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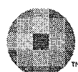

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PREFACE

This book takes a modern approach to teaching Torts. What makes our approach modern?

Without sacrificing the best of the classic cases, we frequently use *contemporary cases* with language, fact patterns, and issues that capture the interest of today's law school students. Our cases are edited to preserve and convey the language of the law, the factual context for judicial decisions, and the logic and precedents on which those decisions are based.

Although traditionally it has been thought that common law forms the foundation of tort law, increasingly we are coming to find that tort law is greatly influenced by legislative action, reflected in *statutory law*. Our book supplements judicial opinions with statutes, clearly delineated to support student understanding of salient topics.

Rather than inundating the student with a preponderance of undifferentiated exposition, we recognize that note material ought to be supplied judiciously, with the aim of facilitating a deeper understanding of the cases and theory. We have gone one step further and organized our notes according to their function:

- *Introductory and transitional notes* promote close attention and deeper insight into doctrinal themes and issues
- *"Perspective Notes"* provide a window to seminal legal scholarship, critical analysis, and legal theory

Our students have responded with great enthusiasm to the *problem exercises* that we've created as a vehicle for analyzing the policy implications of doctrine. Increasingly, problem exercises are becoming a staple of pedagogy in newer course books. Ours are drawn for the greater part from actual cases, with citations provided. We have varied their difficulty, so students have the chance to work with both relatively easy and increasingly challenging examples.

When one looks at the interior of an older casebook, it is often difficult to discern where a case ends and other material begins. We see no reason to add confusion to an amply challenging subject by obscuring the divisions between cases, notes, statutory material, and problem exercises. Generous use of heading levels and consistently clear design elements make it a pleasure to navigate through *Basic Tort Law.*

We have modeled our writing style for this book on the clarity and directness that have always been the hallmarks of fine legal analysis and writing. As in the appearance of our pages, we hope that our readers will find that a straightforward writing style sets the stage for effective learning.

This edition reflects suggestions from colleagues who have used the first edition. It makes the procedural posture clear for every case, takes account of overrulings and repeals that affected cases and statutes in the first edition, and adds a small number of new cases intended to help improve students' understanding of negligence *per se*, the substantial factor test, assumption of risk, and some other topics. It is our hope that colleagues will find these materials as stimulating to teach from as we have in our own classes. Even more importantly, we hope that students will enjoy our modern style of teaching that uses clarity as a springboard for a deeper and more nuanced understanding of the law.

Arthur Best
David W. Barnes

January 2007

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Steven D. Smith, The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law, 72 Cornell L. Rev. 765 (1987), copyright Cornell University 1987. Reprinted by permission.

BASIC TORT LAW

CHAPTER 1

INTRODUCTION

I. In General

An honest introduction to this book would probably be "Jump in and see what happens." Your goal for the first year of law study is to learn how to learn and to begin to understand how lawyers analyze legal questions. You will do your best learning by observation, participation, and investigation. And as you immerse yourself in legal analysis, you will begin to develop ideas about the role of law in society and about how courts and legislatures create legal rules. You will also become familiar with typical solutions our legal system offers to various types of recurring problems.

Even though figuring things out for yourself is the essence of legal education, you might like to have some basic information about the legal world you are about to enter. This Introduction explains how this book is organized, gives you some basic background about the history of tort law, and offers excerpts from scholarly articles that will give you some points of reference as you begin your own work of finding out about tort law.

II. Categories of Tort Law

Tort law is a collection of principles describing the legal system's civil (noncriminal) response to injuries one person inflicts on another. When one person acts in a way that causes some injury to another person, tort law sometimes requires the injurer to pay money to the victim. A plaintiff (the injured person) may win damages from a defendant by proving that the defendant intentionally injured the plaintiff. These cases are called intentional tort cases. In other cases, a plaintiff can win damages by showing that even though the defendant did not mean to do anything that the law prohibits, the defendant failed to act as carefully as the law requires. These instances are negligence cases. Finally, in some circumstances a defendant will be liable to a plaintiff even if the defendant did not intend to injure the plaintiff, even if the plaintiff acted with whatever care the law requires. These cases are called strict liability cases.

III. Organization of This Book

This book begins with a discussion of intentional torts, such as assault, battery, and intentional infliction of emotional distress. These torts involve situations where one person intentionally contacts another in a harmful or offensive way, makes another fear that a harmful or offensive contact is impending, or causes another person severe emotional distress. In some circumstances, a person is entitled to (privileged to) harm another, such as when the person is acting in self-defense or with the consent of the other person. The book considers the defenses for each tort that may protect the person from liability.

Next, the book covers the basic aspects of the unintentional torts of negligent and reckless conduct, where one person's carelessness injures another. The injured person may recover damages if the careless person had an obligation of care to the injured person or failed to be reasonably careful, and the careless person's conduct caused the injured person's harm. The analysis of liability for careless conduct includes some policy limitations that define when one person owes a duty to another or when the causal connection between conduct and harm is close enough to support liability. The analysis also involves questions of how liability for damages is shared when more than one person has been careless. Finally, a defendant may avoid or reduce liability by proving a defense, such as the plaintiff's own negligence, or by showing that the defendant is entitled to immunity.

Some important elaborations of basic negligence doctrines are the book's next topics, including the special duties owed by professionals to their clients and by occupiers of land to people who enter the land. Other special issues involve the extent of a negligent person's liability to those who suffer economic or emotional harm in the absence of physical harm. A chapter on damages describes the categories of harms for which damages may be recovered and how those damages are proved and measured.

The book's remaining chapters treat strict liability in traditional contexts, strict liability for product-related injuries, negligence-based liability for product-related injuries, and the torts of trespass, nuisance, and defamation. The book concludes with a chapter on reform measures that provide substitutes for tort lawsuits.

Judicial decisions are the primary materials in this book. They show how courts have dealt with each of tort law's topics. Also, where legislatures have responded to the same topics, illustrative statutes are included. They describe how the law varies from state to state and how courts and legislatures may take different approaches to the same problems. Throughout the book, you will find problems that permit you to test your comprehension of the basic principles. In addition, special notes draw your attention to perspectives on the law to provoke thought or aid your understanding of the rationales for legal principles.

IV. Typical Stages of Tort Litigation

Most of the cases in this book are appellate court opinions. In each of them, a party who lost in the lower court has claimed that the judge in that lower court erred in some way and that the lower court judge's decision should be reversed. Understanding

these appeals requires understanding the stages of a lawsuit, so a detailed study of civil procedure is essential. Nevertheless, it helps to understand the basics at this point.

Complaints and Initial Responses. A lawsuit begins when a plaintiff files a complaint in a trial court. This document alleges that certain facts are true and that because these facts are true, the defendant should be required to pay damages to the plaintiff or give the plaintiff some other relief. A defendant has two options at this point. One is to ask the judge to dismiss the plaintiff's claim on the ground that even if the plaintiff's allegations are true, the plaintiff would have no legal right to recover damages from the defendant. The other is to file an answer to the complaint, admitting or denying the allegations. The answer may also describe defenses that the defendant believes protect the defendant from liability and facts relating to the plaintiff's conduct or the particular circumstances of the case that support a decision in favor of the defendant. After filing an answer, the defendant has another opportunity to ask that the case be dismissed. When a trial court considers a motion to dismiss made at any time, the court compares the parties' allegations and submissions with the legal principles the court believes apply to the type of case the plaintiff has described.

Summary Judgment. Usually after discovery is completed, either a plaintiff or a defendant can move for summary judgment. (Discovery is the process in which parties may obtain information from each other and third parties and develop the evidence they plan to introduce to support their positions.) A court may enter judgment in favor of the moving party if, based on the evidence that the nonmoving party could produce at trial, the applicable legal doctrines would require a judgment against the nonmoving party and for the moving party. Summary judgment eliminates the need for a trial when there are no genuine disputes about the facts.

Trial. At a trial, parties present information in the form of testimony and physical things. The "trier of fact" is either a jury or, in what is called a bench trial, a judge. Once the trier of fact determines what it thinks is the truth about what happened, the trier of fact applies legal rules to those facts. The judge instructs the jury about the relevant legal rules. These jury instructions specify what result is required (judgment for the plaintiff or judgment for the defendant) according to what factual findings the trier of fact makes. If the trier of fact decides in the plaintiff's favor, ordinarily it also decides how much money the defendant should pay the plaintiff.

Judgments as a Matter of Law. At several stages during the trial, each party may ask the judge to rule in its favor on the ground that, even if the opposing party's evidence is accepted as true, the opposing party should still lose. A court might enter judgment as a matter of law (sometimes called "directing a verdict") in favor of the defendant if the plaintiff fails to offer sufficient evidence to support an essential element of the plaintiff's case, such as the fact that the defendant's conduct was a cause of the plaintiff's injury. Or a judge might enter a judgment (direct a verdict) in favor of the plaintiff if no reasonable jury, viewing all of the evidence, could find against the plaintiff.

Judgment. The trial court enters a judgment for the plaintiff, awarding damages or other relief, or for the defendant, depending on the verdict the jury has rendered. If the judge believes that no reasonable jury could have found in favor of a party, the judge may grant judgment as a matter of law (formerly called a judgment notwithstanding the verdict or judgment N.O.V.) to that party's opponent. Finally, a trial judge may decline to enter any judgment at all and may order that the case be tried again if the judge believes that there were errors in the administration of the trial, that the jury's deliberations seem to have been affected by consideration of improper factors, or that the verdict is against the weight of the evidence.

Appeal. A party who loses at any stage of the litigation may be entitled to appeal. The appellate court will consider all of the trial judge's actions about which the parties have raised and preserved objections. With regard to facts, the appellate court will treat as true all the facts that the jury may have found to be true, as long as there was any reasonable basis in the evidence for the jury's conclusion. The appellate court may affirm the trial court's action, may reverse it, or may reverse it and remand for a new trial.

V. How Tort Law Works Now: An Empirical View

Compared with other law school courses, a torts course has the advantage or disadvantage of dealing with topics that people have already thought about a great deal before entering law school. Not too many of us have feelings about civil procedure prior to law study, but most people have lots of ideas about how the legal system treats events like automobile accidents and product-related injuries. It's helpful that tort law has an inherent interest, but it might be counterproductive to begin the study of tort law against a background of popular myths. The article below presents some basic empirical data about how tort law relates to injuries people suffer. It also compares that view of reality with a rival description composed of what the article calls anecdotal evidence.

MICHAEL J. SAKS, DO WE REALLY KNOW ANYTHING ABOUT THE BEHAVIOR OF THE TORT LITIGATION SYSTEM—AND WHY NOT?*

140 U. Pa. L. Rev. 1147 (1992)

. . . The use of anecdotal evidence has been unusually popular in discussions about the nature of the litigation system.[30] Perhaps the use of anecdotes is not entirely

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[30] One example is the case of the burglar who fell through the skylight. According to this anecdote, the burglar sued and won damages of $206,000 plus $1,500 per month for life. Another case involved a plaintiff in a medical malpractice action who claimed that she lost her powers of extrasensory perception due to negligent treatment with a CAT scan. She won the case and was awarded $1 million in damages. A third example involved "[a]n overweight man with a history of coronary disease [who] suffered a heart attack trying to start a Sears lawnmower. He sued Sears, charging that too much force was required to yank the mower's pull rope. A jury in Pennsylvania awarded him $1.2 million, plus damages of $550,000 for delays in settling the claim."

inappropriate or unfair, given the central role cases play in law as the device for sampling social facts, the unit of accretion of judicial authority, and the principal tool for educating new lawyers. . . .

Nevertheless, anecdotal evidence is heavily discounted in most fields, and for a perfectly good reason: such evidence permits only the loosest and weakest of inferences about matters a field is trying to understand. Anecdotes do not permit one to determine either the frequency of occurrence of something or its causes and effects. They do no better in enlightening us about the behavior of the tort litigation system. . . .

Although the validity of the anecdotes themselves is the least important issue, their validity deserves mention. Some litigation system anecdotes are simply fabricated. Others are systematically distorted portrayals of the actual cases they claim to report.[34] More important than what we learn about these stories, perhaps, is what we learn about ourselves and our remarkable credulity. Even when true, anecdotes enjoy a persuasive power that far exceeds their evidentiary value.

. . . Anecdotes about undeserving plaintiffs are intriguing or outrageous and have been repeated often in the media. Consequently, people readily believe that the category of undeserving plaintiffs dominates the system. . . .

The first thing to determine is how many actionable injuries occur. . . .

The most interesting and legally useful studies of base rates have been done in relation to medical malpractice. In these studies, medical experts evaluate a large sample of hospital records to indentify iatrogenic injuries [harm caused by medical treatment] and determine which were negligently produced. Perhaps the best known study was conducted jointly by the California Hospital Association and the California Medical Association and published in 1977. This study found that 79 per 10,000 patients had suffered negligent injuries. The most recent such study, conducted in 1990 by researchers based at the Harvard School of Public Health, found that 100 of 10,000 New York hospital discharges suffered from negligent iatrogenic injuries. . . .

One of the most remarkable features of the tort system is how few plaintiffs there are. A great many potential plaintiffs are never heard from by the injurers or their insurers. The first and most dramatic step in this process of nonsuits is the failure of so many of the injury victims to take measures to obtain compensation from those who injured them.

[34] Consider the three anecdotes presented supra note 30. The "burglar" who fell through the skylight was a teenager who climbed onto the roof of his former high school to get a floodlight. See Bodeine v. Enterprise High Sch., 73225, Shasta County Superior Court (1982), reported in Fred Strasser, *Tort Tales: Old Stories Never Die*, Nat'l L.J., Feb. 16, 1987, at 39. The fall rendered him a quadriplegic. See id. A similar accident at a neighboring school killed a student eight months earlier. See id. School officials already had contracted to have the skylights boarded over so as to "solve a . . . safety problem." Id. The payments were the result of a settlement; the case did not go to trial. See id. In the CAT scan/ESP case, the woman did claim economic loss due to her inability to perform her job as a psychic. But her claimed permanent injuries were due to a severe allergic reaction to a pre-scan drug injection. The judge instructed the jury not to consider the claim for loss of ESP and associated economic damages. The judge also set aside the million dollar award as either excessive or inconsistent with his instructions, and a new trial was ordered. See Haimes v. Hart, 81-4408, Philadelphia Court of Common Pleas, reported in Strasser, supra, at 39. In the third case, the man who suffered the heart attack was a 32-year-old doctor with no history of heart disease, and the lawnmower was shown to be defective. See Daniels & Martin, . . . at 325. Daniels and Martin also note that only the Time magazine version of the case gave accurate details. See id.; George J. Church, *Sorry, Your Policy Is Canceled*, Time, Mar. 24, 1986, at 20, 20.

By comparing the cases determined to be instances of negligent injury with insurance company records, the study of California medical malpractice found that at most only 10% of negligently injured patients sought compensation for their injuries. Even for those who suffered major, permanent injuries (the group with the highest probability of seeking compensation) only one in six filed. . . . The Harvard Medical Practice Study found that in New York State "eight times as many patients suffer an injury from medical negligence as there are malpractice claims. Because only about half the claimants receive compensation, there are about sixteen times as many patients who suffer an injury from negligence as there are persons who receive compensation through the tort system." . . .

Although trials are the legal system's iconographic center, they also are its chief aberration. Fewer than ten cases in one hundred proceed to trial. The great majority are resolved through negotiated settlements. . . . Out of 10,000 actionable negligent injuries, approximately 9600 disappeared when injury victims did not pursue a claim. Half of those that were presented to attorneys never became filed lawsuits. Of the 200 cases filed (2% of those negligently injured), 170 will be settled, paying most plaintiffs less than their actual losses. Trials will commence for about thirty of these cases. Of the 1,000,000 patients who were not negligently injured, an estimated 2400 will mistakenly regard their injuries as resulting from negligence, and about one third of those become filed lawsuits. . . .

