the meaning of "permanent." At any rate, one can find a more defensible foundation to rest his doctrine upon.

Finally, some cases have been caught in the quicksands of the proximate cause formula.[56]

The rationale of the minority is the strict contract approach. It runs all the way from the simple assertion that omission of a provision for medical or surgical treatment means no treatment, to the more recondite divining process familiarly known as the contemplation of the parties. There are some way-stations. Let them bear their own witness.

See to like effect, Insurance Co. v. Dunn; Gaaes v. Insurance Co., *supra*, note 39.

55. Roderick v. Insurance Co., 98 S.W. (2nd) 983 (Mo., 1936).

56. Eggen v. U.S.; Prickett v. U. S.; U. S. v. Anderson; Smith v. U. S.—all *supra*, note 39. In the last case, plaintiff had tuberculosis. He refused to follow the treatment outlined. "Such neglect or refusal makes it so that it cannot be said that the disease was incurable and the disability was permanent at the time of the discharge, for the incurability or permanency which subsequently became evident may be due to such neglect or refusal and not to the fact that the disease was then incurable."

In *Roderick v. Insurance Co.*,[57] the court states the position of the minority:

> "To get at the true legal situation we must constantly have full regard for the fact that this action is not one in tort for damages but instead is on a contract which contains certain specific terms and provisions embracing what was in the contemplation of the parties at the time the contract was entered into. In other words, an insurance contract is nothing but a contract which definitely fixes the insurer's liability and the insured's right to recover thereon. It must follow, therefore, that in a case such as this, the insurer's liability for and the insured's right to disability benefits must not only be determined solely from the language of the policy itself, but with that language liberally construed in favor of the insured, if it is perchance ambiguous and susceptible of more than one interpretation. . . Had defendant at the time of the issuance of its policy desired to limit its liability to incurable disability[58] only, it would have had the right to have

57. *Supra,* note 55.

58. Even a liberal and brilliant judge may fall into the cold atomic trap of a bare legal analysis. Judge Burch of Kansas in Marsh v. Peoria Life Insurance Co., 133 Kan. 191, 229 Pac. 934 (1931), delivers this opinion: "Defendant requested an instruction to the effect that it was the duty of plaintiff to exercise every reasonable effort to aid recovery. The contract does not so provide. No doubt it is the moral duty of every person to make the most of himself under even the most adverse circumstances; but the issue in this case was whether the plaintiff's disability was permanent."

This cryptic exposition is not overly clear. But a possible inference is that morals and law operate in different universes of action. The former becomes the latter only through statutory formality or informal judicial acquisition.

Of course, academically we can draw a sharp distinction between morals and law. "Morality furnishes the criterion for the proper evaluation of our interests; law marks out the limits within which they ought to be confined. To analyze out a criterion for the evaluation of our interests is the function of morality; to settle the principles of the reciprocal delimitation of one's own and

> done so; but it did not do so and we can only conclude therefore that the duty to submit to an operation was not within the contemplation of the parties[59] when the contract was entered into."

The minority finds some solace in the various entire contract statutes. The *Titsworth* case[60] illustrates the use of this support:

> "It is well settled that it is against the policy of this state to permit implications in insurance contracts. As to contracts of life insurance, it is expressly provided by Chap. 441 of the Acts of 1907, that the entire contract of insurance shall be contained in the policy. Such requirement of a surgical operation . . . not being contained in the stipulation of the written contract, the defendant insurance company is not entitled to take advantage of the failure or refusal of the insured to submit to such an operation."

Whatever the language of these laws, their avowed intentions were to make the insurance carrier attack the application to the contract so that the insured might have evidence of what was stated.[61] They were never intended to foreclose public morality from the arena of contract interpretation. In fact they were aimed in the opposite direction.

Shot through with the archaic notion of the liberty and

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other people's interests is the function of law." KORKUNOV, GENERAL THEORY OF LAW, p. 52.

Whether Judge Burch had such a distinction in mind is questionable. His comment about morality may be the pin prick of his social consience struggling with the time-ingrained ideal of liberty of contract.

59. Does anyone really believe that when a man buys a policy, he sits down with the company representative and marks out the range of and apportions the risks to be assumed?

60. *Supra*, note 40.

61. *Cf.* Archer v. Assurance Society, 169 A.D. 43, 154 N.Y.S. 519 (1915).

inviolability of contract, the minority stops short at the vital point, namely, what is best for society. Contracts are not mere exercises in logic. They must be juxtaposed against the teeming tapestry of our daily life and tested for their harmony with the public weal.

The evolution of the doctrine of "avoidable consequences" in Tennessee is deserving of special comment.

The *Titsworth* case[62] in 1927 bore the doctrine's first child in the disability field. The plaintiff had a fracture or dislocation of the *coccyx*. The carrier paid benefits for a short period. Then it denied liability on the ground of "avoidable consequences." The court repudiated the insurance carrier's view.

