

Markets, Time, and Damages: Some Unsolved Problems in the Field of Crops

I. INTRODUCTION

There is a natural tendency to assume that few areas of the law must be as exhaustively settled as that of the common law of recovery in damages for injuries to agricultural crops. This inclination, however, should be resisted. The area features diverse and inconsistent approaches by the courts to recurring problems of loss measurement and remedy. Lacunae in the case law remain. This Note attempts to analyze this state of affairs and identify the most even handed, efficient, and workable remedies.

Indiana law in this area has developed in a logical, incremental manner. It now occupies a leading position nationally in the fashioning of appropriate remedies. This Note first examines its historical development. The Note then broadens its focus to discuss critically the contrasting rules, measures, and formulae for recovery established over time in the various jurisdictions.

Particular emphasis will be placed on the following concerns: First, the determination of proper damage awards for destruction of annual crops; second, the selection of the proper market or contractual value of destroyed crops; third, the determination of damages for injuries to annual crops; fourth, the effect of later contingencies such as bad weather on damages awards; and fifth, the proper role of comparison crops in determining damages. Finally, the Note considers the availability or unavailability of prejudgment interest as an element of damages awards. The Note concludes with a review of the implications of the foregoing for Indiana law.¹

II. OVERVIEW OF THE DEVELOPMENT OF INDIANA LAW

Viewed in the perspective of their historical development, the Indiana cases manifest a liberalizing trend in the allowable scope of a plaintiff's recovery. At least in part, however, the trend amounts

¹To avoid distracting complications and to reduce the scope of the discussion to manageable proportions, the following assumptions have been adopted: First, the Note assumes no possibility of reasonably cost-effective restorative treatment of injured crops. Second, only annual, as opposed to perennial, crops will be discussed. Third, no causal complications at the time of defendant's alleged tortious act are considered. Fourth, there is assumed to be no costly or compensable effort by any plaintiff to ward off or minimize injury to his crops in anticipation of the impending threat posed by the defendant's activities. Finally, except where specified, this Note assumes no waste-crop disposal costs to any plaintiff that would not otherwise have been incurred.

to a process of making explicit that which was left implicit in previous decisions.

The early Indiana case of *Avan v. Frey*,² though not on its facts within the scope of this Note, is of some interest. This case involved the breach by the defendant of a two-year land rental agreement. Apparently no crops were even begun by the plaintiff. The court approved a recovery by the plaintiff based on the amount and value of the crops which could have been raised on the land in each of the two years.³

Avan left several problems unresolved: Must the plaintiff have had some intention of actually raising crops on the tract in question? Must he have had the ability to raise crops of the value in question? If intention or ability is necessary for recovery, but is absent in a given case, can the plaintiff recover based on a showing of his intention to assign or sublet the land to another person for crop growing purposes? What would be the effect, if any, of a general crop failure in the relevant growing season of the second year of the breached rental agreement? Assuming that the plaintiff brings suit immediately upon the breach, what is the best way to adjust the plaintiff's recovery for the contingency of crop failure?

In *Avan*, "laying grounds for damages"⁴ was merely preparatory to the plaintiff's recovery based on some particular damages formula or measure of recovery. As it was apparently not an issue on appeal, the court did not discuss the plaintiff's actual damages formula. What was added or subtracted from the crop-producing value of the land for the two-year term of the lease was simply not indicated.

The early Indiana cases that specifically involve tortious destruction of growing crops also tended to raise more issues than they resolved. The case of *Young v. Gentis*,⁵ for example, involved the defendant's diversion of water into a public ditch which caused an overflow of water onto the plaintiff's land. The court found that insofar as the submersion caused permanent damage to the plaintiff's land, the measure of damages was the difference in the value of the land before and after the trespass.⁶ In addition, the plaintiff was permitted to recover for crop destruction in the measure of "the value of the crop destroyed."⁷

This simple formula raises numerous problems. The court in *Young* did not discuss such crucial issues as proper time of valua-

²69 Ind. 91 (1879).

³*Id.* at 93.

⁴*Id.*

⁵7 Ind. App. 199, 32 N.E. 796 (1892).

⁶*Id.* at 207, 32 N.E. at 798.

⁷*Id.*

tion, determination of a market price, risk of subsequent crop loss due to natural causes, and the proper role of costs and expenses not incurred by the plaintiff in growing the crop because of its tortious destruction.

Two years after *Young*, some light was shed on these issues in *Chicago & Erie Railroad v. Barnes*.⁸ In *Barnes*, a distinction was drawn between crops "considerably advanced toward maturity" and those not.⁹ Here, the plaintiff's growing crops were flooded due to the defendant's negligence in constructing and maintaining a bridge and culvert. The major contribution of this case lies in its general suggestion that

[t]he value of a particular crop depends not upon its cost of production, but upon its present condition and prospects. There may be, and doubtless are, instances where the cost of production might throw light upon the value of the article, but we do not regard this as such a one.¹⁰

The emphasis of *Barnes* in measuring damages was thus on the present and future. The crucial unresolved issue was how to relate present and future in determining damages.

A year later, in *Louisville, New Albany and Chicago Railway v. Sparks*,¹¹ the elements present in the *Barnes* and *Young* opinions were brought together. The defendant,¹² a railroad, was accused of negligent reconstruction of a culvert which caused water to overflow and stand upon the plaintiff's cropland. The court found that "[w]here the destruction or injury of the crops enters into the damages as an element, such damages are measured by proof of the value of the crops with and without the injury"¹³ Although the plaintiff also alleged and recovered for permanent injuries to real estate, the context seemed to indicate that the court intended the following discussion to apply to destroyed or damaged crops as well:

Values, as counsel correctly contend, may be proved by the opinions of the witnesses, for these are, after all, but estimates based upon the fact that other property of a similar character in the neighborhood has been or could be sold for similar prices. Such opinions may also be based upon

⁸10 Ind. App. 460, 38 N.E. 428 (1894).

⁹*Id.* at 463, 38 N.E. at 429. Damages measures in the latter category will tend to be more conjectural.

¹⁰*Id.*

¹¹12 Ind. App. 410, 40 N.E. 546 (1895).

¹²It may be noted that historically, a remarkably high percentage of the defendants in crop damage cases were railroads. The most historically common cause of tortious crop injury apparently has been flooding.

¹³12 Ind. App. at 412, 40 N.E. at 547.

the knowledge of the witness of persons desiring to purchase the property and the price that they are offering for it.¹⁴

While *Sparks* thus cast a certain glow into the darkness of uncertain recovery in this area, its light was fleeting. Suppose that a plaintiff's crops are destroyed in an immature state. Is the plaintiff then faced with the task of producing evidence of what similar ankle-high crops have sold for in that neighborhood in the past? If so, he is likely to be denied recovery. How is he to show what such immature crops could be sold for, if there is historically no market for such a commodity, except perhaps as feed?

Other questions present themselves. Could the value of a destroyed crop ever be less than zero? What if the cost of disposing of the crop outweighs the cost of marketing saved for the plaintiff? Most crucially, the court in *Sparks* called for ascertaining the value of the crop at two different times: before and after the injury. How far apart may these times properly be? Are we to consider the crop's value at the moment before the injury, and subtract the crop's value in the precise moment after the injury? If the crops are damaged, but still marketable, is there any flexibility in the matter of fixing the time of postinjury valuation? May either the plaintiff or the defendant offer evidence of post injury value based on harvest-time value? What if the plaintiff was in the habit of storing his crops for a time, and then selling them? What if the plaintiff just happened to do so on the occasion in question? What if crop storage for later sale is a widely-practiced custom in the area? A fair recovery for many plaintiffs requires considering crop prices that were obtainable months after harvest time.