Of the cases that finally arrive at trial for the judge or jury to take their turn at sorting, in which ones is liability found and why? Can we explain and predict trial outcomes? Or are they random and unpredictable? If patterns exist, have they changed over time? . . .

The best known research on juries, conducted by Kalven and Zeisel, found a rate of agreement of about 80% between the liability decisions of judges and juries in both criminal and civil trials.[310] Recall that these findings derived from the process of having hundreds of judges in thousands of jury trials provide their own assessment of the case while the jury was deliberating so the judges' views could be compared with those of the jury.

Of the basic level of agreement between judges and juries, Kalven observed that "the jury agrees with the judge often enough to be reassuring, yet disagrees often enough to keep it interesting." More refined analyses of the data strengthened the conclusion that the jury understood the evidence (as well as the judge did). . . .

A considerable body of research both on actual juries and in well controlled trial simulations supports the conclusion that juries make reasonable and rational decisions. . . .

. . . On average, awards undercompensate losses. A recent study of medical malpractice awards found that each one percent increase in loss resulted in an additional one-tenth to one-twentieth of a percent increase in award.

The benchmarks most often used to assess jury awards have been decisions of other decision-makers in comparable circumstances. We previously discussed the research of Kalven and Zeisel in regard to the rate of judge-jury agreement on liability verdicts. When judge and jury both decided for the plaintiff, juries awarded more damages than judges would have 52% of the time, while judges awarded more 39% of the time and

[310] Harry Kalven, Jr. & Hans Zeisel, The American Jury at 58 (1966)—Eds.

they were in approximate agreement 9% of the time. Overall, juries awarded 20% more money than judges would have. Similarly, recent findings by the National Center for State Courts found that jury awards in tort trials were higher than judges' awards. Who came closer to the "correct" amount? We cannot say. . . .

At nearly every stage, the tort litigation system operates to diminish the likelihood that injurers will have to compensate their victims. . . . At the same time that it provides such infrequent and partial compensation, it succeeds in generating huge overestimates of its potency in the minds of potential defendants. . . .

The absence of empirically validated models of the behavior of the litigation system, incorporating data about both system and the environment which produces its cases, leads to a panoply of problems. Reform efforts must guess at which problems are real and which are mythical. Being the product of guesswork, some reforms will produce effects contrary to the intentions of their makers; indeed, some already have. We will fail to anticipate future changes in litigation activity caused by changes in the law or the legal system or the social, economic, or technological environment of the litigation system. Because they will arrive unexpectedly and their causes will be poorly understood, the effects of those changes will repeatedly arrive as new "crises." . . .

NOTES TO "DO WE REALLY KNOW ANYTHING ABOUT THE BEHAVIOR OF THE TORT LITIGATION SYSTEM—AND WHY NOT?"

1. ***Another Famous Case: Hot Coffee.*** A lawsuit involving McDonald's and its coffee became very well known in the early 1990s. The plaintiff bought a cup of coffee at a drive-thru window. She suffered serious burns when some of the coffee spilled in her lap. At trial, she showed that McDonald's served its coffee at temperatures significantly hotter than the temperatures used by other fast food outlets, and that the company had maintained that practice despite knowledge of many other serious burns over a ten-year period. A jury awarded the victim $160,000 in compensatory damages and $2.7 million in punitive damages. The trial court modified the award to a total of $640,000, and the parties later settled the case for an undisclosed amount. See *McDonald's Settles Lawsuit over Burn from Coffee,* Wall St. J., Dec. 2, 1994, at B6.

2. ***Statistical Information About Possible Claims.*** The Saks article states that many potential plaintiffs never seek compensation. One reason for this in the medical malpractice field may be that the victims know about an unwanted outcome but never learn that a medical mistake was made. The Harvard School of Public Health finding that one out of every hundred hospital cases involved harm produced by medical treatment was based on analysis of hospital records by researchers who had no connections with the hospitals or the patients. While the researchers identified cases that involved mistakes, the patients in those cases were not necessarily aware of those mistakes.

3. ***Gaps Between Perception and Reality.*** The article suggests that the tort system makes it unlikely that injurers will be required to compensate victims, that the victims who do receive compensation are usually undercompensated, and that many victims never seek compensation at all. The article also suggests that potential defendants overestimate the power of the tort system. Despite these facts, the tort system continues

to be our society's main method of resolving disputes about injuries. Understanding the reasons for its continued prominence may be an underlying inquiry in the torts course.

VI. How Tort Law Serves Society

Tort law has developed over time through the adjudication of a huge number of cases. While courts seek to do justice in these individual cases, they usually do not seek to describe the overall role of tort law in society. Scholars, on the other hand, often try to find patterns and overall rationales in the courts' output of articulated doctrines and decided cases.

The classic tort law treatise describes compensation and deterrence as two primary factors that explain tort doctrines:

> A Recognized Need for Compensation. It is sometimes said that compensation for losses is the primary function of tort law and the primary factor influencing its development. It is perhaps more accurate to describe the primary function as one of determining when compensation is to be required. Courts leave a loss where it is unless they find a good reason to shift it. A recognized need for compensation is, however, a powerful factor influencing tort law. Even though, like other factors, it is not alone decisive, it nevertheless lends weight and cogency to an argument for liability that is supported also by an array of other factors. . . .
>
> Prevention and Punishment. The "prophylactic" factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive.

Prosser & Keeton on Torts §4 (5th ed.).

In *Sixty Years of Torts: Lessons for the Future*, the author describes how the goals of compensation and deterring future harm may conflict in some cases and suggests some factors that may influence courts to favor one goal over the other at various times. *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law* describes common critiques of the goals of compensation, deterrence, and punishment, and also examines another possible function for tort law: providing a process for resolving disputes and propounding social norms.

J. CLARK KELSO, SIXTY YEARS OF TORTS: LESSONS FOR THE FUTURE*

29 Torts & Ins. L.J. 1 (1993)

. . . The single most important force affecting the development of law in [the twentieth] century has been the overwhelming acceptance of the legal realist position by courts, the bar, scholars, and the public. The central insight of the legal realist program was that the system of formal rules of law that had been developed was

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* J. Clark Kelso, 29 Torts & Ins. L.J. 1 (1993), copyright American Bar Association. Reprinted by permission.

conceptually empty and had little predictive value because the formal rules were so readily manipulable that a court could reach whatever result it wanted, based upon other considerations. . . .

Legal realism caused courts to turn increasingly away from formal rules and toward a direct evaluation of the consequences of decisions and rules, and an evaluation of whether those consequences were consistent or inconsistent with public policy and justice — a style of judicial decisionmaking dubbed "instrumentalism" by legal scholars. Instead of simply applying the time-honored rules of tort law, courts and scholars began to ask utilitarian and consequentialist questions: What is the purpose of the law of torts? What goals are we seeking to advance? Are those goals well served by imposing liability in this case and in cases like this case? For sixty years now, courts, practitioners, and scholars have struggled to answer these questions and to develop the law of torts in a way that brings us as close as possible to fulfilling the objectives of tort law.

Identifying the goal or goals of tort law seemed to be a relatively easy task. Reduced to its essentials and stripping away all that is unnecessary, the consequence of a successful tort lawsuit is to invoke the power of the state (in the form of a judgment) to compel one person (the defendant) to compensate another (the plaintiff) for injuries for which the defendant may be judged "responsible" in some way. As a result of this invocation of sovereign power, the injured person is compensated, and the tortfeasor (and all who might find themselves in a situation similar to that of the tortfeasor in the future) is deterred from engaging in whatever conduct caused the injury. The twin pillars of tort law — compensation and deterrence — were born of the legal realist movement and the simple act of describing the most obvious consequences of a successful tort lawsuit. . . .

Having identified our two prime goals, the next step in the legal realist project was to develop rules of tort law that would maximize the achievement of those goals when applied to the great mass of cases. There is difficulty in maximizing both goals, however, because they stand somewhat in opposition. Advancing the compensation goal to its extreme (by, for example, . . . rejecting any requirement of fault) results in too much deterrence (or, in the words of the law and economics bunch, an inefficient level of deterrence). Dean Guido Calabresi said it best: "Our society is not committed to preserving life at any cost." There comes a point when compensation is overshadowed by its negative impact upon other important societal objectives.

By the same token, advancing the deterrence goal to its extreme — which presumably would mean imposing liability only in those cases in which we clearly could identify some socially unacceptable conduct by the defendant as the cause of the harm — would leave uncompensated a significant number of injured persons who, in our gut and in our heart, we believe deserve compensation.

The trick is to find the right level of compensation and the right level of deterrence, and this is where the courts began to run into trouble. Although compensation and deterrence are stated as though they are equal goals, and, as noted above, compensation and deterrence plainly are linked together, the scales are tipped as a practical matter in favor of compensation. . . .

Because the compensation goal is so much more visibly advanced or undermined than the deterrence goal, and because courts do their best to avoid error, it stands to reason that, all other things being equal, courts will err on the side of too much compensation. At the end of a day's work, a judge can feel comfortable knowing that the injured party was compensated, even though forcing the defendant to pay

may result in too much deterrence. After all, the defendant (particularly if the defendant is a business or has access to a deep pocket) ultimately will recoup the financial burden placed upon it by the court, and the innocent plaintiff in some cases has suffered permanent loss that can never be fully compensated by a damage judgment.

In summary, then, courts identified two instrumental goals for the law of torts, compensation and deterrence, but tended to emphasize compensation over deterrence, in part because it was easier to evaluate the courts' performance in meeting or falling short of the compensation goal.

. . . As members of the upper class and the elite, judges might be expected to favor the propertied classes, and legal history in the eighteenth and nineteenth centuries is consistent with that view. With the birth of the Progressive Movement in the early part of [the twentieth] century, however, the opening up of political processes to "the People," and an ever-increasing sense of judicial independence, judges began to feel themselves freer to use their power to achieve an element of redistributive justice.

The targets of redistributive justice — businesses, those with significant property interests, and the insurance industry — loudly complained throughout the expansion of tort law. But the complaints that the system was becoming increasingly unjust were met by arguments that redistribution and risk-spreading were themselves just causes. Moreover, from World War II until at least the mid-1970s, economic times were rather good in the United States, and the targets of redistributive justice had a difficult time making a good case for the proposition that the consequences of tort expansion were on balance harmful to society's interests.

With the onset of the oil crisis in the 1970s, the economic picture changed dramatically. We entered a long period of high inflation and low growth ("stagflation"). When this economic downturn combined with a downward swing in the insurance cycle, the conditions were ripe for the insurance industry and business interests to make a more compelling case that tort expansions in the name of compensation, particularly those that took place during the 1960s, were bad public policy. For the first time, the expansion in tort liability appeared to threaten the very existence of entire companies and industries. With the election of Ronald Reagan, business interests found a friendly voice to articulate their concerns. These essentially political developments found intellectual expression in the voluminous writings of the school of law and economics, which emphasized achieving the right amount of deterrence as the prime goal of tort law.

In times of plenty it was somewhat easier for courts to ignore complaints from business that tort liability was too burdensome. After all, one additional lawsuit usually will not damage a company irreparably, especially when the theory is that tort liabilities ultimately will be distributed widely through the insurance industry and slight increases in prices. But when times are hard, expansive tort liability can drive companies over the edge. The insurance industry itself may be imperiled, and it may be impossible for a company to raise prices in light of world competition. These realities bring to the surface some of the negative consequences of expansive tort liability. Thus, during periods of recession or very slow growth, courts are more likely to focus their attention upon the deterrence goal of tort law (rather than the compensation goal), and are more likely to restrict tort liability in order to ensure that an optimal level of deterrence is attained (and a destructive over-deterrence is avoided). . . .

To summarize our quick trip through sixty years of tort law, we began in the 1930s with courts adopting a relatively new method of decisionmaking, which emphasized the consequences of rules of law. An instrumental analysis of tort law resulted in the identification of compensation and deterrence as our two beacons. Because the compensation beacon generally was easier to perceive than the deterrence beacon, which always is shrouded in the fog of uncertainty and speculation, courts naturally expanded tort law in pursuit of compensation. It was only when the entire country fell upon economic hard times that courts and legislatures began to recognize more clearly the perils of sailing too closely to the compensation goal. . . .

[S]o long as courts continue to focus much of their attention upon the social consequences of the rules of tort law, the expansions and contractions of torts will depend significantly upon the state of the economy and the country's commitment and capacity to redistribute wealth. If courts are convinced that the short- and long-term stability of businesses and our economy will not be imperiled by tort expansions, we should expect a slow return to more compensation-oriented decisions. In contrast, if courts remain nervous about the state of the economy and tort law's contribution to a weak economy, we can expect slow but steady contractions. . . .

STEVEN D. SMITH, THE CRITICS AND THE "CRISIS": A REASSESSMENT OF CURRENT CONCEPTIONS OF TORT LAW*

72 Cornell L. Rev. 765 (1987)

. . . Critics argue that tort law employs irrational criteria in deciding which injury victims should be compensated and which should not. If tort law's function is to compensate persons who have suffered loss as a result of accidental injury, the critics argue, it makes little sense to compensate persons injured by another's negligence while denying compensation to those injured by non-negligent human activities, illnesses, natural catastrophes, or physical and mental disabilities. Such injuries may certainly be as severe as in the case of a negligently inflicted harm. Moreover, in each instance the injuries result from accidental or fortuitous causes. If a policy compensating for accidental injuries is justified, the critics assert, then the system should compensate all such victims. . . .

After deciding which claimants to compensate, tort law faces the daunting task of determining how much these claimants should receive. Critics argue that here too the system fails dismally. Compensation's cardinal principle prescribes that injured plaintiffs should receive an amount necessary to make them "whole," that is, to restore them to the position they would have occupied but for the defendant's tortious conduct. This "make whole" principle is difficult enough to apply to a plaintiff's purely monetary loss, such as medical expenses or future lost earnings. However, when we apply the standard to nonpecuniary intangible losses such as pain and suffering, psychic injury, or distress from the loss of a loved one, quantifying such losses in monetary terms becomes not merely difficult but conceptually impossible. . . .

Critics of the system respond to the deterrence rationale in two ways. Some broadly assert that tort law has no substantial deterrent effects. The deterrence view of tort law, these critics argue, rests upon wildly unrealistic assumptions about human knowledge, decision making, and conduct. To believe that tort law deters inefficient

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behavior, one must accept that (1) human beings know what the law is; (2) they have the information and ability to perform the sophisticated cost/benefit calculus upon which the deterrence rationale relies; and (3) humans are rational creatures who actually make and act upon such cost/benefit calculations. Critics claim that such assumptions contradict not only ordinary experience and observation, but psychological research as well.

The second objection to the deterrence rationale suggests that even if the psychological assumptions of the deterrence view were sound, tort law still would not produce optimal levels of safety investment. Optimal levels would be achieved only if all actual injury costs—and no more than actual costs—were allocated to the injury-causing activities. If injurers are liable for less than actual costs, their incentive to adopt safety measures is insufficient; if they are liable for more than the actual costs of injuries, they overinvest in safety. . . .

A third objective often attributed to the tort law system is the punishment of wrongdoers. Critics of this ostensible function assert two principal objections. One holds simply that punishment is not a legitimate state function. This objection equates punishment with simple vengeance—a relic of the primitive need to "get even." . . .

A second objection to the punishment function asserts that even if punishment is an appropriate state function, tort law is a poor instrument for the task. Tort rules often impose liability upon persons or institutions for conduct that cannot be considered blameworthy. Strict liability doctrines expressly renounce "fault" as a requisite for liability. Even negligence principles employ an "objective" standard of reasonable conduct that may impose liability upon persons who lack the subjective ability to understand or conform to objective standards and who thus cannot be considered culpable. . . .

