

**1732 DAMAGES: DUTY TO MITIGATE: INTENTIONAL TORT**

If you find that (plaintiff) knew of harm caused by (describe intentional conduct) and if you find that (plaintiff) (either) (intentionally failed to protect (his) (her) interests) (or) (was heedlessly indifferent to protecting (his) (her) interests), then you should not include as damages any amount that (plaintiff) could have avoided or minimized by reasonable efforts and failed to do so.

The burden of proof is upon (defendant) to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that:

1. (plaintiff) knew of harm resulting from (describe intentional conduct); and
2. (plaintiff) intentionally failed to act to protect (his) (her) interests or was heedlessly indifferent to them.

You should not reduce (plaintiff)'s damages, if you determine that (plaintiff) was merely careless in protecting (his) (her) interests.

**COMMENT**

The instruction and comment were approved in 2011.

**Mitigating Damages from an Intentional Tort:** In S.C. Johnson & Son, Inc. v. Morris, 2010 WI App 6, 322 Wis.2d 766, 779 N.W.2d 19, the court of appeals discussed whether the duty to mitigate damages applies to a party injured by an intentional act.

The trial court said the policy behind the duty to mitigate is evident in the Restatement's section on avoidable consequences. Restatement (Second) of Torts § 918(2). The court of appeals explained the policy as follows:

This section states that "[o]ne is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregardful of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests." This rule protects the "merely careless or stupid person" from consequences that the tortfeasor intended or was willing to

have occurred, but it does not protect "the person who stubbornly refuses to protect his [or her] own interests" from the consequences of that same tortfeasor's conduct.

The court in S.C. Johnson & Son, supra, held that a party who is injured by intentional conduct has a duty to mitigate damages, but more than a negligent failure to mitigate must be shown by the intentional tortfeasor. Instead, the defendant must prove that the plaintiff intentionally failed to act or was heedlessly indifferent to the harm caused by the defendant.