Some specificity was lent to the rules for recovery in *Ayers v. Hobbs*.¹⁵ *Ayers* involved an alleged willful and unlawful conversion by the defendant of one-half of twenty-four acres of matured but unharvested wheat. The case was decided with no special regard for the character of the converted goods as crops but rather on the general basis of conversion of personal property. It was on this theory, and without much reflection on the particular problem of damaged or destroyed crops, that the court ruled that "the measure of damages was the value of the property at the time it was converted to the appellant's use"¹⁶

The court in *Ayers* thus did not discuss which factors could properly be considered in determining the value of a crop, assuming that the crop was to be valued as of the time of conversion, or

¹⁴*Id.* at 412-13, 40 N.E. at 547.

¹⁵41 Ind. App. 576, 84 N.E. 554 (1908).

¹⁶*Id.* at 580, 84 N.E. at 555.

destruction, or injury. Most of the problems raised by *Sparks* remained. As well, the observations of the court in *Barnes*¹⁷ remain apposite: To what extent is evidence of the value a commodity will or would have had on a particular date in the future, relevant to its value before that date? The relevance of maturity or post-maturity value of a crop to the value of that crop in an immature state is clear. Growing crops are not typically sold for pennies an acre, though at the time of sale they are nearly worthless. Yet, determining what a destroyed crop might have fetched months later depends on unpredictable variables, if not sheer speculation.

Even if the hypothetical subsequent market or other value of a previously destroyed crop could be established with certainty, the plaintiff's damages would still not be unequivocally clear. Suppose, for example, that the defendant negligently destroyed the plaintiff's lottery ticket. Assume that but for the defendant's destructive act, the ticket would with perfect certainty have remained intact and in the plaintiff's possession. The number on the plaintiff's nonexistent lottery ticket is chosen on the day of the drawing for a huge prize. The plaintiff cannot collect, and sues the defendant. Are the plaintiff's actual damages reflected most accurately by the huge prize he has lost? Would the plaintiff be fully compensated by an award of what he paid, or slightly less than what he paid, for his ticket; perhaps by an equal price ticket with the same chance of winning as his original ticket in another unconduted lottery? Courts have treated the analogous crop damages problem in various ways.¹⁸ The better remedies have been those that would focus more on the prize lost by the plaintiff in the original lottery.

These early Indiana cases¹⁹ were recently utilized to establish a more explicitly liberal measure of recovery in *Richardson v. Scroggham*.²⁰ *Richardson*, like *Ayers v. Hobbs*,²¹ involved the unlawful conversion of crops by the defendant. The court in *Richardson* distinguished *Ayers* and its time-of-the-conversion valuation. The crops in *Ayers* had been mature at the time of conversion. Recovery based on their value at that time thus fully compensated the plaintiff.²²

¹⁷10 Ind. App. at 463, 38 N.E. at 429.

¹⁸The reader who is anxious to discover what the value of a crop really is will recognize that the value of any particular crop, at any particular time, is equal to the value to some particular person of the right or rights to do or attempt to do one or more things, with respect to the crop, at some particular time or times.

¹⁹Indiana law in this area developed under collective rather than individual aegis; no single judge authored more than one of the early decisions considered here.

²⁰159 Ind. App. 400, 307 N.E.2d 80 (1974).

²¹41 Ind. App. 576, 84 N.E. 554 (1908).

²²159 Ind. App. at 405-06, 307 N.E.2d at 84.

The court went on to adopt a rule enunciated in an Illinois appellate court²³ allowing recovery based not on the negligible immediate use value of the crops at the time of their conversion, but on the value of the immature crops together with the value of the owner's rights to mature and harvest the crops at the proper time.²⁴

The court in *Richardson* noted that the *Barnes* forward-looking valuation of a growing crop seemed to be predicated upon the assumption of a crop "considerably advanced toward maturity,"²⁵ unlike that in *Richardson*. The applicability of *Barnes* arises due to the availability in *Richardson* of photographic and close comparative evidence of yields from similar crop fields in the neighborhood also grown by the plaintiff that reduced the uncertainty of his proper measure of recovery to a level similar to that of *Barnes*.²⁶ The *Richardson* court also cited the rather cryptic opinion in *Avan v. Frey*,²⁷ to the effect that "evidence was admissible to prove the amount and value of crops which would have been raised on land as a basis for laying the groundwork for damages."²⁸

Perhaps the most fundamental question raised by *Richardson* concerns what, precisely, was meant by the suggestion that the value of a growing crop "includes" its value at a later time at which it would have been harvested. Even if a harvest value reflecting "all the material facts which would affect it"²⁹ could be calculated, and even if proper scope for intuition and approximation were allowed,

²³*Johnson v. Sleaford*, 39 Ill. App. 2d 228, 188 N.E.2d 230 (1963). This case involved crop damage due to the defendant's cattle running at large. The court held that evidence of probable crop yields and probable market value at maturity of damaged crops should be admitted along with evidence of "the usual market value of the product at the usual market, at the harvesting season . . ." *Id.* at 237, 188 N.E.2d at 234, 235. This rule of recovery has lost its avant-garde status, and is not as flexible and expansive in its provision for damages as the most recently enunciated Indiana rule. This new Indiana rule is discussed immediately below in connection with *Decatur County AG-Servs., Inc. v. Young*, 401 N.E.2d 731 (Ind. Ct. App. 1980). If the recovery can be held within speculative bounds, the plaintiff should not in all cases be confined to recovery based on "usual market value" (if such exists), and "at the usual market, at the harvesting season." *Johnson v. Sleaford*, 39 Ill. App. 2d at 237, 188 N.E.2d at 234. It is the particular plaintiff, and not the usual or average plaintiff, whose losses the court seeks to make whole. An individual plaintiff's recovery should reflect his own individual marketing decision and skills. The plaintiff may have intended, as a matter of habit or otherwise, to store this particular damaged crop for sale some months after the harvesting season. The threat of a plaintiff manipulating his damages is controllable by the court.

²⁴159 Ind. App. at 407, 307 N.E.2d at 84-85.

²⁵10 Ind. App. at 463, 38 N.E. at 429.

²⁶159 Ind. App. at 405-06, 307 N.E.2d at 84.

²⁷69 Ind. 91 (1879).

²⁸159 Ind. App. at 406, 307 N.E.2d at 84.

²⁹*Id.* at 407, 307 N.E.2d at 85 (quoting *Johnson v. Sleaford*, 39 Ill. App. 2d at 238, 188 N.E.2d at 235).

certain problems calling for uniform treatment would remain. Probability or improbability of maturation is an example of such an item. Suppose that a jury estimated that the likelihood of a destroyed crop's full maturation but for the defendant's tortious injury was 90%. What effect should this belief have on the plaintiff's recovery? Should the court or the jury simply assume that a 90% chance means that the crop's full maturation was otherwise "probable" and award damages based upon the full assumed harvest-time value? Or should the plaintiff's recovery be discounted somewhat to reflect the estimated 10% risk of crop loss due to natural or other nontortious causes? If no such discount is made, the plaintiff is in effect receiving an award including free crop insurance. On the other hand, if the plaintiff had purchased crop insurance, he would have been able to recover for any subsequent loss due to natural causes from his insurer, but for the defendant's tortious act. Such a plaintiff should be permitted to avoid the discounting by offering evidence at trial concerning the scope of his insurance coverage.

The most recent Indiana decision in this series is *Decatur County AG-Services, Inc. v. Young*.³⁰ While *Richardson* was a crop conversion case which drew support from crop injury cases, *Decatur* was a crop injury case which drew support from crop conversion cases.³¹ Here, the plaintiff, Young, contracted with the defendant, Decatur, to aerially spray Young's eighteen acre soybean field with insecticide to exterminate grasshoppers.³² The court in *Decatur* split over the relevance of the plaintiff's "usual procedure" of storing his harvested soybeans in his own storage bins for sale "after the planting period the following year."³³

The majority held that the plaintiff's recovery need not be limited by formulae based on the injured crop's harvest-time value. The liberalizing reform of the *Richardson* crop conversion case was thus found insufficiently liberal under the circumstances in *Decatur* six years later.³⁴ The majority recognized that the *Sparks*³⁵ damages measure, which focused on the value of the crops before and after the injury, did not specify a proper time for postinjury valuation.³⁶

³⁰401 N.E.2d 731 (Ind. Ct. App. 1980). Like *Richardson*, this case was decided on appeal by the First District Court of Appeals of Indiana.