The criticisms considered [above] are powerful ones. In fact, they may be too powerful. The cogency of those criticisms rests, after all, upon the assumption that compensation, deterrence, and punishment are the objectives of tort law. If tort law is as ill-suited to accomplishing compensation, deterrence, and punishment as critics suggest, then we must question whether it is at all proper to attribute those goals to tort law. If tort law instead has a primary function different than compensation, deterrence, and punishment, then it is hardly pertinent to attack tort law for failing to achieve those ends. The very incompatibility of the tort law system with such objectives suggests that critics, as well as many proponents, have misconceived the proper function of that system. . . .

[This article proposes that tort law's primary function is simply to resolve disputes.] Dispute resolution's full significance becomes apparent only when viewed in the broader context of the social universe which human beings inhabit. That universe is composed, in large part, of a system of social norms—"shared expectations and guidelines for belief and behavior." In much the same way that gravitational and kinetic laws give order to the physical universe, social norms give order to the social universe: all of us rely constantly upon norms in deciding how we should think, speak, and behave and in anticipating how others in society will think, speak, and behave. Without such norms, social intercourse would be unpredictable and chaotic. Recognized norms are thus an essential condition of rational social life. . . .

In sum, society must enforce its norms, but it must not enforce them too rigorously or mechanically. Although no single test or criterion can wholly reconcile these competing needs, one factor which powerfully influences the response to norm violation is the resulting harm or lack of harm. A trivial norm violation, such as a breach of table etiquette, usually harms no one; such a violation therefore results at most in social

disapproval. At the other extreme, criminal law enforces norms, such as the norm against taking human life, whose violation consistently results in serious harm. Between these extremes lies a set of norms that, although important, are not as imperative as those enacted into criminal law. Such middle level norms constitute the essence of tort law, which seeks to capture such norms with formulas that often amount to little more than open-ended, incorporative allusions to whatever pertinent social norms may exist. Thus, when people act in ways that affect others, tort law requires them to use the care expected of "the reasonable person." Similarly, manufacturers must produce goods that conform to "consumer expectation."

Tort law imposes sanctions for violations of these norms only when such violations result in injuries that in turn generate disputes among members of society. By limiting itself to dispute resolution, tort law avoids overly rigid enforcement of norms and directs its efforts to maintaining those norms which society most clearly wants reinforced. . . .

From a societal perspective, therefore, tort law's dispute resolution function is vital not merely because it prevents private violence, but more importantly because it reinforces the normative order upon which society depends. . . .

The narrow view of personal "injury" likely derives from the typical computation of tort damages, which generally enumerates the kinds of injuries for which the victim may recover damages in tort cases. The resulting list usually includes lost income, medical expenses, pain and suffering, and emotional distress or psychic injury. To be sure, a tort victim often suffers all of these kinds of injury, which this essay will refer to collectively as "actual loss." However, the list typically omits an important element of the tort victim's injury: it fails to recognize the victim's consciousness of having been wronged by the violation of a social norm. This aspect of injury — the sense of having been wronged — might be termed the "sense of injustice." . . .

Recognition of the full character of a tort injury leads to a deeper understanding of tort law's remedial function. Tort law's treatment of injury is not confined to payment of monetary damages. Although responsive to the victim's "actual loss," monetary damages do not specifically treat the victim's sense of injustice, an essential part of her injury. Rather, the tort process's response to injury includes the liability determination and the assessment of damages against the tortfeasor. A system of social insurance would go only halfway: although it would address the victim's "actual loss," it would lack the tort process's comprehensiveness and sensitivity to the full scope of the victim's injury. . . .

This essay does not pretend to make the case for preserving the tort law system. Its aim has been more modest. The essay simply claims that tort law should be understood — and hence evaluated — as a system for resolving disputes generated by the violation of social norms. Whether the system adequately performs its dispute resolution function remains an open question and is a question that can be answered not in the abstract, but only through experience and continuing practical evaluation. . . .

NOTES TO "SIXTY YEARS OF TORTS: LESSONS FOR THE FUTURE" AND "THE CRITICS AND THE 'CRISIS': A REASSESSMENT OF CURRENT CONCEPTIONS OF TORT LAW"

1. ***Observing Compensation and Deterrence.*** Professor Kelso's article points out that the compensation effects of tort doctrines are typically easier to observe than the

deterrent effects of those doctrines. Compensation is easy to observe, because it consists of court orders that defendants pay money to plaintiffs. Changes in people's conduct may be difficult to link to deterrent effects of tort law, because changes in conduct may be the result of many influences.

2. *Additional Rationales for Tort Law.* Professor Smith's article proposes that tort law may serve values in addition to compensation, deterrence, and punishment. He proposes that identifying injustice, even if it occurs only in a minority of instances of unjustly inflicted injuries, may be of great value to an individual who has felt wronged. He suggests that deterrence may come about indirectly through the institution of tort law, because the social norms that people learn are probably influenced by tort doctrines. Also, punishment through the tort system may be sensible if it is viewed as a type of restorative justice, because it can reinforce social norms to the victim and also to society as a whole.

CHAPTER 2

Intentional Torts

I. Introduction

Functions of tort law. Tort law allows plaintiffs to obtain compensation for injuries inflicted on them by defendants or to obtain court orders that stop ongoing or anticipated injuries. As a whole, tort doctrines express society's standards for what types of conduct are acceptable and what kinds of effects one actor may impose on another. Tort law can direct compensation to victims of prohibited conduct, and may also deter people from acting in those forbidden ways.

Categories of tort law. Tort law allows plaintiffs to recover for a wide variety of harms. For some types of harm, in order to recover damages a plaintiff must prove that the defendant intended to affect the plaintiff in some way that the law forbids — these are called *intentional tort* cases. For some other types of injury, a plaintiff may recover without proof that the defendant meant to cause a prohibited effect if the plaintiff proves that the defendant's conduct was less careful than the law requires — these are *unintentional tort* cases. *Negligence* and *recklessness* are the two main types of unintentional tort cases. Finally, a plaintiff may sometimes recover for an injury without proving either that the defendant meant to cause harm or that the defendant's conduct lacked some required degree of carefulness — these are *strict liability* cases.

Types of intentional torts. Tort law treats many types of conduct as intentional torts. This chapter covers *battery*, *assault*, and *intentional infliction of emotional distress*. These tort actions represent one societal response to types of conduct that are highly reprehensible. They also illustrate a framework that applies to other types of intentional torts and to most other types of tort actions as well.

II. Battery

Intentional tort doctrines protect a person from having someone interfere with that person's recognized *legal interests*. A legal interest is a right or privilege that the law protects. The intentional tort of battery protects a person's bodily integrity, the right to be free from intentionally inflicted contact that is harmful or offensive.

A. Intent to Contact

Waters v. Blackshear introduces some important battery concepts. Be sure to note: (1) what the defendant did that interfered with the plaintiff's bodily integrity (the defendant's conduct); (2) what the law requires for the conduct to be characterized as a battery; and (3) why the court thought this defendant's conduct fit those requirements.

If someone picked you up and threw you at another person, thereby injuring that person, the law would not treat *you* as having committed an intentional tort. In a tort case, the plaintiff must satisfy an *act requirement* by showing that the defendant committed a voluntary act. Polmatier v. Russ examines this issue as well as the range of definitions of "intent" that may be used in intentional tort cases. The decision also elaborates on the rules for categorizing an intentional tort as a battery and illustrates some differences between tort and criminal law rules.

WATERS v. BLACKSHEAR

591 N.E.2d 184 (Mass. 1992)

WILKINS, J.

On June 6, 1987, the minor defendant placed a firecracker in the left sneaker of the unsuspecting minor plaintiff Maurice Waters and lit the firecracker. Maurice, who was then seven years old, sustained burn injuries. The defendant, also a minor, was somewhat older than Maurice. The defendant had been lighting firecrackers for about ten minutes before the incident, not holding them but tossing them on the ground and watching them ignite, jump, and spin.

Maurice and his mother now seek recovery in this action solely on the theory that the minor defendant was negligent. The judge instructed the jury, in terms that are not challenged on appeal, that the plaintiffs could recover only if the defendant's act was not intentional or purposeful and was negligent. The jury found for the plaintiffs, and judgment was entered accordingly. The trial judge then allowed the defendant's motion for judgment notwithstanding the verdict on the ground that the evidence showed intentional and not negligent conduct. We allowed the plaintiffs' application for direct appellate review and now affirm the judgment for the defendant.

We start with the established principle that intentional conduct cannot be negligent conduct and that negligent conduct cannot be intentional conduct. The only evidence of any conduct of the defendant on which liability could be based, on any theory, is that the defendant intentionally put a firecracker in one of Maurice's sneakers and lit the firecracker.

The defendant's conduct was a battery, an intentional tort. See Restatement (Second) of Torts §13 (1965) ("An actor is subject to liability to another for battery if [a] he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and [b] a harmful contact with the person of the other directly or indirectly results"); 1 F.V. Harper, F. James, Jr., O.S. Gray, Torts §3.3, at 272-273 (2d ed. 1986) ("to constitute a battery, the actor must have intended to bring about a harmful or offensive contact or to put the other party in apprehension thereof. A result is intended if the act is done for the purpose of accomplishing the result or with knowledge that to a substantial

certainty such a result will ensue" [footnote omitted]); W.L. Prosser & W.P. Keeton, Torts, §9, at 41 (5th ed. 1984) ("The act [of the defendant] must cause, and must be intended to cause, an unpermitted contact").

The intentional placing of the firecracker in Maurice's sneaker and the intentional lighting of the firecracker brought about a harmful contact that the defendant intended. The defendant may not have intended to cause the injuries that Maurice sustained. The defendant may not have understood the seriousness of his conduct and all the harm that might result from it. These facts are not significant, however, in determining whether the defendant committed a battery. See Horton v. Reaves, 186 Colo. 149, 155, 526 P.2d 304 (1974) ("the extent of the resulting harm need not be intended, nor even foreseen"). The only permissible conclusion on the uncontroverted facts is that the defendant intended an unpermitted contact. . . .

NOTES TO WATERS v. BLACKSHEAR

1. ***Parties and Pleadings.*** The person who brings an issue to a court's attention in a tort case is usually called the *plaintiff* or *petitioner* or *complainant.* The person whose conduct a plaintiff believes has caused or is about to cause an injury is usually called a *defendant* or *respondent.* A lawsuit begins with written documents called *pleadings.* A plaintiff files a formal written document called a *complaint,* stating that a defendant has done (or is doing) something for which tort law provides a remedy. The defendant responds to the complaint in a formal written *answer.* The answer may dispute the plaintiff's description of the defendant's actions. On the other hand, a defendant's answer may agree with the plaintiff's description of the defendant's actions but argue either that: (1) tort law allows those actions; or (2) tort law ordinarily forbids those actions but that something about the plaintiff's conduct or some other aspect of the case should prevent the court from ruling in the plaintiff's favor.

2. ***Plaintiff's Characterizations of Facts and Legal Doctrines.*** Every tort case must have a *legal theory* and a *factual theory.* A legal theory is a statement of the type of tort that the plaintiff claims the defendant committed. A legal theory determines what the plaintiff must prove to obtain the remedy he or she seeks. The plaintiff's choice of legal theory determines what facts are relevant. A factual theory is a statement of what caused the plaintiff's injury, including a statement of what the defendant did or did not do in the context of the significant circumstances related to the injury. A plaintiff will win a tort case if: (1) the plaintiff can persuade the trier of fact (the jury, or the judge in a case tried without a jury) that, as a matter of historical fact, some events occurred; and (2) the jurisdiction's legal doctrines support the conclusion that when events of the type the plaintiff described have occurred, a plaintiff is entitled to a remedy.

In *Waters,* the legal theory at stake on appeal involved the tort of battery. The plaintiff had sought recovery on another theory, negligence, probably because the defendant was covered by an insurance policy that would pay damages for negligent conduct but not for intentional torts. If the defendant's conduct satisfied the requirements for battery, then the plaintiff's negligence claim had to fail. What facts and/or events must a party prove to have occurred to support a finding that a battery occurred? What was the factual theory (presented by the defendant) to support a finding of battery? What facts did the defendant claim were true and sufficient to support a finding that the defendant's conduct was a battery?

3. *Variety of Legal Theories.* A person may act without intending to invade the legally protected interests of another. If the defendant carelessly dropped the firecracker and it happened to fall into Waters's shoe, there would be no battery. There might, however, be a tort in these situations based on another legal theory such as recklessness or negligence. Learning tort law involves learning which legal theory fits the facts of a case.

4. *Variety of Sources of Law.* The *Waters* court relied on several types of authority in reaching its conclusion: the Restatement (Second) of Torts, two treatises on tort law, and a decision from another court. Judges and lawyers (and law students) regularly rely on all of these resources to find accurate statements of the law. Statutes and regulations are additional sources of law discussed in this book.

5. *Restatements of Tort Law.* The Restatement (Second) of Torts is a publication of a private organization called the American Law Institute (ALI). Members of the ALI are prominent judges, lawyers, and law professors. The ALI has prepared a large number of Restatements of the law for different fields of law. The Restatements are intended to codify common law doctrines as developed in state courts; where state court doctrines are not uniform, the authors of the Restatements either incorporate the doctrine they consider best or state that there are rival points of view on an issue. Restatement provisions are not binding authority in a state unless they have been adopted by that state's courts. The Restatements usually have had great persuasive power, though, because of the prestige of the members of the committees that have produced them and because of the quality of the analysis they have presented. A Restatement (Third) of Torts is currently being produced by the ALI.

POLMATIER v. RUSS

537 A.2d 468 (Conn. 1988)

GLASS, A.J. . . .

The plaintiff, Dorothy Polmatier, executrix of the estate of her deceased husband, Arthur R. Polmatier, brought this action against the defendant, Norman Russ, seeking to recover damages for wrongful death. The state trial referee, exercising the power of the Superior Court, rendered judgment for the plaintiff. The defendant has appealed from that judgment. We find no error.

The trial court's memorandum of decision and the record reveal the following undisputed facts. On the afternoon of November 20, 1976, the defendant and his two month old daughter visited the home of Arthur Polmatier, his father-in-law. Polmatier lived in East Windsor with his wife, Dorothy, the plaintiff, and their eleven year old son, Robert. During the early evening Robert noticed a disturbance in the living room where he saw the defendant astride Polmatier on a couch beating him on the head with a beer bottle. Robert heard Polmatier exclaim, "Norm, you're killing me!" and ran to get help. Thereafter, the defendant went into Polmatier's bedroom where he took a box of 30-30 caliber ammunition from the bottom drawer of a dresser and went to his brother-in-law's bedroom where he took a 30-30 caliber Winchester rifle from the closet. He then returned to the living room and shot Polmatier twice, causing his death.

About five hours later, the defendant was found sitting on a stump in a wooded area approximately one half mile from the Polmatier home. The defendant was naked

and his daughter was in his arms wrapped in his clothes, and was crying. Blood was found on his clothes, and he had with him the Winchester rifle, later determined to be the murder weapon.

The defendant was taken to a local hospital and was later transferred to Norwich Hospital. While in custody he was confined in Norwich Hospital or the Whiting Forensic Institute. The defendant was charged with the crime of murder pursuant to General Statutes §53a-54a(a), but was found not guilty by reason of insanity pursuant to General Statutes §53a-13. Dr. Walter Borden, a psychiatrist, testified at both the criminal and this civil proceeding regarding the defendant's sanity. In the present civil case Borden testified that, at the time of the homicide, the defendant was suffering from a severe case of paranoid schizophrenia that involved delusions of persecution, grandeur, influence and reference, and also involved auditory hallucinations. He concluded that the defendant was legally insane and could not form a rational choice but that he could make a schizophrenic or crazy choice. He was not in a fugue state. The trial court found that at the time of the homicide the defendant was insane. . . .