From the facts of the case, the court was not faced with an acceptance or repudiation of the principle. It could well have stated that acceptance or denial of the rule would have produced the same result. The operation involved in the case was a major one.[63] This approach would have been consistent with the judicial theory that no more be decided in a litigation than necessary. But the court's impulsiveness was not to be denied. It must go the whole hog or not at all. Thus Tennessee, at least in language, had rejected "avoidable consequences" as a principle in disability cases.

Then came the *Davis* case in 1934.[64] A carrier again raised the issue of avoidable consequences. Its physicians testified that the operation was a minor one and free from danger. The plaintiff offered no counteracting expert testimony. The court directed a verdict for the defendant insurance company. Not only did it take a position diametrically opposed to the Titsworth case but it transcended the range of the rule and refused

62. *Supra,* note 40.

63. *Cf.* PROCEEDINGS OF THE ASSOCIATION OF LIFE INSURANCE COUNSEL, Vol. 5, p. 496.

64. *Supra,* note 39.

to submit the case to the jury. What of the *Titsworth* case? The court would not dare to over-rule it. That would be heresy. So it chased the chimera of distinction.

> "The issue in the instant case is quite different from that in the *Titsworth* case. The present defendant insurance company declined to accept the proofs of disability furnished by plaintiff, Davis, for the reason that, as it claimed, they did not show total and permanent disability within the terms of the policy contract and the company at no time acknowledged liability for disability benefits or made payments therefor. The question below was, therefore, whether there had been a breach of the defendant's contract to pay disability benefits as defined in the policy and to establish such breach, the burden was on the plaintiff to prove that his claimed disability was both total and permanent."

The court proceeded to reason further that since the ail ment could be removed by a minor operation, it was not incurable. If it was not incurable, it was not permanent. Now we dispose of the *Titsworth* case.

> But "it was not claimed that there was any fraud or misrepresentation in the proofs which were furnished by Titsworth[65] in the first instance and it is obvious that after the acceptance of such proofs of disability as satisfactory and the payment of the stipulated disability benefits for four months, the insurance company could not escape the continuous monthly payment of such benefits during the lifetime of the insured or until maturity of said policies as an endowment in any manner other than through the rights reserved in the policies to examine the person of

65. Nor is there any claim of fraud or misrepresentation in the present case.

the insured at all reasonable times after receiving notice of disability and to demand and receive proof of continuance of disability from time to time. . ."

"The rights thus reserved by the insurer were clearly defined in the policies and did not include the right to demand that the insured should submit to a surgical operation. . .

" . . . as no right to require a surgical operation in the circumstances stated was reserved in the contract, the Chancellor rendered a decree against the insurance company for the amount of the stipulated benefits . . . which decree was affirmed by this court. . ."

Therefore, the distinction lies in non-recognition of a claim at the outset or at a subsequent time. If you adopt the former procedure, then you can avail yourself of the rule. If you make a payment, then the rule is snatched from the corral of available remedies and lost to you forever. How can such a position be justified? Suppose the carrier paid because, doubtful of the outcome of plaintiff's condition, it felt that fair dealing required such an attitude until the outlook became more definite. Is it then to be penalized for such an attitude? Suppose a new drug is devised or a new operative technique making the cure a simple one? Has the door of redress been closed irrevocably to the carrier?

If the carrier cannot use the defense after payment, because the contract does not so provide, where in the policy is any provision permitting the defense before a payment is made?

Came 1935! The Tennessee court, by dictum, swings the pendulum of decision back to the *Titsworth* view.[66] The golden thread of continuity and logic wavers drunkenly in the cross winds of indecision.

66. Temples v. Insurance Co., 79 S.W. (2nd) 608 (Tenn., 1935).

What of the framework of details within which the majority rule operates? First, the type of operation in terms of the hazard The tests erected in the tort cases of cost, convenience, reasonable certainty of cure, minimum danger are but dimly recognized in the disability cases The language used is too vague[67] to accurately divine the attitude of the courts. In some cases, however, the tort criteria are dangerously thrust aside. In *Jones v. Assurance Society*[68] even the hope of a partial cure is enough to invoke the operation of the rule. In the case of *U. S. v. Clapp*,[69] only two excuses are left to the assured: "that the operation would not be successful or unless it was impossible for him to procure a competent surgeon to perform it. . . ." Cost and danger[70] are irrelevant.