³¹*Johnson v. Sleaford*, 39 Ill. App. 2d 228, 188 N.E.2d 230 (1963) involved crop damages due to defendant's cattle running at large. The dissent in *Decatur* discussed the crop conversion case of *Lamoreaux v. Randall*, 53 N.D. 697, 208 N.W. 104 (1926) and focused in particular on a wheat crop condemnation case, *United States v. 576.734 Acres of Land*, 143 F.2d 408 (3d Cir.), cert. denied, 323 U.S. 716 (1944).

³²401 N.E.2d at 732.

³³*Id.* at 732-33. The plaintiff offered ample evidence of his customary practice.

³⁴*Id.* at 733-34.

³⁵12 Ind. App. at 412, 40 N.E. at 547.

³⁶401 N.E.2d at 733.

In the interests of full compensation of the injured party for the actual loss inflicted, the majority permitted damages based on the higher prices actually received by the plaintiff after storing his crops for months, rather than confining his damages to those based on the range of market prices available when his soybeans were harvested.³⁷ In contrast, the dissent maintained that the majority's approach was not "consistent with the general rule concerning measure of damages in the case of injury to growing crops."³⁸ It urged that "Young's damages should have been computed on the basis of the highest market price obtainable at the time of harvest."³⁹

It will be confirmed immediately below that nationally, the cases are indeed in fractious conflict on this and other crop damage recovery issues. There is also an initially unnerving absence of explicit support for the new Indiana view allowing recovery based on postharvest prices or sales. Among the unresolved questions is this: Does it matter, as the majority in *Decatur* suggests,⁴⁰ that the plaintiff provided his own storage facilities, as opposed to paying a third party for storage? Surely it does not. The plaintiff's recovery should be reduced only if the defendant's tortious act reduced the plaintiff's storage costs below what they otherwise would have been. Further, there is no compelling reason not to extend the *Decatur* approach to cases in which the crops are completely destroyed. The plaintiff in a case of total destruction should be permitted to show what his destroyed crops would have been worth had they been matured, harvested, stored, and later marketed.

With regard to crops which are injured but nonetheless marketed postharvest, both the majority and the dissent expressed some concern over the problem of a plaintiff taking advantage of the *Decatur* rule by speculating in order to enhance his damages.⁴¹ This concern may be based partially on the prospect of a plaintiff who testifies that his poststorage sale reflected neither the industry-wide custom, nor his own "usual procedure," as in *Decatur*,⁴² but an unplanned marketing decision on his part.

Such concern for not encouraging a plaintiff to enhance or fail to mitigate his damages is overdrawn. As long as the plaintiff is not to be offered some minimum level of damages based on harvest-time crop value, his damages-based incentives still generally orient him toward rationally choosing his optimal market-based strategy. The

³⁷*Id.*

³⁸*Id.* at 734 (dissenting opinion).

³⁹*Id.* at 735.

⁴⁰*Id.* at 734 (majority opinion).

⁴¹*Id.* at 734-35.

⁴²*Id.* at 733.

defendant has, through his actions, inevitably tied himself to the plaintiff's marketing strategy and market outcome. There should rarely be evidence that this intertwining of fates has affected the plaintiff's risk-taking behavior in marketing his crops or holding them off the market. The most likely effect would be a reduced willingness on the part of the plaintiff to hold his crops off the market, paying storage costs, in hopes of securing a better price, in view of his diminished yield and prospective crop income.

Having traced the development of Indiana law, it is useful to turn now to a broader consideration of rules drawn from other jurisdictions. On the basis of a comparison of alternatives, ideal rules can be identified and workable rules developed that are applicable to Indiana and other jurisdictions.

III. DAMAGES AWARDED FOR DESTRUCTION OF ANNUAL CROPS

Historically, the courts have offered a variety of measures of recovery for the destruction of annual crops.⁴³ Much of the variety does not involve inconsistency of approach. Surely the most fundamental reason for such diversity is the ease or difficulty in a particular case of proof of damages for crops destroyed or damaged at various stages of development. Incompatibilities among the measures, however, remain significant. For ease of comparison, some of the most important formulations based on land rental value are as follows:

⁴³The aim of the court in crop destruction as well as crop damage cases has been formulated in familiar ways. These include: fair compensation for the plaintiff for the actual loss in value, perhaps with natural and proximate cause limitations, *Little Rock & F.S. Ry. v. Wallis*, 82 Ark. 447, 102 S.W. 390 (1907) and *Staub v. Muller*, 7 Cal. 2d 221, 60 P.2d 283 (1936); compensation of the plaintiff for the actual loss sustained, *Chew v. Lucas*, 15 Ind. App. 595, 43 N.E. 235 (1896); and placing the injured party in the position he would have occupied had the damage not occurred, *Eichenberger v. Wilhelm*, 244 N.W.2d 691 (N.D. 1976).

These formulations suggest that a fair damages award would leave the plaintiff indifferent between two choices: either the value flowing to him from the time of the defendant's tort, with the addition of a sum of money in damages, or the value that would have flowed to the plaintiff from the time of the defendant's tort if such tort had not occurred.

More workable methods of determining damage awards have familiar difficulties, such as proper accommodation for purely mental suffering, the payment of attorneys' fees, anxiety caused by the litigation itself, or spite and sympathy. Of greater interest with specific regard to crop damage cases are the following problems: First, are the particular qualities of the individual plaintiff given proper scope? The prices that the plaintiff might have received, but for the defendant's tort, reflect subjective factors such as his relative bargaining power and trading skills. W. TOMEK, *AGRICULTURAL PRODUCT PRICES* 219 (1972). Second, a plaintiff who has been denied an opportunity to cultivate, mature, and market a destroyed crop has been denied an opportunity to gain

- A. the value of the crops destroyed is equal to the land's value immediately before the injury minus the land's value immediately after the injury;⁴⁴
- B. recovery of the diminution in the rental value of the land if the value of the crop destroyed is not practically demonstrable;⁴⁵
- C. recovery of the rental value of the land if there is no establishable market value of the crop destroyed;⁴⁶
- D. recovery of the rental value of the land plus the cost of seeding, labor, and other expenses of production if there is no establishable market value of the crop destroyed;⁴⁷
- E. recovery of the rental value of the land plus the cost of labor and materials expended plus interest if it is "unmatured" crops which are destroyed.⁴⁸

Recoveries A through E, which are based on land rental value, share certain problems. Determining the value, or reduction in value, of farmland is made difficult by the fact that "there is no such thing as an organized farm real estate market—nationally, regionally, or

valuable practical experience, experience worth a certain monetary value. Third, assuming that the plaintiff does not plant a further crop in mitigation of damages, there is a certain value—positive or negative—to be attached to the plaintiff's increased leisure. Prejudgment interest can be viewed as a way of minimizing a plaintiff's under-compensation, but no case attempts to come to terms explicitly with any of the three compensation problems above.

⁴⁴Ward v. Chicago, M. & St. P. Ry., 61 Minn. 449, 63 N.W. 1104 (1895). This case involved injury to perennial crops, but the court specifically included annual crops within the rule.

⁴⁵Harvey v. Mason City & Ft. D.R.R., 129 Iowa 465, 105 N.W. 958 (1906); Drake v. Chicago, R.I. & P.R.R., 63 Iowa 302, 19 N.W. 215 (1884); Larson v. Lammers, 81 Minn. 239, 83 N.W. 981 (1900).