After a trial to the court, the court found for the plaintiff . . . and awarded compensatory damages. On appeal the defendant claims that the trial court erred in failing to apply the following two-pronged analysis to his claim: first, whether the defendant intended the act which produced the injury; and second, whether he intended the resulting injury. . . .

. . . The first prong is whether the defendant intended the act that produced the injury. The defendant argues that for an act to be done with the requisite intent, the act must be an external manifestation of the actor's will. The defendant specifically relies on the Restatement (Second) of Torts §14, comment b, for the definition of what constitutes an "act," where it is stated that "a muscular movement which is purely reflexive or the convulsive movements of an epileptic are not acts in the sense in which that word is used in the Restatement. So too, movements of the body during sleep or while the will is otherwise in abeyance are not acts. An external manifestation of the will is necessary to constitute an act, and an act is necessary to make one liable [for a battery]. . . ." The defendant argues that if his "activities were the external manifestations of irrational and uncontrollable thought disorders these activities cannot be acts for purposes of establishing liability for assault and battery." We disagree.

We note that we have not been referred to any evidence indicating that the defendant's acts were reflexive, convulsive or epileptic. Furthermore, under the Restatement (Second) of Torts §2, "act" is used "to denote an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended." Comment b to this section provides in pertinent part: "A muscular reaction is always an act unless it is a purely reflexive reaction in which the mind and will have no share." Although the trial court found that the defendant could not form a rational choice, it did find that he could make a schizophrenic or crazy choice. Moreover, a rational choice is not required since "[a]n insane person may have an intent to invade the interests of another, even though his reasons and motives for forming that intention may be entirely irrational." 4 Restatement (Second), Torts §895J, comment c. The following example is given in the Restatement to illustrate the application of comment c: "A, who is insane, believes that he is Napoleon Bonaparte, and that B, his nurse, who confines him in his room, is an agent of the Duke of Wellington, who is endeavoring to prevent his arrival on the field of Waterloo in time to win the battle.

Seeking to escape, he breaks off the leg of a chair, attacks B with it and fractures her skull. A is subject to liability to B for battery."

We recognize that the defendant made conflicting statements about the incident when discussing the homicide. At the hospital on the evening of the homicide the defendant told a police officer that his father-in-law was a heavy drinker and that he used the beer bottle for that reason. He stated he wanted to make his father-in-law suffer for his bad habits and so that he would realize the wrong that he had done. He also told the police officer that he was a supreme being and had the power to rule the destiny of the world and could make his bed fly out of the window. When interviewed by Dr. Borden, the defendant stated that he believed that his father-in-law was a spy for the red Chinese and that he believed his father-in-law was not only going to kill him, but going to harm his infant child so that he killed his father-in-law in self-defense. The explanations given by the defendant for committing the homicide are similar to the illustration of irrational reasons and motives given in comment c to §895J of the Restatement, set out above.

Under these circumstances we are persuaded that the defendant's behavior at the time of the beating and shooting of Polmatier constituted an "act" within the meaning of comment b, §2, of the Restatement. Following the majority rule in this case, we conclude that the trial court implicitly determined that the defendant committed an "act" in beating and shooting Polmatier. Accordingly, the trial court did not err as to the first prong of the defendant's claim.

The second prong of the defendant's claim is that the trial court erred in failing to determine whether the defendant intended the resulting injury to the decedent. The defendant argues in his brief that "[t]he trial court must satisfy the second prong of its intentional tort analysis with a finding that the defendant acted 'for the *purpose* of causing' [1 Restatement (Second) of Torts §13, comment d] or with a '*desire* to cause' [1 Restatement (Second) of Torts §8A] the resulting injury." (Emphasis added.) This argument is more persuasive in its application to proof of the elements of crimes than in its relation to civil liability.

In the criminal law the "act" and the "intent" of the actor are joined to determine the culpability of the offender. For example, the allegations of the essential elements of murder are as follows: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person." General Statutes §53a-54a(a). The defendant claims that "[i]ntent need not involve ill will or malice, but must include a design, purpose and intent to do wrong and inflict the injury." Under the Restatement, "intent" is used "to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." 1 Restatement (Second), Torts §8A. Comment b to §8A of the Restatement provides in pertinent part: "All consequences which the actor desires to bring about are intended, as the word is used in this Restatement. Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." We have stated that "[i]t is not essential that the precise injury which was done be the one intended." Alteiri v. Colasso, 168 Conn. 329, 334, 362 A.2d 798 (1975).

As discussed above, the defendant gave the police and Borden several reasons why he killed Polmatier. Under comment c to §895J of the Restatement, it is not necessary for a defendant's reasons and motives for forming his intention to be rational in order

for him to have the intent to invade the interests of another. Considering his statements to the police and to Borden that he intended to punish Polmatier and to kill him, we are persuaded that the defendant intended to beat and shoot him. . . .

There is no error.

NOTES TO POLMATIER v. RUSS

1. *The Act Requirement.* The *Polmatier* court described a two-step process to determine if a defendant committed an intentional tort. The first question is whether the defendant "intended the act that produced the injury." This is the *act requirement.* Plaintiffs must satisfy the act requirement in all tort cases. The second question is whether the defendant "intended the resulting injury to the decedent." This is the *intent requirement.* Plaintiffs are obligated to satisfy the intent requirement only in intentional tort cases.

The act must be an *external manifestation* of the *actor's will.* This definition of "act" has two parts. First, an external manifestation is something that can be perceived. Even "standing still" or "doing nothing" can be perceived. What external manifestations were significant in establishing the plaintiff's case? Second, the movement or failure to move must result from the actor's will. A movement or failure to move when asleep ("or while the will is otherwise in abeyance") is not a manifestation of will. What reasons support the court's treatment of Russ's movements as manifestations of his will?

2. *The Intent Requirement.* The intent requirement for all intentional torts is described in Restatement (Second) of Torts §8A: "Intent . . . denotes that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."

For battery, the plaintiff must establish that the defendant intended to cause a contact that is harmful or offensive. Intent may be shown by demonstrating that the actor either (a) desired the harmful or offensive contact or (b) believed that the harmful or offensive contact was substantially certain to result. Other intentional torts protect different interests, and their intent requirements are modified accordingly.

What evidence supports a finding that Russ desired to invade Polmatier's interest in being free from harmful contact?

3. *Intending the Precise Injury.* As the *Polmatier* court stated, it is not essential that the precise injury that was done be the one intended. The tort of battery only requires that the actor intend a conduct that is harmful or offensive. Similarly, in Waters v. Blackshear, the court observed that for determining whether the defendant committed a battery it did not matter that the defendant may not have intended to cause the injuries that the plaintiff sustained, known the seriousness of the conduct, or desired all the harm that might result.

4. *Distinctions Between Tort Law and Criminal Law.* A person's conduct may be both a tort and a crime. For example, when one person shoots and kills another, the injury might be called a battery in tort law and murder in criminal law.

Different rules govern the treatment of torts and crimes. In criminal cases, the decision to initiate a case is made by a public official (a prosecutor); in tort cases it is made by a private individual (a plaintiff). The degree of persuasiveness the prosecutor

must achieve in a criminal case is usually "beyond a reasonable doubt." The plaintiff in a tort case need only satisfy a "preponderance of the evidence" standard of persuasiveness. The sanctions usually imposed in criminal law are deprivation of a defendant's liberty by imprisonment (or by lesser requirements such as probation) or a fine that must be paid to the government. Tort law requires a defendant to pay money to a plaintiff and may also restrict a defendant's future conduct.

When a court orders a torts defendant to pay damages, it is said that the defendant *has been found liable*. In criminal law, when a court fines or jails a criminal defendant, it is said that the defendant *has been found guilty*. A torts case typically involves issues of liability rather than guilt.

5. *Problems: Desire or Substantial Certainty*

A. A plaintiff can satisfy the intent requirement for battery with proof that the defendant either (1) *desired* to cause a contact that was harmful or offensive or (2) *was substantially certain* that such a contact would occur. In a case involving the following facts, the court concluded that the defendant was substantially certain that he would injure the plaintiff. Which facts provide support for that conclusion?

> Regina Labadie was injured by a snowball thrown by William Semler, who was 17 years old. William testified that Regina Labadie pulled up in front of William's house and began yelling obscenities about his mother, Patricia Semler. William testified that he asked Labadie to leave many times but she refused. William further testified that because he wanted Labadie to "shut up and leave," he reached down to the side of the road and made a snowball. He then threw it at Labadie from a distance of ten to fifteen feet, hitting her in the face. William specifically testified that he did not intend to injure Labadie. William was an accomplished high school athlete in football and baseball. William admitted that he was aware that Labadie's car window was down. William took no precautions to avoid hitting Labadie in the face.

See Labadie v. Semler, 585 N.E.2d 862 (Ohio Ct. App. 1990).

B. Which definition of "intent"—desire or substantial certainty—is most convincing in the following case?

> Betty England was an employee at Dairy Queen who allegedly suffered humiliation and embarrassment as a result of an act of her manager, Larry Garley, though she suffered no physical harm. Betty testified that Larry used profane language when he told her to prepare the hamburgers correctly. She stated Larry, while looking straight at her, then threw the hamburger, which hit her on the leg, and that she argued with him about the matter and several patrons observed the incident, which caused her to cry and become emotionally upset. Larry testified he threw the hamburger toward a trash can because he was disgusted with the way the hamburgers were being prepared. He stated he did not see where the hamburger hit, but noticed some of it splattered on Betty and another employee. He testified he did not intend to hit anyone with the hamburger. He stated he and Betty argued about the matter and he told Betty to go home. The other employee did not see Larry throw the hamburger, but observed a hamburger hit the floor and splatter mayonnaise and mustard on her and Betty. The court found that the intent requirement for battery was met.

See England v. S&M Foods, Inc., 511 So. 2d 1313 (La. Ct. App. 1987).

> ***Perspective: Historical Developments***
>
> The distinction between intentional torts and nonintentional torts derives from legal theories used in the King's Court in England in the thirteenth century. Intentional torts were included in a theory called *trespass vi et armis*, which is an interference with a legally protected interest of another "by force and arms." Liability was imposed for harms caused by direct physical force, such as hitting another over the head with a log. Indirectly caused or *consequential* harms, such as leaving a log in the road, were included in a different theory, called "trespass on the case." In early English jurisprudence, *trespass vi et armis* did not require proof of intent to cause an injury and trespass on the case did not require proof of careless conduct, as intentional torts and the tort of negligence do now. The only available defense was proof that it was not the defendant's act that caused the harm, but rather the act of a third person or an act of God. The act requirement remains in modern law, but a fault requirement has been added: intent for the intentional torts and conduct falling short of some standard of carefulness for unintentional torts. See generally Elizabeth C. Price, *Toward a Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault*, 61 Tenn. L. Rev. 1277 (1994).

B. Intending Contact That Is Harmful

Nelson v. Carroll considers whether an actor who commits a battery may be liable for harms the actor did not intend and could not reasonably have foreseen. It also shows how a plaintiff's factual theory relates to the harm for which the plaintiff seeks damages.

NELSON v. CARROLL

735 A.2d 1096 (Md. 1999)

CHASANOW, J. . . .

We summarized the essential facts of this case [on a previous occasion when the case was before the court]:

> Carroll shot Nelson in the stomach in the course of an altercation over a debt owed to Carroll by Nelson. The shooting occurred on the evening of July 25, 1992, in a private nightclub in Baltimore City that Nelson was patronizing. Carroll, who was described as being a "little tipsy," entered the club and demanded repayment by Nelson of the $3,800 balance of an $8,000 loan that Carroll had made to Nelson. Nelson immediately offered to make a payment on account but that was unsatisfactory to Carroll. At some point Carroll produced a handgun from his jacket.
>
> Carroll did not testify. There were only two witnesses who described how the shooting came about, Nelson and Prestley Dukes (Dukes), a witness called by Carroll. Dukes testified that when Nelson did not give Carroll his money Carroll hit Nelson on the side of the head with the handgun and that, when Nelson did not "respond,"

> Carroll "went to hit him again, and when [Carroll] drawed back, the gun went off." Nelson, in substance, testified that he tendered $2,300 to Carroll, that Carroll pulled out his pistol and said that he wanted all of his money, and that the next thing that Nelson knew, he heard a shot and saw that he was bleeding.

Nelson v. Carroll, 711 A.2d 228, 229 (Md. Ct. Sp. App. 1998). . . .

Nelson's sole contention before this Court is that he was entitled to a motion for judgment on the issue of liability for battery. He contends that the evidence that Carroll committed a battery is uncontested. Specifically, Nelson asserts that Carroll's primary defense on the issue of liability — that the discharge of the handgun was accidental — is unavailable under the circumstances of this case. . . .

A motion for judgment may be made at the close of evidence offered by an opposing party or after all the evidence has been presented. In considering a motion for judgment in a jury trial, "the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made." Md. Rule 2-519(b). Our task, therefore, is to determine whether, considering the essential elements of a tort claim for battery, there is any dispute over material facts from which a jury could conclude that Carroll had not committed a battery when he shot Nelson. Since the only disputed fact relates to whether Carroll shot Nelson accidentally as he was striking him, we need only address the narrow question of whether, under the facts of this case, the defense that the shot was fired accidentally is capable of exonerating Carroll of liability.

A battery occurs when one intends a harmful or offensive contact with another without that person's consent. See Restatement (Second) of Torts §13 & cmt. d (1965). . . . A battery may occur through a defendant's direct or indirect contact with the plaintiff. In this case, Carroll unquestionably committed a battery when he struck Nelson on the side of his head with his handgun. Likewise, an indirect contact, such as occurs when a bullet strikes a victim, may constitute a battery. "[I]t is enough that the defendant sets a force in motion which ultimately produces the result. . . ." Prosser & Keeton, The Law of Torts §9, at 40 (5th ed. 1984). Thus, if we assume the element of intent was present, Carroll also committed a battery when he discharged his handgun, striking Nelson with a bullet. . . .

Carroll's defense that he accidentally discharged the handgun requires us to examine the "intent" requirement for the tort of battery. It is universally understood that some form of intent is required for battery. See Restatement (Second) of Torts §13 (1965) ("An actor is subject to liability to another for battery if . . . he acts *intending* to cause a harmful or offensive contact. . . ." (Emphasis added); Prosser & Keeton, The Law of Torts §9, at 39 (5th ed. 1984) (Battery requires "an act *intended* to cause the plaintiff . . . to suffer such a contact. . . ." (Emphasis added)); Harper, James & Gray, The Law of Torts §3.3, at 3:9 (3d ed. 1996) ("[T]o constitute a battery, the actor must have *intended* to bring about a harmful or offensive contact or to put the other party in apprehension thereof." (Emphasis added) (footnote omitted)). It is also clear, however, that the intent required is not a specific intent to cause the type of harm that occurred:

> The defendant's liability for the resulting harm extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim.

Prosser & Keeton, The Law of Torts, §9, at 40 (5th ed. 1984).

On the other hand, a purely accidental touching, or one caused by mere inadvertence, is not enough to establish the intent requirement for battery. See, e.g., Steinman v. Laundry Co., 109 Md. 62, 66, 71 A. 517, 518 (1908) (finding a lack of intent for battery where "[t]here [was] no pretense here that this contact of his knee with hers was wilful, angry or insolent, and *the only inference from her testimony is that it was purely accidental,* as in the case of one stumbling, and, in his fall coming in contact with the person of another." (Emphasis added.)