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67 In the Culver case, *supra,* note 39, however, the problem is examined carefully

68 *Supra,* note 39

69 *Supra,* note 39

70 The greater portion of the cases involve hernia On the seriousness of this operation and the probability of cure, there is much dispute *Cf* following cases in the tort field describing the operation as a major one and therefore not within the rule J B Berry's Sons Co v Presnell, 183 Ark 125, 35 S W (2nd) 83 (1931), Kay v Kansas City Public Service Co (Mo App) 23 S W (2d) 1087 (1930), Fremd v Gividen 233 Ky 36, 24 S W (2nd) 915, Louisville R R v Kerrick, 178 Ky 486, 199 S W 44 (1917), Henley v Olka Ry Co, 197 Pac 488 (Okla, 1921), McNally v R R Co, 87 N J L 455, 95 Atl 122 (1915)

Disability cases to the same effect Kordulak v Insurance Co, Boughton v Insurance Co, *supra,* note 39

But *contra,* Culver v Insurance Co, Finkelstein v Insurance Co, *supra,* note 39

The approach of the cases show a striking naivete in handling these medical problems Very little effort is devoted to an analysis of the types of hernia or the factors which bear on cure Medical literature is sparsely cited Yet you cannot decide this question by drinking solely at the fount of the law

WATSON ON HERNIA (1924) states that the mortality rate is highest for the umbilical variety, lower in the inguinal type, and lowest in the femoral variety

The average rate of mortality for non-strangulated hernia is 5 per cent For strangulated hernias, the mortality depends on the delay in operative treat-

When the evidence of successful cure is so evenly balanced, in conflict of opinion, then the rule does not apply.[71]

Which rule of reason applies? Only one case deals at any length with this problem. The others adopt some rule, but which one is not apparent. The *Jones* case[72] alone recognizes possible divergences in the application of the reasonable man doctrine. It adopts the abstract impeccable man concept.

> "Some men would be so afraid of an operating table that they wouldn't submit to an operation at all. You are not to go by that. Some people might be so rash that they would want to go on the operating table for anything or for any little ailment. We can't be guided by them. You take what would a man of ordinary prudence . . . do."

Is the question of medical or surgical treatment one of fact or one of law? Can it be either, depending upon his circumstances? A lone dissenter makes it a perennial question of fact.[73] The others shift it from a fact base to a law base in

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ment: 1-12 hours, 5 per cent; 12-24 hours, 10 per cent; and 24-48 hours, 25 per cent.

There are the additional hazards of (1) post-operative complications, *e.g.*, Watson mentions the possibility of pulmonary thrombosis which usually occurs between the 10th and 14th day and which has a high mortality rate; (2) recurrence—*e.g.*, NELSON'S LIVING SURGERY, Vol. 14, p. 635 states: "No man past middle age with a direct hernia can ever with safety resume hard manual labor and should seek lighter employment." Suppose the assured is a freight handler and is fitted for no other occupation?

"Cases should be followed for two years before calling them cures." Nelson writes further that the chances of recurrence of a direct hernia is 10 to 20 per cent, of an oblique hernia, 1 to 10 per cent.

This medical evidence offers fruitful paths of inquiry in the individual cases.

71. Reinsch v. Insurance Co., Liberty Life v. Downs, *supra*, note 39.

72. *Supra*, note 39.

73. Insurance Co. v. Sandera, *supra*, note 39—"We believe the sound rule, which is supported by the great weight of American authority is that no surgical operation should be compelled as a matter of law and that the reasonableness

the light of the relative weights of evidence submitted by the litigants.[74]

Finally, who bears the burden of proof? Must the plaintiff prove that he has done everything possible to alleviate his condition, or is the defendant the burden carrier? The cases which identify incurability and permanency impose the burden on the plaintiff[75] The cases adopting the other theories shift it to the defendant.

The battlefield of litigation sketched: the colorations painted in; which side bears the banner of the just? Whatever the decision, it should rest on a base of social welfare.

Society has made a large capital investment in bringing the individual to the fruition of adulthood. He should, therefore, not be privileged to withdraw from the production process because of a contractual advantage. Illness costs us ten billion dollars a year.[76] Why permit this unremunerative obligation to be needlessly increased? To adopt the rigid conceptualistic approach to contract interpretation is to make our societal life process a game in which the spider ensnares the fly and then sits back to a leisurely meal. This jars the sensibilities of any believer in a society in which the individual reaches his fullest growth only through cooperative activity in group life. If this conclusion be sound, then let us join with, that notable legal scholar, Professor Corbin, and say:

> "The question now is not what is the meaning of words, but what does the welfare of society require in

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or unreasonableness of such demand even in minor surgical operations should be ascertained and determined as a part from all attendant facts and circumstances of each particular case as it arises."

74. Reinsch v. Insurance Co., Assurance Society v. Singletary, Insurance Co. v. Davis, Finkelstein v. Insurance Co., *supra*, note 39.

75. Smith v. U. S., *supra*, note 39. ". . . the plaintiff . . . must also show affirmatively that he had undergone proper treatment."

76. I. B. FALK, SECURITY AGAINST SICKNESS, p. 12.

view of these unknown or unanticipated circumstances. To answer this question the court must resort to general rules of law even though they were unknown by the parties, to rules of fairness and morality, to the prevailing mores of the time and place. This process may be called one of judicial construction."[77]

NEWARK, N. J. LAWRENCE J. ACKERMAN.

77. SELECTED READINGS IN THE LAW OF CONTRACTS, p. 873.