⁴⁶Faires v. Dupree, 210 Ark. 797, 197 S.W.2d 735 (1946); Brown v. Arkebauer, 182 Ark. 354, 31 S.W.2d 530 (1930); St. Louis, I.M. & S. Ry. v. Saunders, 85 Ark. 111, 107 S.W. 194 (1908). The emphasis, which seems proper, on *diminution* in rental value in these cases brings into focus the appropriateness of the plaintiff's mitigation of damages by planting a second crop or renting his land for another purpose for the term, generally a growing season or year, for which the plaintiff's land has been affected by the defendant's tort.

⁴⁷Enright v. Toledo, P. & W. Ry., 158 Ill. App. 323 (1910); Farley v. City of Des Moines, 199 Iowa 974, 203 N.W. 287 (1925) (alternate remedies also available); Horres v. Berkely Chem. Co., 57 S.C. 189, 35 S.E. 500 (1900). Recovery of irretrievable expenditures, with interest on those expenditures, may be warranted if their value is not already reflected in an assessment of the rental value of the tract before the defendant's injury. There is a problem of excessive recovery, however, if the plaintiff's crop was destined to be a losing one due to the plaintiff's inefficiency in labor and materials costs. Perhaps it is simplest and best if, at a maximum, "ordinary" or "average" expenses are recoverable.

⁴⁸Horres v. Berkely Chem. Co., 57 S.C. 189, 35 S.E. 500 (1900). For an only partially successful critique of *Horres*, see Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 P. 942 (1907).

locally."⁴⁹ Idiosyncratic values often enter into farm real estate transactions⁵⁰ because some buyers or potential buyers may unwittingly offer a higher price than necessary and thereby establish an unrealistic price.⁵¹ On the other hand, a potential seller "may want to stay in a location familiar to him, even though others want it for a more intensive use; and he sometimes wants to stay there regardless of the cost in terms of a foregone alternative opportunity."⁵²

The courts must therefore consider whether testimony as to rental value is genuinely reflective of the evaluation of well-informed, prudent, impartial, unpressured lessors and lessees of the property in question. There is also a potential problem of circularity insofar as witnesses evaluate a rental property on the basis of the value of crops that might be produced on it, while the courts may have turned to the rental value measure precisely because of the speculativeness of recoveries based on crop value.

A more bothersome problem concerns whether to limit the range of possible uses upon which the rental value of the land may be based. The rental value of a tract may, for example, be higher as a parking lot or as a field for growing some crop disfavored by the plaintiff than as a wheat field. To base a plaintiff's damages on more lucrative land use options rejected by the plaintiff tends to over-compensate him.

Such problems are avoided by the following crop-value-based remedies:

- F. the value of the unmaturing crop at the time of the invasion, and not a presumed later market value;⁵³
- G. the value of the unmaturing crop at the time of the invasion, and not the difference in value of the land before and after destruction of the crop;⁵⁴

⁴⁹R. SUTER, *THE APPRAISAL OF FARM REAL ESTATE* 56 (1974).

⁵⁰*Id.*

⁵¹*Id.* at 57.

⁵²*Id.* at 58.

⁵³*Taylor v. Canton Township*, 30 Pa. Super. 305 (1906); *Lampley v. Atlantic Coast Line R.R.*, 63 S.C. 462, 41 S.E. 517 (1902); *Sabine & E.T.R.R. v. Joachimi*, 58 Tex. 456 (1883). This line of cases finds the presumed later market value to be speculative and irrelevant. It is of special interest that the court in *Lampley* offered in addition a presumably alternative recovery allowing rental value of the land, cost of fertilizers used, cost of labor in preparing the land, cost of cultivation up to the time of injury, the fair value of the owner's services in overseeing such work, and interest on the amount lost up until the verdict. *Colorado Consol. Land & Water Co. v. Hartman*, 5 Colo. App. 150, 38 P. 62 (1894) offers roughly the two remedies available in *Lampley*, as well as a recovery based on the average yield and market value of similar crops planted and cared for in the same manner, less the cost of maturing, harvesting, and marketing. *Id.* at 152, 38 P. at 63.

⁵⁴*Alabama Great S. Ry. v. Russell*, 254 Ala. 701, 48 So. 2d 239 (1949); *Brous v. Wabash R.R.*, 160 Iowa 701, 142 N.W. 416 (1913); *Pascal v. Chicago, R.I. & P. Ry.*, 160

- H. the value of the crop at the time of destruction, but no recovery if there is evidence only of the value of a matured crop;⁵⁵
- I. recovery of the market value of the crops at the time of their destruction minus later unincurred costs saved by the plaintiff;⁵⁶
- J. recovery of the value of the unmaturing crops at the time of their destruction, and not merely their value for immediate severance and use;⁵⁷
- K. recovery of the value of the unmaturing crop at the time of the invasion, assuming "ordinary" costs are incurred and "ordinary" care is used by the plaintiff.⁵⁸

Recoveries based on formulae F through K above share the problem suggested by the view that there simply is no organized market for growing crops.⁵⁹ Formulae based on the value of the injured crop at the time of its destruction either undercompensate the plaintiff by failing to view growing crops as a developing investment, or solve the problem by moving in the direction of remedies L and M as follows:

- L. recovery of the value of the yield but for the injury, minus the value of the amount actually produced, minus the extent of later unincurred costs saved by the plaintiff;⁶⁰

Iowa 484, 141 N.W. 920 (1913). The court in *Brous* offered an alternative remedy of the crop's presumed value in matured condition minus expenses for maturing and marketing. There is no discussion of the also unincurred risk of later crop failure, and the plaintiff's recovery is not discounted to reflect this factor.

⁵⁵*Thompson v. Chicago, B. & Q.R.R.*, 84 Neb. 482, 121 N.W. 447 (1909).

⁵⁶*Wolfsen v. Hathaway*, 32 Cal. 2d 632, 198 P.2d 1 (1948). Because a major part of the difference in value between a growing and a matured crop tends to be a reflection of the value added through the plaintiff's later expenditures on his maturing crop, this remedy will tend to be inadequate. It effectively deducts the unincurred costs twice from the plaintiff's recovery, and provides very little incentive not to tortiously destroy young crops.

⁵⁷*St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz*, 226 Ill. 409, 80 N.E. 879 (1907); *Chicago & R.I.R.R. v. Ward*, 16 Ill. 522 (1855) (Skinner, J., concurring).

⁵⁸*Roberts v. Lehl*, 27 Colo. App. 351, 149 P. 851 (1915). Contrast the rule presented in the earlier Colorado case of *Colorado Consol. Land & Water Co. v. Hartman*, 5 Colo. App. 150, 38 P. 62 (1894), which allowed comparison with crops cared for in the same manner as that of the plaintiff, as opposed to those cared for in an "ordinary" way.

⁵⁹*St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz*, 226 Ill. 409, 80 N.E. 879 (1907); *Economy Light & Power Co. v. Cutting*, 49 Ill. App. 422 (1893); *Tretter v. Chicago & Great W. Ry.*, 154 Iowa 280, 134 N.W. 626 (1912).

⁶⁰*Uhrhan v. Morie*, 293 S.W. 483 (Mo. Ct. App. 1927); *Smith v. Hicks*, 14 N.M. 560, 98 P. 138 (1908); *Di Bacco v. State*, 53 A.D.2d 939, 385 N.Y.S.2d 214 (1976); *Hall v. Brown*, 102 Or. 389, 202 P. 719 (1921); *International Great N.R.R. v. Reagan*, 36 S.W.2d

- M. recovery of the value of the yield but for the injury, minus the value of the amount actually produced, minus all expenses of the plaintiff.⁶¹

This solution, found in a variety of cases, is to recognize explicitly that the value of a crop at the time of destruction includes the value of the owner's right to attempt to mature, harvest, and market the crops.⁶² Section VI below discusses a major systematic difference between the value of developing and fully matured crops: the reduction of risk of injury to the crop from various natural causes.