The intent element of battery requires not a specific desire to bring about a certain result, but rather a general intent to unlawfully invade another's physical well-being through a harmful or offensive contact or an apprehension of such a contact. As Professors Harper, James, and Gray observe in their treatise, the intent element of battery must be carefully analyzed:

> It has been seen that to constitute a battery a defendant's conduct must be characterized by the factor of intent. But it is necessary to analyze the mental element more carefully. All that is necessary is (a) that the actor engage in volitional activity and (b) that he intend to violate the legally protected interest of another in his person. . . .

Harper, James & Gray, The Law of Torts §3.3, at 3:13-14 (3d ed. 1996).

Thus, innocent conduct that accidentally or inadvertently results in a harmful or offensive contact with another will not give rise to liability, but one will be liable for such contact if it comes about as a result of the actor's volitional conduct where there is an intent to invade the other person's legally protected interests. . . .

The only reasonable inference that can be drawn from the circumstances of this shooting, which in essence are uncontested, is that Carroll's actions evidenced an intent to commit a battery. Carroll presented no evidence disputing the fact that he carried a loaded handgun and that he struck Nelson on the head with the gun. The merely speculative evidence upon which Carroll claims the shot was an accident was Dukes' testimony that when Carroll "went to hit him again . . . the gun went off." In contrast, the evidence is undisputed that Carroll possessed a handgun which he openly carried into the nightclub, that Carroll struck Nelson with the handgun, and that the handgun discharged simultaneously as Carroll went to strike Nelson again. Indeed, taking every possible inference in favor of Carroll, the gunshot occurred as he attempted to strike Nelson with the gun. Under such circumstances, no reasonable inference can be drawn that Carroll lacked the required intent to commit the battery. . . .

The law imposes upon Carroll the responsibility for losses associated with his wrongful actions. It is of no import that he may not have intended to actually shoot Nelson since the uncontested facts demonstrate that he did intend to invade Nelson's legally protected interests in not being physically harmed or assaulted. He violated those interests by committing a . . . battery when he threatened Nelson with the handgun and struck Nelson on the head. Even assuming as we must that Carroll did not intend to inflict the particular damages arising from the gunshot wound, it is more appropriate that those losses fall to Carroll as the wrongdoer than to Nelson as the innocent victim. Therefore, the motion for judgment as to liability should have been granted, with the only question remaining for the jury being the damages resulting from the discharge of the gun.

NOTES TO NELSON v. CARROLL

1. ***Identifying Significant Facts.*** In Nelson v. Carroll, the defendant's actions included: (1) moving a gun toward the plaintiff and hitting him with it; and (2) moving a gun toward the plaintiff in a way that resulted in a bullet wound. Assuming that each of these actions could be characterized as a battery, from the plaintiff's point of view which one provides the better basis for a lawsuit? From which action did the plaintiff suffer the greater harm?

2. ***Defining "Injury" and "Harm."*** Even if the defendant in *Nelson* had no intention to hit the plaintiff with a bullet, the defendant was still subject to liability for battery. As the court stated, "the intent required is not a specific intent to cause the type of harm that occurred."

The Restatement (Second) of Torts distinguishes between an *injury* and a *harm*. Section 7 says that, to commit an intentional tort, an actor needs only to intend an injury. An *injury* "denotes the invasion of any legally protected interest of another."

A *harm* "denotes the existence of loss or detriment in fact of any kind to a person." An injury causes a harm if the injury actually has a detrimental effect on the plaintiff. According to the Restatement (Second) of Torts §7 comment b, harm is

> the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person, or in physical things, and also the detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests.

The harm Carroll had in mind when he raised the gun was different from the harm Nelson suffered. In an intentional tort case, the plaintiff is required only to prove that the defendant inflicted a legally recognized injury. Damages are measured, however, by the amount of harm suffered.

3. ***Direct and Indirect Contacts.*** The simplest battery cases involve direct contact between some part of the defendant's body and some part of the plaintiff's body (such as a contact between a defendant's fist and a plaintiff's chin). As *Nelson* shows, however, contact between the plaintiff's body and something put in motion by the defendant (e.g., a bullet) can also support a battery claim.

How should tort law respond if a defendant does not cause contact with the plaintiff's body but causes contact with something the plaintiff is holding or something the plaintiff is wearing? A treatise states:

> Thus, if all other requisites of a battery against the plaintiff are satisfied, contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in the plaintiff's hand, will be sufficient; and the same is true of the chair in which the plaintiff sits, the horse or the car the plaintiff rides or occupies, or the person against whom the plaintiff is leaning.

W. Page Keeton et al., Prosser & Keeton on the Law of Torts §9, at 39-40 (5th ed. 1984).

4. ***Problem: Factual Theories and Intent to Contact.*** In the following case, on what conduct does the plaintiff base a claim? Is battery an appropriate legal theory?

> Plaintiff, awaiting her husband's arrival, was sitting in a booth at Paul's Barbecue at 2:00 a.m. with her sister-in-law. After they had been there a short time, they were

joined in the booth by a witness to the events, and a few minutes later the defendant came over. The plaintiff had a cup of coffee and a glass of water on the table in front of her when the defendant arrived; the defendant had a cup of coffee with him. The defendant told plaintiff he knew her from somewhere; she said that she did not know him and asked him to leave the table. Plaintiff stated she did not watch the defendant as he got up to leave; all she recalled was that he called her a name, and the next thing she knew was that she had been hit on the head, apparently by a water glass, and was covered by blood. She had a cup of coffee in her hand at the time and stated she threw it at defendant after she had been hit. The witness testified that defendant stood up, and after calling plaintiff a name, either threw the glass at her, or threw the water at her and the glass slipped out of his hand, and that after that plaintiff threw the coffee at defendant. The defendant testified that after standing up and calling plaintiff a name he was hit by hot coffee, and the glass then flew out of his hand. The defendant testified that he did not intentionally throw the water glass at plaintiff, but rather that it was an accident.

See Di Giorgio v. Indiveri, 10 Cal. Rptr. 3 (Cal. Dist. Ct. App. 1960).

Perspective: Judgments as a Matter of Law

In some situations, our legal system permits the judge to award victory to a party in a lawsuit before the presentation of evidence, after the presentation of evidence, and even after a jury has decided the case. In general, these judicial actions are called *judgments as a matter of law.* The specific varieties of judgments as a matter of law are sometimes called *summary judgment, directed verdict,* and *judgment notwithstanding the verdict* (also called a motion for judgment N.O.V., which abbreviates the Latin *non obstante veredicto*). In *Nelson,* the court considered all of the evidence in the light most favorable to Carroll. That hardly seems fair. Our general sense is that the jury is supposed to weigh the evidence offered by both parties before reaching a verdict. Under some circumstances, however, one party may request that the court end the trial and decide the case in favor of that party.

For example, a court will grant a defendant's motion for a judgment if the plaintiff has failed to show any facts that would entitle the plaintiff to win. A defendant could move for a directed verdict in a battery case if there was no evidence that the defendant intended to contact the plaintiff. A plaintiff could move for a directed verdict if the defendant offered no evidence to contradict the plaintiff's evidence. If the judge grants the motion, the judge enters judgment for the moving party, which means that the party making the motion wins the lawsuit without the case going to the jury.

Nelson's motion for judgment was based on the argument that Carroll had presented no acceptable defense. Carroll's only defense was that the gun went off accidently. The appellate court said that the motion should be granted because an unintended or accidental harm that accompanies an intended contact (Carroll did intend to hit Nelson with the pistol) is still a battery. The court concluded that, *even if everything Carroll said was true,* Carroll would still have to lose. The court will grant the motion only if there is no uncertainty about the facts involved — only if the case can be decided by looking at the law.

A motion for a *directed verdict* comes before the jury has decided the case. A motion for *judgment notwithstanding the verdict* comes after the jury has decided the case. In either case, the court will grant the motion only when there is just one legal conclusion that can reasonably be drawn from the facts. In many cases in this book, appellate courts analyze whether the facts were so clear that the trial court could decide the case without giving the case to the jury. Other cases are situations in which appellate courts are considering whether the juries' conclusions were adequately based on the evidence presented at trial.

C. Intending a Contact That Is Offensive

Battery actions are based on claims that a defendant intended to cause a contact that is harmful *or* offensive. Leichtman v. WLW Jacor Communications, Inc. and Andrews v. Peters both involve claims that the defendant intended a contact that was offensive. Consider whether the definitions the courts use and the ways the courts apply them seem sensible, and whether they provide a basis for predicting results when plaintiffs attempt to characterize other kinds of conduct as offensive. White v. Muniz considers whether the defendant must intend a contact that turns out to be harmful or offensive or whether the defendant must intend not only the contact but also to cause harm or offense.

LEICHTMAN v. WLW JACOR COMMUNICATIONS, INC.

634 N.E.2d 697 (Ohio Ct. App. 1994)

PER CURIAM.

The plaintiff-appellant, Ahron Leichtman, appeals from the trial court's order dismissing his complaint against the defendants-appellees, WLW Jacor Communications ("WLW"), William Cunningham and Andy Furman, for battery. . . .

In his complaint, Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress." . . .

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other . . . , and
>
> (b) a harmful contact with the person of the other directly or indirectly results[; or]
>
> (c) an offensive contact with the person of the other directly or indirectly results.

In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." Love v. Port Clinton (1988), 524 N.E.2d 166, 167. It has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness." State v. Phipps (1979), 389 N.E.2d 1128, 1131. Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact.

As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury—that others will commit no intentioned aggressions upon them." Pound, An Introduction to the Philosophy of Law (1922) 169. . . .

Judgment accordingly.

ANDREWS v. PETERS

330 S.E.2d 638 (N.C. Ct. App. 1985)

Becton, J. . . .

The facts, briefly stated, are as follows. The plaintiff, Margaret H. Andrews, was injured on 27 September 1979 when her co-employee at Burroughs Wellcome Corporation, the defendant, August Richard Peters, III, walked up behind her at work and tapped the back of her right knee with the front of his right knee, causing her knee to buckle. Andrews lost her balance, fell to the floor, and dislocated her right kneecap. Andrews instituted this action against Peters for intentional assault and battery. She sought compensation for medical expenses, loss of income, pain and suffering, permanent disability, and punitive damages.

The trial judge submitted the case to the jury on the theory of battery. The jury entered a verdict in favor of Andrews on liability and awarded her $7,500 in damages. . . . Peters appeals. . . .

Peters contends that the trial court erred in denying his motions for a directed verdict at the close of Andrews' evidence and at the close of all the evidence. . . . Peters alleges that there is no evidence that he intended to injure Andrews. As summarized in Peters' brief:

> [Peters] testified that he did not intend to be rude or offensive in tapping [Andrews] behind her knees. He stated that the same thing had only moments before been done to him by a co-worker and that it struck him as fun. He stated that he tried to catch [Andrews] to prevent her from striking the floor, that he was shocked by what had happened, and that he immediately apologized to [Andrews] and attempted to help her.

Peters' construction of the broad language in the . . . earlier case law ignores the nature of the intent required for an intentional tort action.

> The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable

> although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good.

W. Prosser & W. Keeton, The Law of Torts Sec. 8, at 36-7 (5th ed. 1984). . . .

Peters does not deny that he intended to tap Andrews behind the knee. Although tapping Andrews' knee was arguably not in and of itself a harmful contact, it easily qualifies as an offensive contact. "A bodily contact is offensive if it offends a reasonable sense of personal dignity." Restatement, supra, Sec. 19 and comments. . . .

The trial judge phrased the issue of liability succinctly: "Did the defendant commit a battery upon the plaintiff on September 27, 1979?" We note that the jury instructions are neither included in the record nor are they the subject of an assignment of error. We are therefore left to presume that the trial court instructed the jury correctly on the theory of battery. From the jury's verdict, we conclude that the jury found that Peters intended to cause a harmful or offensive contact, i.e., the tapping of Andrews' knee, and that he should therefore be liable for the unforeseen results of his intentional act.

Since there was evidence of the requisite intent to submit the case to the jury on the theory of battery, we hold that the trial court did not err in denying Peters' motions for a directed verdict. . . .

NOTES TO LEICHTMAN v. WLW JACOR COMMUNICATIONS, INC. AND ANDREWS v. PETERS

1. ***Offensive Contact.*** According to the Restatement (Second) of Torts §19, "a bodily contact is *offensive* if it offends a reasonable sense of dignity." Comment a to that section says:

> In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

Why were the contacts suffered by Leichtman and Andrews offensive?

2. ***Problem: Contextual Issues for Offensiveness.*** How would the Restatement's concept of "social usages prevalent at the time and place" apply in the following situations?

A. Defendant saw plaintiff, a stranger, stand up at a table in a fancy restaurant and cough loudly three times. Defendant rushed from another table behind the plaintiff and grabbed the plaintiff from behind to execute the Heimlich anti-choking maneuver.

B. Defendant saw plaintiff, a neighbor, receive a prize at a local art fair. Defendant rushed up to the plaintiff and gave the plaintiff a tight hug that lasted about one minute.

In either of these situations, would assigning a particular gender to any of the individuals affect your analysis?

3. ***Subjective and Objective Tests.*** The intent test for any intentional tort requires the factfinder to determine what was going on in the defendant's mind—specifically, what the defendant desired or knew. For battery, the factfinder must conclude that the

defendant desired to contact the plaintiff (or to cause the plaintiff to anticipate imminent contact) or was substantially certain that a contact (or anticipation of contact) would occur as a result of the defendant's act. This intent test is called a *subjective test* because it focuses on what the individual defendant desired or knew.

The test for offensiveness requires the factfinder to evaluate a defendant's conduct in terms of societal standards and a "reasonable sense of dignity." This offensiveness test is called an *objective test*, because it focuses on a general societal consensus rather than on what the individual defendant desired or knew. An act can be offensive regardless of what the defendant personally thought about its character.

To define "harmful" contact, the Restatement again uses an objective test. The Restatement (Second) of Torts §16 defines "bodily harm" as "any physical impairment of the condition of another's body, or physical pain or illness." Comment a adds: "There is an impairment of the physical condition of another's body if the structure or function of any part of the other's body is altered to any extent even though the alteration causes no other harm." The Restatement (Second) of Torts §15 comment b concludes, however, that "[t]he minute disturbance of the nerve centers caused by fear, shock or other emotions does not constitute bodily harm" unless some other effect on the body (such as an illness) results.

Perspective: Motion for a Directed Verdict

In Andrews v. Peters, the defendant's motion for a directed verdict was based on his claim that Andrews presented no evidence that he had intended to injure her. Following the procedure described in the Perspective Note following Nelson v. Carroll, the trial court considered the facts in the light most favorable to Andrews and then denied Peters's motion. Did either the trial court or the appellate court believe that no reasonable juror could decide that the defendant's conduct was a harmful or offensive contact?

WHITE v. MUNIZ

999 P.2d 814 (Colo. 2000)

KOURLIS, J. . . .

In October of 1993, Barbara White placed her eighty-three year-old grandmother, Helen Everly, in an assisted living facility, the Beatrice Hover Personal Care Center. Within a few days of admission, Everly started exhibiting erratic behavior. She became agitated easily, and occasionally acted aggressively toward others.

On November 21, 1993, the caregiver in charge of Everly's wing asked Sherry Lynn Muniz, a shift supervisor at Hover, to change Everly's adult diaper. The caregiver informed Muniz that Everly was not cooperating in that effort. This did not surprise Muniz because she knew that Everly sometimes acted obstinately. Indeed, initially Everly refused to allow Muniz to change her diaper, but eventually Muniz thought that Everly relented. However, as Muniz reached toward the diaper, Everly struck Muniz on the jaw and ordered her out of the room.

The next day, Dr. Haven Howell, M.D. examined Everly at Longmont United Hospital. Dr. Howell deduced that "she [had] a progressive dementia with characteristic gradual loss of function, loss of higher cortical function including immediate and short term memory, impulse control and judgement." She diagnosed Everly with "[p]rimary degenerative dementia of the Alzheimer type, senile onset, with depression."

In November of 1994, Muniz filed suit alleging assault and battery[3] against Everly, and negligence against Barbara and Timothy White. The case proceeded to a jury trial on March 17, 1997. While arguing outside the presence of the jury for specific jury instructions, the parties took differing positions on the mental state required to commit the alleged intentional torts. Muniz requested the following instruction: "A person who has been found incompetent may intend to do an act even if he or she lacked control of reason and acted unreasonably." White tendered a different instruction:

> A person intends to make a contact with another person if he or she does an act for the purpose of bringing about such a contact, whether or not he or she also intends that the contact be harmful or offensive. The intent must include some awareness of the natural consequences of intentional acts, and the person must appreciate the consequences of intentional acts, and the person must appreciate the offensiveness or wrongfulness of her acts.

The trial court settled on a slightly modified version of White's instruction. It read:

> A person intends to make a contact with another person if she does an act for the purpose of bringing about such a contact, whether or not she also intends that the contact be harmful or offensive.
>
> The fact that a person may suffer from Dementia, Alzheimer type, does not prevent a finding that she acted intentionally. You may find that she acted intentionally if she intended to do what she did, even though her reasons and motives were entirely irrational. *However, she must have appreciated the offensiveness of her conduct.*

(Emphasis added.) In selecting the instruction on intent, the trial court determined that Everly's condition rendered her mental state comparable to that of a child.

Muniz's counsel objected to the last sentence of the instruction, claiming that it misstated the law. He argued that the instruction improperly broadened the holding in Horton v. Reaves, 186 Colo. 149, 526 P.2d 304 (1974), where the supreme court held that an infant must appreciate the offensiveness or wrongfulness of her conduct to be liable for an intentional tort. The jury rendered verdicts in favor of Everly and White.

The court of appeals reversed the decision of the trial court and remanded the case for a new trial. The court of appeals reasoned that most states continue to hold mentally deficient plaintiffs liable for their intentional acts regardless of their ability to understand the offensiveness of their actions. "[W]here one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it." Muniz v. White, 979 P.2d 23, 25 (Colo. App. 1998). The court of appeals reasoned that insanity may not be asserted as a defense to an intentional tort, and thus concluded that the trial court erred in "instructing the jury that Everly must have appreciated the offensiveness of her conduct." Id. at 26.

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[3] For simplicity, we address the issues in this case in terms of the battery claim only. The same principles would apply in the assault context.

The question we here address is whether an intentional tort requires some proof that the tortfeasor not only intended to contact another person, but also intended that the contact be harmful or offensive to the other person.

State courts and legal commentators generally agree that an intentional tort requires some proof that the tortfeasor intended harm or offense. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts §8 (5th ed. 1984); Dan B. Dobbs, The Law of Torts §30 (2000). According to the Restatement (Second) of Torts,

> (1) An actor is subject to liability to another for battery if
>
> (a) he acts *intending to cause a harmful or offensive contact* with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) an offensive [or harmful] contact with the person of the other directly or indirectly results.
>
> (2) An act which is not done with the intention stated in Subsection (1, a) does not make the actor liable to the other for a mere offensive contact with the other's person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.

Restatement (Second) of Torts §18 (1965) (emphasis added).

Historically, the intentional tort of battery required a subjective desire on the part of the tortfeasor to inflict a harmful or offensive contact on another. Thus, it was not enough that a person intentionally contacted another *resulting* in a harmful or offensive contact. Instead, the actor had to understand that his contact would be harmful or offensive. The actor need not have intended, however, the harm that actually resulted from his action. Thus, if a slight punch to the victim resulted in traumatic injuries, the actor would be liable for all the damages resulting from the battery even if he only intended to knock the wind out of the victim.

Juries may find it difficult to determine the mental state of an actor, but they may rely on circumstantial evidence in reaching their conclusion. No person can pinpoint the thoughts in the mind of another, but a jury can examine the facts to conclude what another must have been thinking. For example, a person of reasonable intelligence knows with substantial certainty that a stone thrown into a crowd will strike someone and result in an offensive or harmful contact to that person. Hence, if an actor of average intelligence performs such an act, the jury can determine that the actor had the requisite intent to cause a harmful or offensive contact, even though the actor denies having such thoughts.

More recently, some courts around the nation have abandoned this dual intent requirement in an intentional tort setting, that being an intent to contact and an intent that the contact be harmful or offensive, and have required only that the tortfeasor intend a contact with another that *results* in a harmful or offensive touching. See Brzoska v. Olson, 668 A.2d 1355, 1360 (Del. 1995) (stating that battery is an intentional, unpermitted contact on another which is harmful or offensive; and that the intent necessary for battery is the intent to contact the person); White v. University of Idaho, 797 P.2d 108, 111 (1990) (determining that battery requires an intent to cause an unpermitted contact, not an intent to make a harmful or offensive contact). Under this view, a victim need only prove that a voluntary movement by the tortfeasor resulted in a contact which a reasonable person would find offensive or to which the victim did not consent. See University of Idaho, 797 P.2d at 111. These courts

would find intent in contact to the back of a friend that results in a severe, unexpected injury even though the actor did not intend the contact to be harmful or offensive. The actor thus could be held liable for battery because a reasonable person would find an injury offensive or harmful, irrespective of the intent of the actor to harm or offend.

Courts occasionally have intertwined these two distinct understandings of the requisite intent. See Brzoska, 668 A.2d at 1360 (approving the Restatement view of the intent element of a battery, but summarizing the rule as "the intentional, unpermitted contact upon the person of another which *is* harmful or offensive") (emphasis added); Keeton, supra, §8 (noting that applying the element of intent frequently confuses authorities). In most instances when the defendant is a mentally alert adult, this commingling of definitions prejudices neither the plaintiff nor the defendant. However, when evaluating the culpability of particular classes of defendants, such as the very young and the mentally disabled, the intent required by a jurisdiction becomes critical.

In Horton v. Reaves, 186 Colo. 149, 526 P.2d 304 (1974), we examined the jury instructions used to determine if a four-year-old boy and a three-year-old boy intentionally battered an infant when they dropped a baby who suffered skull injuries as a result. We held that although a child need not intend the resulting harm, the child must understand that the contact may be harmful in order to be held liable. Our conclusion comported with the Restatement's definition of intent; it did not state a new special rule for children, but applied the general rule to the context of an intentional tort of battery committed by a child. Because a child made the contact, the jury had to examine the objective evidence to determine if the child actors intended their actions to be offensive or harmful. This result complied with both the Colorado jury instruction at the time, and the definition of battery in the Restatement.

In this case, we have the opportunity to examine intent in the context of an injury inflicted by a mentally deficient, Alzheimer's patient. White seeks an extension of *Horton* to the mentally ill, and Muniz argues that a mere voluntary movement by Everly can constitute the requisite intent. We find that the law of Colorado requires the jury to conclude that the defendant both intended the contact and intended it to be harmful or offensive.

Because Colorado law requires a dual intent, we apply here the Restatement's definition of the term. As a result, we reject the arguments of Muniz and find that the trial court delivered an adequate instruction to the jury.

Operating in accordance with this instruction, the jury had to find that Everly appreciated the offensiveness of her conduct in order to be liable for the intentional tort of battery. It necessarily had to consider her mental capabilities in making such a finding, including her age, infirmity, education, skill, or any other characteristic as to which the jury had evidence. We presume that the jury "looked into the mind of Everly," and reasoned that Everly did not possess the necessary intent to commit an assault or a battery.

A jury can, of course, find a mentally deficient person liable for an intentional tort, but in order to do so, the jury must find that the actor intended offensive or harmful consequences. As a result, insanity is not a defense to an intentional tort according to the ordinary use of that term, but is a characteristic, like infancy, that may make it more difficult to prove the intent element of battery. Our decision today does not create a special rule for the elderly, but applies Colorado's intent requirement in the context of a woman suffering the effects of Alzheimer's.

Contrary to Muniz's arguments, policy reasons do not compel a different result. Injured parties consistently have argued that even if the tortfeasor intended no harm or offense, "where one of two innocent persons must suffer a loss, it should be borne by the one who occasioned it." Keeton, supra, §135. Our decision may appear to erode that principle. Yet, our decision does not bar future injured persons from seeking compensation. Victims may still bring intentional tort actions against mentally disabled adults, but to prevail, they must prove all the elements of the alleged tort. Furthermore, because the mentally disabled are held to the reasonable person standard in negligence actions, victims may find relief more easily under a negligence cause of action.

With regard to the intent element of the intentional torts of assault and battery, we hold that regardless of the characteristics of the alleged tortfeasor, a plaintiff must prove that the actor desired to cause offensive or harmful consequences by his act. The plaintiff need not prove, however, that the actor intended the harm that actually results. Accordingly, we reverse the decision of the court of appeals, and remand the case to that court for reinstatement of the jury verdict in favor of White and consideration of any remaining issues.

NOTES TO WHITE v. MUNIZ

1. ***Dual Intent.*** Two typical rules for battery are (a) the defendant need not intend the specific harm that resulted from the defendant's intentional contact and (b) whether a contact is offensive is determined by reference to an objective test. For instance, a man intending to strike another on the head with a pistol will be liable for the harm associated with a bullet hitting the other in the chest. And, whether blowing smoke in another's eyes is offensive is not determined by reference to what the parties believe but by what societal standards reveal. Into that context White v. Muniz introduced what the court called a "dual intent" requirement for battery. The Colorado Supreme Court correctly stated that not all jurisdictions agree with its approach. Is the "dual intent" approach consistent with the two tort rules described above?

2. ***Dual Intent and Unintended Consequences.*** In White v. Muniz, the defendant hit the plaintiff in the jaw, causing severe injuries. Because the defendant was mentally ill, the question arose whether the defendant intended to cause harm when she struck the plaintiff. The issue in this case is closely related to an issue arising in cases when the actor touches another in a way that the actor believes is friendly (as opposed to harmful or offensive) but a harm or offense unexpectedly occurs. These cases are often described as "friendly unsolicited hug" cases, because of the apparent frequency with which one person puts his arm around the shoulders or neck of another person in a way he considers affectionate. In these cases, the contact causes an unexpected and severe injury to the other person's neck or back. The actor intended to contact the other, and a harmful contact resulted. Is that enough to make the actor liable for battery?

3. ***Problem: Bodily Harm from Offensive Contact.*** In the following case, was the intent element for battery met? The defendant argued that because he did not intend to cause harm, injury, or offensive contact, his act did not meet the intent requirement for battery. Does it matter whether the jurisdiction follows the "dual intent" approach described in White v. Muniz?

> The [defendant] professor and the plaintiff had long been acquainted because of their mutual interest in music, specifically, the piano. Professor Neher was a social guest at the Whites' home when the plaintiff was seated at a counter writing a resume for inclusion in the University's music department newsletter. Unanticipated by the plaintiff, the professor walked up behind her and touched her back with both of his hands in a movement later described as one a pianist would make in striking and lifting the fingers from a keyboard. The resulting contact generated unexpectedly harmful injuries. The plaintiff suffered thoracic outlet syndrome on the right side of her body, requiring the removal of the first rib on the right side and scarring of the brachial plexus nerve which necessitated the severing of the scalenus anterior muscles.
>
> The professor stated he intentionally touched the plaintiff's back, but his purpose was to demonstrate the sensation of this particular movement by a pianist, not to cause any harm. He explained that he has occasionally used this contact method in teaching his piano students. The plaintiff said that the professor's act took her by surprise and was non-consensual. She further remarked that she would not have consented to such contact and that she found it offensive.

See White v. University of Idaho, 768 P.2d 827 (Idaho. Ct. App. 1989), *aff'd*, 797 P.2d 108 (Idaho 1990).

D. Damages for Intentional Torts

In most tort cases, plaintiffs seek monetary damages. The plaintiff's desire to receive a monetary judgment is mentioned by the courts in Polmatier v. Russ, Nelson v. Carroll, and Andrews v. Peters. Awards for harms suffered are called *compensatory damages*. Methods for calculating damages are discussed in Chapter 12.

The opinion in Andrews v. Peters also mentions *punitive damages*, which are damages intended to punish the defendant rather than to compensate the plaintiff. While rules vary from state to state, punitive damages may be awarded when the defendant is malicious, or "oppressive, evil, wicked, guilty of wanton or morally culpable conduct, or shows flagrant indifference to the safety of others." See Dan B. Dobbs, Law of Remedies §3.11(2), p.319 (2d ed. 1993).

Taylor v. Barwick discusses a third type of damages, *nominal damages*, which may be awarded instead of compensatory damages when the plaintiff has suffered an injury but no harm. Nominal damages awards might also have been appropriate in Leichtman v. WLW Jacor Communications, Inc. Taylor v. Barwick also discusses a limitation of liability for intentional tort, the doctrine of *de minimis non curat lex*, which says that the law will not involve itself in trifling invasions of others' interests. To understand nominal damages, it is important to remember the distinction between *injury* and *harm*, discussed in Note 2 following Nelson v. Carroll.

TAYLOR v. BARWICK

1997 WL 527970 (Del. Super. Ct. 1997)

Quillen, A.J. . . .

On January 5, 1993, Plaintiff Moses Bernard Taylor ("Taylor"), then an inmate at the Delaware Correctional Center, filed a pro se action in this Court against

Defendants George Barwick ("Barwick"), Richard Shockley, George Glascock, and Robert E. Snyder. Taylor alleged that Barwick, a Staff Lieutenant with the Department of Corrections, committed a battery against him on June 4, 1992 as he was entering the dining hall. Specifically, Taylor alleges that Barwick poked him on the back side with a tree branch. According to Taylor, Barwick then began to laugh at him and made some derogatory comments indicating his hairstyle was "for girls." . . .

For his part, Barwick admits to causing contact to Taylor with a tree branch, but he contends that the incident was an accident. Barwick testified in an affidavit that he observed a three foot stick on the floor and bent over to pick it up. As he was standing up, someone called his name, causing him to turn around, at which point the stick brushed against Taylor. Barwick states that he immediately apologized to Taylor and continued with his duties.

[The plaintiff and defendant both moved for summary judgment.]

Plaintiff's Motion clearly must be denied because issues of material fact remain for resolution by a trier of fact. Rather than engage in an extended colloquy of the disputed issues of fact, the Court will deny plaintiff's Motion because the existence of the intent to cause contact, one of the basic elements of a battery, remains disputed. Barwick asserts that his contact with Taylor was an accident. Plaintiff evidently has no eye-witnesses to contradict Barwick. The Court may rule as a matter of law only when the facts, as presented, allow only one possible inference as to what happened. Notwithstanding plaintiff's certainty, the record does not permit the Court to rule as a matter of law that defendant is liable for battery.

Although the issue is open to greater question, the record also does not permit the Court to rule as a matter of law that defendant is not liable for battery.

. . . The [defendant claims that he is entitled to judgment because] Taylor has failed to allege or establish any facts to sustain his burden of proving an actual injury. In this respect, defendant is correct. The record is void of any probative evidence of physical or mental injury. Defendant's interrogatories specifically asked plaintiff to set forth any injury or illness which Taylor claimed to have suffered from the alleged incident, and yet plaintiff has failed to set forth any evidence. . . . The Court concludes that there is no genuine issue of material fact regarding the existence of actual injury, physical or mental, and plaintiff is therefore unable to recover compensatory damages as a matter of law.