The most fundamental distinction among crop destruction remedies, then, is that of land-rental-based remedies and crop-market-based remedies. The former category has a role to play if rental value calculations can be done independently of crop value. A further requirement is that rental value calculations in a given case be done less speculatively than those involved in determining what would have been the range of probable yields and prices of a crop, had the crop not been destroyed. This requirement will tend more to be met early in the season. Overall, the goal is to provide a universal recovery formula which can be applied whether the injury is from total inability to use a field, complete crop destruction immediately after seeding, complete destruction of growing crops, or complete destruction at full maturity.

Generally, the presumption should be that crop-value-based remedies are to be preferred. They more accurately reflect the plaintiff's loss except in cases of such early crop destruction that their speculativeness exceeds the distortions inherent in formulae based on land rental value. The simplest defensible rule would be to never apply land-rental-value-based remedies, on the assumption that estimates of rental value will inevitably reflect estimates of the value of the land's crop-growing capacity anyway.

IV. PROPER MARKET SELECTION

Indiana has set the standard in the area of the selection of the proper market for purposes of determining market price in cases of

564 (Tex. Civ. App. 1931), *aff'd*, 121 Tex. 233, 49 S.W.2d 414 (1932); *City of Portsmouth v. Weiss*, 145 Va. 94, 133 S.E. 781 (1926).

⁶¹*Peppers Fruit Co. v. Charlebois*, 39 Ariz. 195, 4 P.2d 905 (1931); *Beville v. Allen*, 28 Ariz. 397, 237 P. 184 (1925); *Brace v. Pederson*, 115 Wash. 523, 197 P. 625 (1921). There is no apparent reason to deduct from plaintiff's recovery reasonable costs that he has already incurred.

⁶²*St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz*, 226 Ill. 409, 415-16, 80 N.E. 879, 882 (1907); *Economy Light & Power Co. v. Cutting*, 49 Ill. App. 422, 425 (1893). The court in *Economy Light* found the history of above-average quality, yield, and prices from crops grown on the land to be relevant and admissible in determining the value of the crops at the time of their destruction.

crop damage or destruction.⁶³ Nationally, among the major rules and limitations have been the following:

- A. the inadmissibility of later actual market prices;⁶⁴
- B. the inadmissibility of a general custom of holding harvested crops off the next succeeding market;⁶⁵
- C. the nearest market in time as providing the best approximation of the value of the crops at the time of their destruction;⁶⁶
- D. the nearest market in location as the best approximation of the value of the crops at the place of their destruction;⁶⁷
- E. admissibility of the price at the "usual" market;⁶⁸
- F. the "prudent man" test.⁶⁹

The crucial conflict in the area of proper market determination lies between "nearest market" rules and the more flexible rules to which Indiana is turning.⁷⁰ The nearest market rules offer relative cer-

⁶³*Decatur County AG-Servs., Inc. v. Young*, 401 N.E.2d 731 (Ind. Ct. App. 1980).

⁶⁴*City of Chicago v. Dickman*, 105 Ill. App. 209, 212 (1902); *Burnett v. Great N. Ry.*, 76 Minn. 461, 79 N.W. 523 (1899). The court in *Dickman* determined that the trial court could hear only what price was reasonably probable in October as it appeared at the time of destruction in June. 105 Ill. App. at 212. This has the virtue of preserving uniformity of the plaintiff's recovery regardless of how soon or late the plaintiff brings his cause to trial. It provides for ease of calculation of the extent of liability by prospectively negligent defendants. Its fatal defect is to substantially undercompensate or overcompensate the plaintiff for his actual losses in view of rapid price rises or subsequent crop failures. The court's observation that actual October prices are produced by a multitude of causes beyond the control of the parties is not less true of probable October prices as they appear in June.

⁶⁵*United States v. 576.734 Acres of Land*, 143 F.2d 408 (3d Cir.), *cert. denied*, 323 U.S. 716 (1944). In this condemnation action, the United States was found obligated to pay for the value of the leasehold on the day of the taking, at which time the unmatured crop was said to have a value to be established at the "nearest" time thereafter as possible. The court did not come to terms with the view that the value of a growing crop includes the right to continue to mature it. *Id.* at 409-10.

⁶⁶*United States v. 576.734 Acres of Land*, 143 F.2d 408 (3d Cir.), *cert. denied*, 323 U.S. 716 (1944); *American Smelting & Refining Co. v. Riverside Dairy & Stock Farm*, 236 F. 510 (8th Cir. 1916); *Sayers v. Missouri Pac. Ry.*, 82 Kan. 123, 107 P. 641 (1910).

⁶⁷*American Smelting & Refining Co. v. Riverside Dairy & Stock Farm*, 236 F. 510 (8th Cir. 1916); *Tretter v. Chicago & G.W. Ry.*, 154 Iowa 280, 134 N.W. 626 (1912); *H.F. Wilcox Oil & Gas Co. v. Murphy*, 186 Okla. 188, 97 P.2d 84 (1939); *Missouri, K. & T. Ry. v. Gilbert*, 58 Tex. Civ. App. 467, 124 S.W. 434 (1910). It is possible that the nearest market in time and the nearest market in place to the time and place of destruction are two different markets, with different market prices.

⁶⁸*Johnson v. Sleaford*, 39 Ill. App. 2d 228, 188 N.E.2d 230 (1963). The court allowed evidence of "the usual market value of the product at the usual market, at the harvesting season." *Id.* at 237, 188 N.E.2d at 234.

⁶⁹*Chicago & R.I.R.R. v. Ward*, 16 Ill. 521 (1854) (Skinner, J., concurring).

⁷⁰*Decatur County AG-Servs., Inc. v. Young*, 401 N.E.2d 731 (Ind. Ct. App. 1980).

tainty, simplicity, and predictability. Their important defect is their tendency to result in improper compensation for the plaintiff's actual losses. A plaintiff's choice of market and decision as to storage time can be financially crucial. In the case of wheat crops, for example, "[p]rices in the 1973-74 marketing year rose to an average of \$3.95 compared with \$1.76 the previous year."⁷¹ During any one particular growing season, "[p]rices rise much more than average . . . [or they may] rise much less than average or actually decline . . ."⁷² For soybeans at the Chicago market, "prices in the 1968-1972 period were highest in July and December; however, peak prices sometimes occur during the early spring."⁷³

This volatility of price swing underscores the important practical difference between "nearest market" rules and more flexible market determination rules. It also highlights the superiority of the more flexible rules because such rules take better account of delayed, postharvest sales. The only way to defend the "nearest market" rules is through the assumption that the plaintiff's increased market price for his stored crops tends to be balanced out by his increased storage costs. The jury would then be instructed not to deduct the plaintiff's unincurred storage costs from his recovery. An actual balancing in any given case, however, would be fortuitous.⁷⁴

⁷¹G. SHEPHERD, G. FUTRELL, J. STRAIN, *MARKETING FARM PRODUCTS* 396 (6th ed. 1975).

⁷²*Id.* at 138.

⁷³*Id.* at 137.

⁷⁴Fairness to the defendant as to the extent of his liability is a consideration here. What if the plaintiff had contracted before the loss, or found a buyer after the loss, who was willing to swap a barrel of oil for a bushel of wheat? Can it be said that the defendant should reasonably have foreseen such a possibility, and hence expended more money on being careful? Surely not.

In such cases, it is relevant to ask which of the parties could have avoided or prevented the plaintiff's huge and rare loss at the lower cost. Could the plaintiff have cheaply avoided the loss by informing all the area crop-dusters, railroads, neighbors, and industrial plants of his good fortune in locating his over-eager buyer? Or could the defendant have more cheaply avoided the accident by conducting his operations in light of his telephone survey of the price prospects of area croplands? For Leon Green's approach to the problem of foreseeability of the extent of loss, see Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1405-06 (1961).

This problem should be approached with some care. Splitting the liability by holding the defendant liable for only the reasonably foreseeable extent of the plaintiff's loss, though apparently fair, may tend to generate unfortunate outcomes that leave everyone worse off. If, for example, a \$150 loss is split so that the plaintiff is liable for \$50 and the defendant for \$100, neither party will have an incentive to avoid the accident if the plaintiff could have prevented the accident by spending \$60 or if the defendant could have avoided the accident at a cost to him of \$110. The accident will improperly tend to occur, at a possible social cost of \$150 - \$60 or \$90. The goal of avoiding such waste might be better served by imposing the entire liability on the party who could have avoided the accident at the lower cost, perhaps in conjunction with a last clear chance rule.

The "prudent man" test⁷⁵ focuses attention on what a prudent man would have given for the crop prior to its destruction, provided he would have it secure from trespass and have the right to further cultivate it.⁷⁶ It would logically include the right to choose the optimal market and time of marketing, thus improving upon the "nearest market" formulations.

The major drawback of the prudent man test lies in the problem of subsequent innocent crop loss. It is not easy to determine how much a reasonable and prudent person would have discounted his price due to the risk of crop loss between the time of the defendant's tortious injury and the sale of the crop or the passing of the risk of loss. The first problem is that rainfall, hail, wind, and heat occurring "during critical harvesting periods represent random variables. The number of workdays available for routine tasks such as plowing, planting, and cultivating are random variables."⁷⁷ The second and more crucial problem is that little research has been devoted to determining the frequency of these and other important random inputs.⁷⁸ It would thus be much easier to allow the plaintiff to bear the loss if it should appear that his crop would later have been damaged or destroyed innocently, regardless of the defendant's action.

V. DAMAGES FOR MARKETABLE INJURED CROPS

In the area of damages to be awarded for injury to annual crops which are nonetheless marketed or marketable,⁷⁹ the courts have spoken with more than one voice. Some of the remedies deserving of attention include:

- A. recovery of the diminution in the crop's market value immediately before and after the injury, with the value of the uninjured crop at maturity inadmissible;⁸⁰
- B. recovery of the diminution in market value immediately before and after the injury, with the market value of

⁷⁵See note 69 *supra*.

⁷⁶*Chicago & R.I.R.R. v. Ward*, 16 Ill. 522, 533 (1854).

⁷⁷J. DOLL, V. RHODES, J. WEST, *ECONOMICS OF AGRICULTURAL PRODUCTION, MARKETS, AND POLICY* 193 (1968).

⁷⁸*Id.* at 201.

⁷⁹This would include cases of stunted growth or reduced yields.

⁸⁰*Gresham v. Taylor*, 51 Ala. 505 (1874); *Sayers v. Missouri Pac. Ry.*, 82 Kan. 123, 107 P. 641 (1910); *Sabine & E.T.R.R. v. Joachimi*, 58 Tex. 456 (1883). This line of cases finds the maturity value to be the result of too many arbitrary contingencies to serve as a valid and reliable indicator of the value of the immature crop at the time of its injury.

- the crops at maturity admissible but not in itself a component of a proper measure of damages;⁸¹
- C. recovery of the diminution in market value immediately before and after the injury, and the market value of the crops at the time of maturity minus some or all expenses is a proper measure of damages;⁸²
 - D. recovery of the value of the crops but for the injury minus the value actually received;⁸³
 - E. recovery of the value of the crops but for the injury minus expenses saved for the plaintiff minus the actual value of the crop at maturity received by the plaintiff;⁸⁴
 - F. recovery of the value of the prospective crop when harvested minus the prospective cost of harvesting and marketing, with a reasonable-certainty-of-maturity limitation, and with the rental value of the land recoverable in addition;⁸⁵
 - G. recovery of the value of the prospective crop when harvested minus the unincurred cost of cultivation, harvesting, and marketing saved by the plaintiff, minus the value of the crop actually received by the plaintiff, plus the price paid by the plaintiff for the insecticide which failed to prevent the crop damage.⁸⁶

⁸¹*Ingargiola v. Schnell*, 11 So. 2d 281 (La. Ct. App. 1942); *Abilene & S. Ry. v. Herman*, 47 S.W.2d 915 (Tex. Civ. App. 1932). This line of cases allows evidence of maturity values of crops as indicators of the value of the crops at the time of injury.

⁸²*Peppers Fruit Co. v. Charlebois*, 39 Ariz. 195, 4 P.2d 905 (1931); *Mahaffey v. Carlson*, 39 Idaho 162, 228 P. 793 (1924); *Tretter v. Chicago & G.W.R.R.*, 154 Iowa 280, 134 N.W. 626 (1912); *First Wis. Land Corp. v. Bechtel Corp.*, 70 Wis. 2d 455, 235 N.W.2d 288 (1975); *Bader v. Mills & Baker Co.*, 28 Wyo. 191, 201 P. 1012 (1921). A number of opinions in this area fail to specify unequivocally that it is only the unincurred costs that plaintiff would otherwise have had to pay that are being deducted from his recovery. See, e.g., *Brace v. Pederson*, 115 Wash. 523, 197 P. 625 (1921). There is no obvious justification for requiring the plaintiff to in effect pay twice for tilling the soil.

⁸³*Burt v. Lake Region Flying Serv.*, 78 N.D. 928, 54 N.W.2d 339 (1952). The proper role of expenses saved by the plaintiff is not discussed.

⁸⁴*Steffen v. County of Cuming*, 195 Neb. 442, 238 N.W.2d 890 (1976); *Swenson v. Chevron Chem. Co.*, 89 S.D. 497, 234 N.W.2d 38 (1975); *Cutler Cranberry Co. v. Oakdale Elec. Coop.*, 78 Wis. 2d 222, 254 N.W.2d 234 (1977). In *Cross v. Harris*, 230 Or. 398, 370 P.2d 703 (1962), the court allowed recovery of the cost of destroying the damaged crops in addition to the above measure. *Id.* at 409, 370 P.2d at 709.

⁸⁵*United Verde Cooper Co. v. Ralston*, 46 F.2d 1 (9th Cir. 1931). Language in this opinion requiring the deduction of the costs of "producing" the crop from the plaintiff's recovery is not to be read strictly, as this would effectively require the plaintiff to pay certain production costs twice. *Id.* at 2. The court in *Ralston* also found the rental value of the land to be recoverable. *Id.*

⁸⁶*Swenson v. Chevron Chem. Co.*, 89 S.D. 497, 234 N.W.2d 38 (1975). In this case, the plaintiff recovered a \$717 insecticide price on the theory that the insecticide did

Once the distractions of double recovery and double payment by the plaintiff are removed,⁸⁷ it becomes clear that the major line of division is between the remedies focusing on immediate diminution in market value, as in remedies A through C above, and remedies based in part on the prospective value of the crop but for the injury, as in remedies D through G. That this division can be partially reconciled is suggested by the consideration, in Section III above, of the extent to which immediate loss in value after the injury must inevitably reflect the loss in attainable future value. On this point, the court's discussion in *First Wisconsin Land Corp. v. Bechtel Corp.*⁸⁸ is illuminating:

The defendants' theory is that testimony as to the plaintiff's costs in growing the beans was irrelevant and should not have been considered by the jury, because the question for consideration was the difference in the value of the crop before and after the injury. In estimating the value of the crop before the injury, it was necessary to know what the crop could be expected to bring at harvest time and what the cost of growing the crop would be. The difference between these two figures is an acceptable method of estimating the value of the crop before the injury.⁸⁹

Just as the preinjury value of the crop reflects the value of the right to attempt to further mature and market the crop, so the value of the right to attempt to further mature and market the crop reflects the further, not yet incurred costs of additional maturation, harvesting, and marketing. The simpler and less circuitous remedy would offer the plaintiff the probable value of the prospective crop, but for the defendant's injury to it, with deductions for the costs of maturing, harvesting, storage, and marketing unincurred or reduced as a result of the defendant's action and for the value of the crop actually marketed by the plaintiff.

As suggested above in Section IV, this simpler remedy should be applied in a crop storage case, not by focusing on the value of the prospective crop only at harvest time nor by considering only some customary time of marketing postharvest, but by considering any postharvest time of marketing chosen in good faith by the plaintiff.

not perform as warranted but would have been worth the price if it had performed as warranted. The better view is that the plaintiff had already been made whole by the court's remedy and that the probable value of his crop at maturity, but for the injury, reflected the increased or more predictable yield which would have been possible by the use of an effective insecticide.