That being said, the Court is still hard pressed to grant the defendant summary judgment on the battery claim as a whole, as actual injury need not be shown to establish liability for battery. It is a long-settled principle of the common law that "the least touching of another in anger is a battery." Cole v. Turner, 6 Mod. 149, 87 Eng. Rep. 907, 90 Eng. Rep. 958 (K B. 1704) (Holt, C.J.). . . . Technically, a battery has been alleged and actual damage is not necessary for a valid cause of action.

But this minor matter does raise in my mind the legal issue of *de minimis non curat lex,* the law cares not about trifles. It seems clear (from plaintiff's own statement indicating it was he, himself, who "became instantly furious" and "started arguing") that plaintiff is the one who made the battery mountain out of a seemingly de minimis poking or brushing mole hill. As this Court has said before:

> Courts are available for many purposes, and providing an outlet clothed with some sense of civility for minor emotional controversies is one service courts perform. . . . [T]here must be a "cultural sense of [a] community standard on de minimis. . . ."

> After all, we all suffer some inconvenience as the price of living. But *de minimis non curat lex*.

Read v. Carpenter, et al., Del. Super., C.A. No. 95C-03-171, Quillen, J. (June 8, 1995), letter op. at 7 n.3. . . . And the de minimis doctrine is important in determining whether a case for only nominal damages should proceed to trial or be dismissed.

> Thus, the allowance of nominal damages is generally based on the ground either that every injury from its very nature legally imports damage, or that the injury complained of would in the future be evidence in favor of the wrongdoer, [especially] where, if continued for a sufficient length of time, the invasion of the plaintiff's rights would ripen into a prescriptive right in favor of the defendant. The maxim "de minimis non curat lex" will not preclude the award of nominal damages in such cases. However, if there is no danger of prescription, no proof of substantial loss or injury, or willful wrongdoing by the defendant, it has been said that there is no purpose for allowing nominal damages, and judgment should be rendered for the defendant.

22 Am. Jur. 2d, Damages, §9, p.39.

As a matter of policy, the Court certainly does not want to preclude outright future dismissal of trumped-up claims in cases of incidental physical contact between prisoners and correctional personnel. On the other hand, the Court does not want to dismiss out-of-hand a complaint where it is alleged that a minor physical contact was deliberately used by supervisory correctional personnel as a form of humiliating the prisoner, even if the prisoner suffered no damage to be remedied by compensation.

In this case, there appear[] to be factual issues on the question of a battery which could result in nominal damages. In particular, genuine issues of material fact exist regarding the allegedly intentional nature of defendant's touching and whether the contact was offensive to a reasonable sense of personal dignity. For these reasons, plaintiff's Motion for Summary Judgment is denied. It is so ordered. Since plaintiff has failed to demonstrate that he has suffered any damage worthy of compensation as a result of the contact, plaintiff is restricted to the recovery of nominal damages in the event that this case goes to trial and plaintiff obtains a favorable verdict on liability. Due to the factual disputes, defendant's Motion for Summary Judgment is denied with respect to defendant's liability for battery but defendant's Motion is granted to the extent that it seeks to limit plaintiff's potential recovery to nominal damages. It is so ordered.

NOTES TO TAYLOR v. BARWICK

1. ***Nominal Damages.*** "Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights." Black's Law Dictionary at 392 (6th ed. 1990). Traditional awards for nominal damages in many states are six cents or one dollar. Money will not encourage a plaintiff to sue when only nominal damages can be expected. A plaintiff suing for nominal damages may be motivated by the desire to vindicate a right — that is, to have the court define the rights and privileges of each party. It is easy to see why this would be important to a prisoner and a prison guard, as in Taylor v. Barwick. That opinion also points out that, in addition to defining the rights of the parties, courts provide "an outlet clothed with some sense of civility for minor emotional controversies."

2. De Minimis non Curat Lex. The doctrine of *de minimis non curat lex* contradicts some people's idea that our society is too litigious and that it is easy to sue and recover damages for any technical interference with a recognized legal interest. The doctrine frustrates lawsuits by people motivated by vengeance, as the plaintiff in Taylor v. Barwick might have been, or who complain about acts courts believe are of little social consequence. The court in Taylor v. Barwick recognized that, on the one hand, the plaintiff made a "battery mountain" out of a "poking or brushing mole hill." The court recognized that, on the other hand, prison guards ought not to be able to use minor physical contact as a form of humiliation. By allowing the trial to proceed, the court recognized that some social purpose would be furthered by the court's intervention in the dispute between the parties.

Perspective: Summary Judgment

In Taylor v. Barwick, both parties "moved for summary judgment." *Summary judgment* is a procedural device that will end the proceedings without a trial. A court will grant a party's motion for summary judgment only when the court concludes that there are no material factual questions to be decided and the law is so clearly in that party's favor that he or she is entitled to win without a trial. Taylor argued that Barwick's hitting him with a tree branch was unquestionably a battery because it was an intentional, offensive contact. Because the court was uncertain that the contact was intentional, Taylor's request for summary judgment was denied. The court concluded that there was an important factual question to be decided.

Barwick moved for summary judgment arguing that Taylor failed to prove that Taylor suffered any harm. Why did this argument fail to persuade the trial court to grant summary judgment in favor of Barwick?

III. Assault

The intentional tort of *assault* protects one's interest in being free from the *apprehension of imminent harmful or offensive contact.* A single act, like the firing of a gun in Polmatier v. Russ, may cause harmful or offensive contact and may also cause anticipation that such contact will imminently occur. Thus, a single act may be both an assault and a battery. A battery may occur without an assault if the victim does not perceive the impending contact. For example, on the facts of Waters v. Blackshear, an assault claim would be possible only if the plaintiff was aware of the lighted firecracker in his sneaker before it exploded. An assault may also occur without a battery.

Assault cases involve an *intent requirement.* They also require analysis of the meaning of *apprehension,* how *imminent* contact must appear to be to qualify as an assault, and the relationship between battery and assault.

A. Intending Apprehension of Imminent Contact

An assault plaintiff must satisfy an intent requirement by showing that the defendant desired or was substantially certain that an apprehension of imminent harmful or offensive contact would result from the defendant's act. Often a court or jury must infer intent from the acts of the defendant. Cullison v. Medley shows how this inference may be made. Brower v. Ackerley applies the definition of "assault" to conduct that was highly reprehensible but that might not have fit the precise definition of the tort.

CULLISON v. MEDLEY

570 N.E.2d 27 (Ind. 1991)

KRAHULIK, J. . . .

Dan R. Cullison (Appellant-Plaintiff below) petitions this Court to . . . to reverse the trial court's entry of summary judgment against him and in favor of the Appellees-Defendants below (collectively "the Medleys"). . . . According to Cullison's deposition testimony, on February 2, 1986, he encountered Sandy, the 16-year-old daughter of Ernest, in a Linton, Indiana, grocery store parking lot. They exchanged pleasantries and Cullison invited her to have a Coke with him and to come to his home to talk further. A few hours later, someone knocked on the door of his mobile home. Cullison got out of bed and answered the door. He testified that he saw a person standing in the darkness who said that she wanted to talk to him. Cullison answered that he would have to get dressed because he had been in bed. Cullison went back to his bedroom, dressed, and returned to the darkened living room of his trailer. When he entered the living room and turned the lights on, he was confronted by Sandy Medley, as well as by father Ernest, brother Ron, mother Doris, and brother-in-law Terry Simmons. Ernest was on crutches due to knee surgery and had a revolver in a holster strapped to his thigh. Cullison testified that Sandy called him a "pervert" and told him he was "sick," mother Doris berated him while keeping her hand in her pocket, convincing Cullison that she also was carrying a pistol. Ron and Terry said nothing to Cullison, but their presence in his trailer home further intimidated him. Primarily, however, Cullison's attention was riveted to the gun carried by Ernest. Cullison testified that, while Ernest never withdrew the gun from his holster, he "grabbed for the gun a few times and shook the gun" at plaintiff while threatening to "jump astraddle" of Cullison if he did not leave Sandy alone. Cullison testified that Ernest "kept grabbing at it with his hand, like he was going to take it out," and "took it to mean he was going to shoot me" when Ernest threatened to "jump astraddle" of Cullison. Although no one actually touched Cullison, his testimony was that he feared he was about to be shot throughout the episode because Ernest kept moving his hand toward the gun as if to draw the revolver from the holster while threatening Cullison to leave Sandy alone.

As the Medleys were leaving, Cullison suffered chest pains and feared that he was having a heart attack. Approximately two months later, Cullison testified that Ernest glared at him in a menacing manner while again armed with a handgun at a restaurant in Linton. On one of these occasions, Ernest stood next to the booth where Cullison was seated while wearing a pistol and a holster approximately one foot from Cullison's face. Shortly after the incident at his home, Cullison learned that Ernest had previously

shot a man. This added greatly to his fear and apprehension of Ernest on the later occasions when Ernest glared at him and stood next to the booth at which he was seated while armed with a handgun in a holster. . . .

Cullison testified that as a result of the incident, he sought psychological counseling and therapy and continued to see a therapist for approximately 18 months. Additionally, Cullison sought psychiatric help and received prescription medication which prevented him from operating power tools or driving an automobile, thus injuring Cullison in his sole proprietorship construction business. Additionally, Cullison testified that he suffered from nervousness, depression, sleeplessness, inability to concentrate and impotency following his run-in with the Medleys. . . .

Cullison alleged an assault. The Court of Appeals decided that, because Ernest never removed his gun from the holster, his threat that he was going to "jump astraddle" of Cullison constituted conditional language which did not express any present intent to harm Cullison and, therefore, was not an assault. Further, the Court of Appeals decided that even if it were to find an assault, summary judgment was still appropriate because Cullison alleged only emotional distress and made no showing that the Medleys' actions were malicious, callous, or willful or that the alleged injuries he suffered were a foreseeable result of the Medleys' conduct. We disagree.

. . . It is the right to be free from the apprehension of a battery which is protected by the tort action which we call an assault. As this Court held approximately 90 years ago in Kline v. Kline (1901), 64 N.E. 9, an assault constitutes "a touching of the mind, if not of the body." Because it is a touching of the mind, as opposed to the body, the damages which are recoverable for an assault are damages for mental trauma and distress. "Any act of such a nature as to excite an apprehension of a battery may constitute an assault. It is an assault to shake a fist under another's nose, to aim or strike at him with a weapon, or to hold it in a threatening position, to rise or advance to strike another, to surround him with a display of force. . . ." W. Prosser & J. Keaton, Prosser and Keaton on Torts §10 (5th ed. 1984). Additionally, the apprehension must be one which would normally be aroused in the mind of a reasonable person. Id. Finally, the tort is complete with the invasion of the plaintiff's mental peace.

The facts alleged and testified to by Cullison could, if believed, entitle him to recover for an assault against the Medleys. A jury could reasonably conclude that the Medleys intended to frighten Cullison by surrounding him in his trailer and threatening him with bodily harm while one of them was armed with a revolver, even if that revolver was not removed from [ ] its holster. Cullison testified that Ernest kept grabbing at the pistol as if he were going to take it out, and that Cullison thought Ernest was going to shoot him. It is for the jury to determine whether Cullison's apprehension of being shot or otherwise injured was one which would normally be aroused in the mind of a reasonable person. It was error for the trial court to enter summary judgment on the count two allegation of assault. . . .

BROWER v. ACKERLEY

943 P.2d 1141 (Wash. Ct. App. 1997)

BECKER, J.

Jordan Brower, who alleges that Christopher and Theodore Ackerley made anonymous threatening telephone calls to him, appeals from a summary

judgment dismissal of his claims against them. . . . The plaintiff, Jordan Brower, is a Seattle resident active in civic affairs. Christopher and Theodore Ackerley, in their early twenties at the time of the alleged telephone calls, are two sons of the founder of Ackerley Communications, Inc., a company engaged in various activities in Seattle including billboard advertising. Brower perceived billboard advertising as a visual blight. Based on his own investigation, he concluded that Ackerley Communications had erected numerous billboards without obtaining permits from the City of Seattle; had not given the City an accurate accounting of its billboards; and was maintaining a number of billboards that were not on the tax rolls. In January, 1991, Brower presented his findings to the City. When the City did not respond, Brower filed suit in October of 1991 against the City and Ackerley Communications seeking enforcement of the City's billboard regulations.

Within two days an anonymous male caller began what Brower describes as "a campaign of harassing telephone calls" to Brower's home that continued over a period of 20 months. The first time, the caller shouted at Brower in an aggressive, mean-spirited voice to "get a life" and other words to that effect. Brower received at least one more harassing telephone call by January of 1992.

When the City agreed to pursue Brower's complaints about the billboard violations, Brower dropped his suit. In April of 1992, the City made a public announcement to the effect that Ackerley Communications had erected dozens of illegal billboards. Within a day of that announcement, Brower received an angry telephone call from a caller he identified as the same caller as the first call. In a loud, menacing voice, the caller told Brower that he should find a better way to spend his time. Two days later there was another call telling Brower to "give it up."

In July of 1992, shortly after the City Council passed a moratorium on billboard activity, Brower received another angry anonymous call. The male voice swore at him and said, "You think you're pretty smart, don't you?" Brower says he seriously wondered whether he was in any danger of physical harm from the caller. Over the following months Brower continued to receive calls from an unidentified male who he says "belittled me, told me what a rotten person I was, and who used offensive profanity."

On July 19, 1993, the City Council passed a new billboard ordinance. At about . . . 7:30 p.m. [an angry-voiced man] called and said, "I'm going to find out where you live and I'm going to kick your ass." At 9:43 p.m. Brower received another call from a voice disguised to sound, in Brower's words, "eerie and sinister." The caller said "Ooooo, Jordan, oooo, you're finished; cut you in your sleep. . . ." Brower recorded the last two calls on his telephone answering machine.

Brower made a complaint to the police, reporting that he was very frightened by these calls. Because Brower had activated a call trapping feature of his telephone service after the third telephone call, the police were able to learn that the call had originated in the residence of Christopher Ackerley. When contacted by the police, Christopher Ackerley denied making the calls. He said Brower's telephone number was in his apartment, and that his brother Ted Ackerley had been in the apartment at the time and perhaps had made the calls.

The City filed no criminal charges based on the police report. Brower then brought this civil suit against Christopher and Theodore Ackerley seeking compensation for the emotional distress he suffered as the result of the telephone calls. . . .

The elements of civil assault have not been frequently addressed in Washington cases. The gist of the cause of action is "the victim's apprehension of imminent physical violence caused by the perpetrator's action or threat." In the 1910 case of Howell v. Winters, [108 P. 1077 (quoting Cooley, Torts (3d ed.) p.278)] the Supreme Court relied on a definition [that] accords with the Restatement (Second) of Torts [§21], which defines assault, in relevant part, as follows:

> (1) An actor is subject to liability to another for assault if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) the other is thereby put in such imminent apprehension.

According to section 31 of the Restatement, words alone are not enough to make an actor liable for assault "unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person." The comments to section 31 indicate infliction of emotional distress is a better-suited cause of action when mere words cause injury, "even though the mental discomfort caused by a threat of serious future harm on the part of one who has the apparent intention and ability to carry out his threat may be far more emotionally disturbing than many of the attempts to inflict minor bodily contacts which are actionable as assaults." [Restatement (Second) of Torts §31 comment a.]

The Ackerleys argue that dismissal of Brower's assault claim was appropriate because the threatening words were unaccompanied by any physical acts or movements. Brower acknowledges that words alone cannot constitute an assault, but he contends the spoken threats became assaultive in view of the surrounding circumstances including the fact that the calls were made to his home, at night, creating the impression that the caller was stalking him.