⁸⁷See notes 82-86 *supra*.

⁸⁸70 Wis. 2d 455, 235 N.W.2d 288 (1975).

⁸⁹*Id.* at 463, 235 N.W.2d at 292.

VI. POSTINJURY RISKS AND ACCIDENTS

Remaining to be considered in further detail are several problems affecting the basic damages measures. First is a more explicit look at the effects of postinjury contingencies on crop yield or crop value. Among the most noteworthy approaches are these:

- A. The risk of later hail, flood, or other weather hazards must be considered with respect to the plaintiff's damage award.⁹⁰
- B. An actual later destructive flood does not affect the plaintiff's damages.⁹¹
- C. Evidence of conditions subsequent to the crop loss is inadmissible.⁹²
- D. An actual later destructive innocent flood does affect the plaintiff's damages.⁹³

The first aim here must be to avoid rules allowing systematically excessive recoveries. One court has urged that "it would not have been proper to have admitted . . . evidence showing that a week or two after the destruction of the crop, all the crops in the neighborhood . . . were destroyed by drought . . . or a tempest, over which neither appellant, appellee nor any other person had any control."⁹⁴ This view reflects the approach to damages issues by which damages are fixed by a hypothetical transaction between the plaintiff and a market buyer immediately after the injury or destruction of the crops. On this view, fortuitous events occurring a week later are irrelevant.

Such an approach, however, results not only in making the plaintiff whole, but in providing him with full and costless crop failure and crop loss insurance from the time of the defendant's injury. There is no obvious reason to do this, as long as the plaintiff is otherwise fully compensated. The real choice is between attempting to discount all recoveries to reflect the proper risk of crop loss that

⁹⁰St. Louis Sw. Ry. v. Ellis, 169 Ark. 682, 276 S.W. 996 (1925); Dutra v. Cabral, 80 Cal. App. 2d 114, 181 P.2d 26 (1947); Drake v. Chicago, R.I. & P.R.R., 63 Iowa 302, 19 N.W. 215 (1884); Hopper v. Elkhorn Valley Drainage Dist., 108 Neb. 550, 188 N.W. 239 (1922). In Sayers v. Missouri Pac. Ry., 82 Kan. 123, 107 P. 641 (1910), this rule was applied even though the crop was ready for harvesting at the time of injury by the defendant.

⁹¹Zuidema v. Sanitary Dist., 223 Ill. App. 138 (1921); City of Chicago v. Dickman, 105 Ill. App. 209 (1902). See also C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES § 126, at 488 (1935).

⁹²Burnett v. Great N. Ry., 76 Minn. 461, 79 N.W. 523 (1899); Ward v. Chicago, M. & St. P. Ry., 61 Minn. 449, 63 N.W. 1104 (1895).

⁹³St. Louis, I.M. & S. Ry. v. Yarborough, 56 Ark. 612, 20 S.W. 515 (1892) (imminent flooding hastened by the defendant's actions).

⁹⁴City of Chicago v. Dickman, 105 Ill. App. 209, 212 (1902).

the plaintiff would have had to bear, and allowing the plaintiff to bear his own losses if his crops would probably have been destroyed innocently regardless of the defendant's conduct. Subject to the plaintiff's ability to prove that his procurement of insurance coverage was rendered ineffective by the defendant's tortious conduct, this Note recommends the latter course in view of its practical simplicity. The argument for this approach is strengthened if it appears that growers can insure their own crops against such contingencies more cheaply than can potential defendants.

A second problem associated with the basic damages measures is that of the admissibility and proper role of evidence, going to the plaintiff's damages, of the productiveness of unaffected comparable fields, owned by the plaintiff himself⁹⁵ or by neighbors,⁹⁶ and of evidence of prior production years on the same land.⁹⁷ The crucial question remains that of how comparable the proffered evidence must be. The answer in ideal terms is simply this: The court should allow comparison evidence as to quality of land, type of crop, growing method, circumstances, and so on if its tendency to mislead is less important than its contribution to the case in determining the actual or prospective value of the plaintiff's crop.

More practically, it is appropriate to rely on the incentives set up by the adversary process to minimize the effect of misleading comparisons. If the plaintiff may show an apparently large loss based on his best three yields in the five previous production years, the defendant should be permitted to show not only that the plaintiff is relying on inconsistent assumptions, but that the plaintiff's best four yields in the five previous production years show a smaller loss.⁹⁸ The court should impose a limit here only when the complexity of the evidence threatens to drive the jury to return simply an intuitively based judgment.⁹⁹

⁹⁵*Teller v. Bay & River Dredging Co.*, 151 Cal. 209, 90 P. 942 (1907); *Smith v. Hicks*, 14 N.M. 560, 98 P. 138 (1908).

⁹⁶The court in *Hall v. Brown*, 102 Or. 389, 202 P. 719 (1921), required a showing of similarity in variety of grain sown, amount sown per acre, time when sown, and method of cultivation.

⁹⁷*Johnson v. Sleaford*, 39 Ill. App. 2d 228, 188 N.E.2d 230 (1963); *Sayers v. Missouri Pac. Ry.*, 82 Kan. 123, 107 P. 641 (1910); *Cutler Cranberry Co. v. Oakdale Elec. Coop.*, 78 Wis. 2d 222, 254 N.W.2d 234 (1977).

⁹⁸*Cutler Cranberry Co. v. Oakdale Elec. Coop.*, 78 Wis. 2d 222, 224-25, 254 N.W.2d 234, 236 (1977).

⁹⁹One might reflect here on the case of *Armer v. Nagels*, 149 Kan. 409, 87 P.2d 574 (1939). The court here held that in arriving at the value of a destroyed barley crop, the jury might consider the quality of the land for the crop of barley, preparation of the ground, quality of the seed planted, the manner in which the crop had gone through the winter, quality of the season for similar crops in the vicinity, the barley yield on that farm and on farms in the vicinity in the past, the necessity of any further work on the crop, and the availability of a market and the market price of barley for

VII. PREJUDGMENT INTEREST

The availability or unavailability of prejudgment interest as an element of the plaintiff's damage award poses a final subsidiary problem. Within the cases there has been a lack of uniformity and often a lack of discussion of the problem. A large number of cases allow interest from the date of the injury.¹⁰⁰ Complications arise, however, along the following lines:

- A. Interest from the date of injury is not available to the plaintiff if his damages are unliquidated.¹⁰¹
- B. Interest from the date of injury is discretionary with the jury.¹⁰²
- C. Interest from the date of injury to the date of the trial is includable as an element of damages.¹⁰³
- D. Interest from the date of injury to the date of the verdict is includable as an element of damages.¹⁰⁴

The offering of prejudgment interest to the plaintiff is justifiable if the plaintiff's injury is conceived of as involving the deprivation of use of valuable income-producing property. This would characterize the situation if the court concerns itself with what the crops in question would have been worth immediately before and after the time of injury, or even the reasonable rental value of the land in question. It becomes less important as the court allows remedies based on crop value at some later time, presumably closer to trial, thus affording the plaintiff fuller compensation. In any event, allowing interest up to the time of the verdict, as opposed to the time of trial, provides fuller compensation for the plaintiff in the absence of deliberate delay on the plaintiff's part.¹⁰⁵

VIII. CONCLUSIONS AS TO INDIANA LAW

From this analysis, two major conclusions appear. First, the lack of support in the cases for a postharvest crop valuation¹⁰⁶ is real, but

seed. This level of detailed comprehensiveness would tend to lessen, rather than enhance, the jury's fidelity to damages law. *Id.* at 412, 87 P.2d at 576.

¹⁰⁰*See, e.g.,* Little Rock & F.S. Ry. v. Wallis, 82 Ark. 447, 102 S.W. 390 (1907); St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz, 226 Ill. 409, 80 N.E. 879 (1907); Horres v. Berkely Chem. Co., 57 S.C. 189, 35 S.E. 500 (1900).

¹⁰¹*Smith v. Platte Valley Pub. Power & Irrigation Dist.*, 151 Neb. 49, 36 N.W.2d 478 (1949); *Calcagno v. Holcomb*, 181 Or. 603, 185 P.2d 251 (1947).

¹⁰²*Midland Valley R.R. v. Snider*, 161 Okla. 215, 17 P.2d 954 (1932).

¹⁰³*Trinity & S. Ry. v. Schofield*, 72 Tex. 496, 10 S.W. 575 (1889).

¹⁰⁴*Lampley v. Atlantic Coast Line R.R.*, 63 S.C. 462, 41 S.E. 517 (1902); *Sabine & E.T.R.R. v. Joachimi*, 58 Tex. 456 (1883).

¹⁰⁵*See Walker, Interest on Damages*, 120 NEW L.J. 308, 310 (1970).

¹⁰⁶*Decatur County AG-Servs., Inc. v. Young*, 401 N.E.2d 731 (Ind. Ct. App. 1980).

is only superficial. This Note has shown that a reasonable extension of the best logic of the Indiana cases is all that is required. The court in *Decatur*, in allowing a postharvest valuation of a damaged crop, properly refused to be distracted from the goal of compensating the injured party for the loss sustained.¹⁰⁷

The second point to be noted is that there is no evident reason to confine this remedy to cases of injured but later marketed crops. The equities call for allowing the owner of a destroyed crop to show the probable value of his crop had he matured it, harvested it, stored it, and then marketed it, all at his expense. To confirm a plaintiff's good faith in claiming this remedy for the destruction of a crop, he should offer evidence of his choosing storage and a later sale, rather than a harvest-time sale, at a time before the price of such stored crops became available for comparison. With this restriction, it is hoped that in an appropriate case, the courts will thus extend the logic of *Decatur*.¹⁰⁸

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¹⁰⁷*Id.* at 733.

¹⁰⁸The secondary source material relevant to the themes and specific discussion topics of this Note is purveyed largely in widely scattered snippets, there being, as Robert Nordstrom observes, a remarkable paucity of scholarly treatment of damages issues. Nordstrom, *Damages as Compensation for Loss*, 5 N.C. CENT. L.J. 15, 34-35 (1973). A few sources have been cited and discussed above and will not be further mentioned here.

On the issue of foreseeability, and particularly foreseeability of the extent of the plaintiff's loss, there is a substantial body of literature from diverse perspectives. One might begin with RESTATEMENT (SECOND) OF TORTS § 435 (2) (1965) and W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 43, at 260-61 (4th ed. 1971). From the perspective of law and economics, one might look first at Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 95-98 (1975) and R. POSNER, ECONOMIC ANALYSIS OF LAW 130-31 (2d ed. 1977).

Payne, *Foresight and Remoteness of Damage in Negligence*, 25 MOD. L. REV. 1, 13 (1962) notes the general irrelevance to the defendant's liability of the circumstance that, for example, the infection entering a wound is an exceedingly rare one. Street, *Supervening Events and the Quantum of Damages*, 78 L.Q. REV. 70, 72-73 (1962) mentions the case of crop destruction. Equally interesting is its brief discussion of an English case in which the plaintiff was found not entitled to greater damages for his ship, sunk at sea, even in view of the increased value it would have had due to the outbreak of war, had it reached port. Atiyah, *Negligence and Economic Loss*, 83 L.Q. REV. 248, 263 (1967) focuses on disallowance of recovery for unforeseeable, though direct, consequences of the defendant's tort. Note, *Taking the Plaintiff As You Find Him*, 16 DRAKE L. REV. 49, 56 (1966) focuses in particular on Iowa's allowance of recovery of damages due to unforeseeable aggravation of an existing injury, to the extent of the aggravation. Linden, *Down with Foreseeability! Of Thin Skulls and Rescuers*, 47 CAN. B. REV. 545, 550, 553-54 (1969) generally follows the approach indicated by its title.

A number of commentaries discuss tortious injuries to crops caused by a defendant's crop dusting or crop spraying, as occurred in *Decatur County AG-Servs., Inc. v.*

Young, 401 N.E.2d 731 (Ind. Ct. App. 1980). Perhaps the most thorough item, but lacking a discussion of damages issues, is Note, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476 (1968). Carsey, *Crop Dusting—The Evolution and Present State of the Law*, 6 FORUM 12, 12 (1970) similarly eschews damages issues, but informatively contrasts negligence, strict liability, and warranty as potential theories of a defendant's liability. Note, *Liability in Crop Dusting: A Survey*, 42 MISS. L.J. 104, 106-09 (1971) focuses on negligence and strict liability as alternative theories of recovery, and Note, *Trespass—Basis of Liability—Damage Caused by Aerial Crop Spraying*, 38 N.D.L. REV. 536 (1962) similarly contrasts negligence and ultra-hazard theory. Neither of the above, nor Comment, *Crop Dusting—Scope of Liability and a Need for Reform in the Texas Law*, 40 TEX. L. REV. 527 (1962) despite their merit, mentions damages issues or problems.

Damages for injuries to crops are the subject of implication, if not thorough discussion, in several recent articles. Note, *Survey of Tort Damages*, 14 WASHBURN L.J. 466, 467, 479, 497 (1975) raises the crop damages issues, attempts a characterization of the meaning of compensatory damages and of general and consequential damages, and discusses briefly the important case of *Sayers v. Missouri Pac. Ry.*, 82 Kan. 123, 107 P. 641 (1910). Comment, *Measure of Damages for Injury to Real Surface Property in Wyoming*, 2 LAND AND WATER L. REV. 235, 240-43 (1967) includes a brief discussion of crop damages, focusing without much elaboration on a rule allowing the plaintiff to recover based on the crop's market value if it is mature and on loss of expected profit if it is not. Note, *Damages—Destruction of Fruit Trees—A Proper Rule of Valuation*, 14 WAYNE L. REV. 1211, 1216-17 (1968) is of interest for its discussion of recovery based on the optimal value use of the real property by the plaintiff, as opposed to recovery based on the suboptimal actual present use of the property by the plaintiff, which may better reflect the plaintiff's actual losses.

A number of items are of indirect but still substantial interest. Note, *Mitigation of Damages Through the Use of Stock Market Indicators*, 47 IND. L.J. 367, 367 (1972) discusses a case in which judicial notice was taken of the 1969 stock market decline, leading to the conclusion that such decline, and not the defendant's wrongful omission, caused the decline in value of the property in question. Cole, *Windfall and Probability: A Study of "Cause" in Negligence Law*, 52 CAL. L. REV. 764, 784-85, 812-13 (1964) discusses the probabilistic validation of contrafactual propositions such as, for example, the proposition that if a defendant had known of the unexpectedly high value of a plaintiff's crops, he would have been careful enough to avoid injuring them. Cole goes on to characterize a "windfall" as "the unearned and unexpected receipt of a measureable advantage inconsistent with the rules of distribution." *Id.* at 813. Note, *Damages Contingent Upon Chance*, 18 RUTGERS L. REV. 875, 892-94 (1964) discusses the relatively great boldness of English law in allowing recoveries to more accurately reflect specific calculations of the probability of occurrence of the event in question.

In Nordstrom, *Toward a Law of Damages*, 18 W. RES. L. REV. 86, 86 (1966), a narrower and a broader meaning of "compensatory" damages is detected, with the former meaning limited to the expectancy interest, and the latter including the plaintiff's expectancy, reliance, and restitutionary interests.

Finally, a pervasive and intractable problem is addressed in Feldman and Libling, *Inflation and the Duty to Mitigate*, 95 L.Q. REV. 270, 275, 279, 282, 286 (1979). The authors find no general duty of plaintiffs to mitigate the effects of inflation, thus offering at least partial justification for this Note's careful avoidance of the topic.