Whether the repeated use of a telephone to make anonymous threats constitutes acts or circumstances sufficient to render the threats assaultive is an issue we need not resolve because we find another issue dispositive: the physical harm threatened in the telephone calls to Brower was not imminent.

To constitute civil assault, the threat must be of imminent harm. As one commentator observes, it is "the immediate physical threat which is important, rather than the manner in which it is conveyed." [Keeton, Prosser & Keeton on the Law of Torts §10, at 45 (5th ed. 1984).] The Restatement's comment is to similar effect: "The apprehension created must be one of imminent contact, as distinguished from any contact in the future." [Restatement Second of Torts §29 comment b.] The Restatement gives the following illustration: "A threatens to shoot B and leaves the room with the express purpose of getting his revolver. A is not liable to B." [Restatement (Second) of Torts §29 comment c, illus. 4.]

The telephone calls received by Brower on July 19 contained two explicit threats: "I'm going to find out where you live and I'm going to kick your ass"; and later, "you're finished; cut you in your sleep." The words threatened action in the near future, but not the imminent future. The immediacy of the threats was not greater than in the Restatement's illustration where A must leave the room to get his revolver. Because the threats, however frightening, were not accompanied by circumstances indicating that the caller was in a position to reach Brower and inflict physical violence "almost at once," we affirm the dismissal of the assault claim. . . .

NOTES TO CULLISON v. MEDLEY AND BROWER v. ACKERLEY

1. *Factual Theories.* The two cases illustrate several types of factual theories a plaintiff might offer. The court in Brower v. Ackerley based its analysis on a series of phone calls made to Brower. By contrast, the court in Cullison v. Medley based its holding only on the acts of the Medleys at Cullison's trailer in February 1986. Among the specific acts of the Medleys that could form the basis for finding that there was an assault that night was Ernest Medley's grabbing and shaking of his gun in its holster. Several months later, Ernest stood next to the booth in a restaurant where Cullison was seated while Ernest was wearing a pistol and a holster approximately one foot from Cullison's face. Would this later act be sufficient to form the basis for finding that there was an assault at the restaurant? Are there other relevant facts provided in the opinion that make this more likely to be an assault? The Restatement recognizes that it is appropriate to consider the surrounding circumstances when deciding whether apprehension of imminent contact is reasonable. See Restatement (Second) of Torts §31.

2. *Injury and Harm.* As for the tort of battery, the defendant need not intend or even foresee the specific consequence of an assault. The injury for assault is the invasion of the plaintiff's peace of mind by causing apprehension of an imminent harmful or offensive contact, without regard to whether the contact occurs. It is this injury that must be intended, not any other specific harm. The harms suffered by the plaintiff in Cullison v. Medley included chest pains, fear of a heart attack, and other physical and emotional consequences.

3. *Objective Test for Apprehension.* The court in Cullison v. Medley applied an *objective test* to determine whether Cullison suffered apprehension. The court stated that the jury must find that the defendant's conduct would normally arouse apprehension in the mind of a reasonable person. This is an objective test because it refers to people in general, not to the specific assault plaintiff. The court in Brower v. Ackerley quoted Restatement (Second) of Torts §31, which says that words alone are not enough to make an actor liable for assault "unless together with other acts or circumstances they put the other *in reasonable apprehension* of an imminent harmful or offensive contact." (Emphasis added.)

4. *Should There Be a Subjective Test for Apprehension?* There was no evidence in *Cullison* or *Brower* that either plaintiff was a particularly sensitive person who frightens easily. The Restatement (Second) of Torts §27 says that, even if a plaintiff frightens easily, the defendant will be subject to liability if he intends to put the plaintiff in apprehension of an immediate bodily contact and succeeds in doing so. See comment a, "Actor's surprising success." The treatise cited in *Cullison* and *Brower*, W. Page Keeton, Prosser & Keeton on Torts at 44 (5th ed. 1984), states that no cases have applied this Restatement rule but that there might be liability if the defendant actually knew of the special sensitivity, but the treatise cites no cases.

Recall that in the context of battery the test for whether a contact is offensive is an objective test. The Restatement (Second) of Torts §19 requires that the contact offend a *reasonable sense of dignity*. Section 19 comment a explains that "[i]n order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity." The Restatement (Second) of Torts took no position on whether

an actor would be subject to liability for battery if he or she knew that the contact would be offensive to the other's abnormally acute sense of personal dignity.

5. ***Conditional Language and Imminent Contact.*** The intermediate appellate court in Cullison v. Medley held that the Medleys' conduct constituted conditional language that did not express any present intent to harm Cullison. A *conditional threat* is one that threatens harm unless the plaintiff behaves in a certain way in the future. Because the harm depends on something that will happen in the future, any contact a plaintiff anticipates is future rather than imminent contact. While the *Cullison* court was correct that a conditional threat is not sufficient to justify an assault, the state's supreme court found that the Medleys threatened imminent contact as well as future contact. The interest protected by assault is the interest in freedom from *imminent* contact.

By contrast, the court in Brower v. Ackerley found that there were no threats of imminent harmful or offensive contact, because the defendant did not threaten actions that would occur "almost at once." The *imminence* of the contact means that the contact will occur without significant delay. Injury threatened for the "near future" is not actionable under the legal theory of assault, while injury threatened for the immediate or imminent future is.

Imminent apprehension sufficient to make an actor liable for assault is different from fear. It is more akin to the *anticipation* that a harmful or offensive contact may occur. Thus, even if the plaintiff's self-defensive action or the intervention of an outside force can prevent the contact, the apprehension or anticipation is still present. See Restatement (Second) of Torts §24.

6. ***Problem: Intent for Assault and Battery.*** Scott Gray began working for defendant Kevin Morley in the concrete business in the summer of 1991. On the morning of July 15, 1991, Morley picked up Gray for work. They worked through the morning and then adjourned to a local tavern for lunch. Gray testified that Morley was angry when they returned to the job site and left "cussing and bitching." At the end of the workday, another employee got into the front seat, and Gray jumped into the back open bed of Morley's truck. A short time later, Gray was thrown from the bed of the truck to the pavement. The impact caused him to suffer a skull fracture and closed head injuries.

Gray stated in a deposition that he did not recall anything unusual about Morley's driving in the moments preceding his injury, other than hearing the squeal of tires and a "sudden jerk." Gray stated that he had previously ridden in the back of Morley's truck, and that on most of those occasions Morley engaged in erratic driving, "swerving around and hitting the brakes and stuff like that, [and would] watch us roll around in the back of the truck, stuff like that." According to Gray, this conduct did not occur "every time, but the majority of the time. It was like fun for him, a game or something." At one point, Gray told Morley that he did not like being thrown around in the back of the truck. Gray could not recall exactly when he said this and conceded that he was not harmed during the previous episodes.

Can Morley's conduct on July 15th be characterized as an assault or a battery? See Gray v. Morley, 596 N.W.2d 922 (Mich. 1999).

7. ***Infliction of Emotional Distress.*** Even though the plaintiff in Brower v. Ackerley may have suffered serious emotional harm from the threats made by the defendants, the particular requirements of the assault and battery tort actions prevented recovery

on either of those theories. Another tort, *infliction of emotional distress* provides an alternative theory on which such plaintiffs might rely. That tort, sometimes called *the tort of outrageous conduct*, is discussed later in this chapter.

> ***Perspective: Motion to Dismiss***
>
> A *motion to dismiss* is a procedural device that, like the motion for summary judgment discussed in the Note 3 following Taylor v. Barwick, avoids a trial. A plaintiff may terminate an action by having the claim voluntarily dismissed before the defendant answers the complaint. An *involuntary dismissal* comes when the court grants a defendant's request that the court dismiss the plaintiff's claim. A court will grant a defendant's motion for dismissal when the plaintiff has failed to produce evidence to support each element of the claim. In Brower v. Ackerley, the defendants claimed that the plaintiff failed to produce any evidence of any threat of *imminent contact*. Because assault requires a threat of imminent harm, the appellate court affirmed the lower court's involuntary dismissal of Brower's claim.

B. Transfer of Intent Among People and Between Torts

Rules for *transfer of intent* facilitate a plaintiff's recovery in assault cases and battery cases. There are two kinds of transfer of intent. The first, *transfer of intent between torts*, allows a plaintiff who suffers a harmful or offensive contact to recover for a battery even if the defendant intended only an assault and allows a plaintiff who suffers apprehension of imminent harmful or offensive contact to recover for an assault even if the defendant intended only a battery. The second kind of transfer of intent is *transfer of intent among people*. If a defendant intends to assault or batter one person but ends up assaulting or battering another, the defendant will be liable to the other as if the other had been the intended target. The following case, Hall v. McBride, illustrates both kinds of transfer of intent in a case where the defendant intends only to scare some boys passing in a car but ultimately shoots a neighbor.

HALL v. McBRYDE

919 P.2d 910 (Colo. Ct. App. 1996)

HUME, J.

. . . On January 14, 1993, Marcus was at his parents' home with another youth after school. Although, at that time, Marcus was, pursuant to his parents' wishes, actually living in a different neighborhood with a relative and attending a different high school in the hope of avoiding gang-related problems, he had sought and received permission from his father to come to the McBryde house that day to retrieve some clothing. Prior to that date, Marcus had discovered a loaded gun hidden under the mattress of his parents' bed. James McBryde had purchased the gun sometime earlier.

Soon after midday, Marcus noticed some other youths in a car approaching the McBryde house, and he retrieved the gun from its hiding place. After one of the other youths began shooting towards the McBryde house, Marcus fired four shots toward the car containing the other youths.

During the exchange of gunfire one bullet struck plaintiff, who lived next to the McBryde residence, causing an injury to his abdomen that required extensive medical treatment. . . .

. . . [P]laintiff contends that the trial court erred in entering judgment for Marcus on the claim of battery. We agree.

An actor is subject to liability to another for battery if he or she acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and a harmful or offensive contact with the person of the other directly or indirectly results.

Here, the trial court found that there was no evidence indicating that Marcus intended to shoot at plaintiff. Furthermore, based upon statements by Marcus that he was not purposely trying to hit the other youths but, instead, was shooting at their car, the trial court also determined that plaintiff had failed to prove Marcus intended to make contact with any person other than plaintiff. Based upon this second finding, and relying on CJI-Civ.3d 20:5 and CJI-Civ.3d 20:8 (1989), the trial court concluded that the doctrine of transferred intent could not apply to create liability for battery upon plaintiff. We conclude that, in reaching its determination that no battery occurred, the trial court did not properly analyze the intent required for battery or the transferability of such intent.

As set forth above, the intent element for battery is satisfied if the actor either intends to cause a harmful or offensive contact or if the actor intends to cause an imminent apprehension of such contact. Moreover, with respect to the level of intent necessary for a battery and the transferability of such intent, Restatement (Second) of Torts §16 (1965) provides as follows:

> (1) If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm.
>
> (2) *If an act is done with the intention of affecting a third person in the manner stated in Subsection (1), but causes a harmful bodily contact to another, the actor is liable to such other as fully as though he intended so to affect him.* (Emphasis Added.)

See also Restatement (Second) of Torts §20 (1965); Alteiri v. Colasso, 362 A.2d 798 (Conn. 1975) (when one intends an assault, then, if bodily injury results to someone other than the person whom the actor intended to put in apprehension of harm, it is a battery actionable by the injured person).

Here, the trial court considered only whether Marcus intended to inflict a contact upon the other youths. It did not consider whether Marcus intended to put the other youths in apprehension of a harmful or offensive bodily contact.

However, we conclude, as a matter of law, that by aiming and firing a loaded weapon at the automobile for the stated purpose of protecting his house, Marcus did intend to put the youths who occupied the vehicle in apprehension of a harmful or offensive bodily contact. Hence, pursuant to the rule set forth in Restatement (Second)

of Torts §16(2) (1965), Marcus' intent to place other persons in apprehension of a harmful or offensive contact was sufficient to satisfy the intent requirement for battery against plaintiff.

Accordingly, we conclude that the cause must be remanded for additional findings as to whether the bullet that struck plaintiff was fired by Marcus. If the trial court finds that the bullet was fired by Marcus, it shall find in favor of plaintiff on the battery claim and enter judgment for damages as proven by plaintiff on that claim.

NOTES TO HALL v. McBRYDE

1. ***Multiple Transfers of Intent.*** The court in Hall v. McBryde held that if Marcus fired the bullet that struck the plaintiff, Marcus would be liable for the intentional tort of battery. This is surprising for two reasons: (1) Marcus did not intend to batter the plaintiff, who was his neighbor; and (2) Marcus did not even intend to assault the plaintiff. The evidence suggests that Marcus intended to assault the youths in the car. The court held that not only can the factfinder transfer the intent from assault to battery, it can transfer intent from intended victims to other people. The first of these transfers of intent is the transfer of intent between torts. The second is the transfer of intent among people. A Missouri court described the transfer of intent among people, saying "The intention follows the bullet." State v. Batson, 96 S.W.2d 384, 389 (Mo. 1936). The court in Hall v. McBryde quotes the Restatement (Second) of Torts §16(1) to support the transfer of intent between assault and battery and §16(2) to support the transfer of intent among people. Would either of these subsections be applicable if Marcus had shot one of the occupants in the car?

2. ***Problem: Transfer of Intent.*** Tim was the son of Zeppo Marx, who starred in such famous comedic films as *Duck Soup, Horse Feathers, Monkey Business,* and *Animal Crackers.* When Tim was nine years old, he played with two friends, Denise and Barbara, both eight years old. At the time of the injury, Denise was standing four feet in front of Tim and Barbara was riding past on her bicycle 30 feet away. Tim said to Denise, "Watch Barbie," as he picked up a rock about the size of a small hen's egg. Barbara saw Tim raise his arm to throw at an angle toward her. Denise looked at Barbara, then back at Tim, and at that moment was hit in the eye by the rock. The line of throw toward Barbara would pass several feet in front of Denise. Deciding the case brought by Denise against Tim Marx, the court found that for the rock to strike Denise, "one of two things would have to occur, either (1) Tim changed the direction of throw without any warning, or (2) he held the rock too loosely, or let go of it too soon to control its flight, and inadvertently hit Denise. The evidence is susceptible of either of these inferences." Does Tim's liability to Denise for the tort of battery depend on which inference is more plausible? See Singer v. Marx, 301 P.2d 440 (Cal. Ct. App. 1956).

Perspective: Transferred Intent

The doctrine of *transferred intent* comes from criminal law, where the doctrine was recognized in England as early as 1553. Without regard to whether the defendant intended to cause injury to a specific defendant, it seemed justified to hold the defendant liable for a violation of the criminal law, such as shooting at

one person in a crowded restaurant and hitting another. Similarly, transferred intent seems appropriate where an actor acts with malice, an antisocial attitude. Also, where a number of persons are engaged in a brawl, it makes sense to hold all liable to a victim without regard to whether any particular brawler intended to injure another specific person. Finally, as the Restatement (Second) §13 states, a batterer is liable for any harm that "directly or indirectly results." This broad scope of liability logically encompasses the unintended victim. See generally Osborne M. Reynolds Jr., *Transferred Intent: Should Its "Curious Survival" Continue?*, 50 Okla. L. Rev. 529 (1997).

IV. Defenses to Assault and Battery

A defense protects a defendant from liability even if a plaintiff can prove that the defendant acted in a way that meets the definitions of "assault" or "battery." This Section considers the most common defenses to assault and battery: consent and defense of self, others, and property.

The *defense of consent* arises when a person voluntarily relinquishes the right to be free from harmful or offensive contact or imminent apprehension of such contact. The *defense of person or property* arises where tort law grants an individual the privilege to use threats or to contact others in ways that would ordinarily be treated as an assault or a battery. The defense that a threat or a contact was permissible as a defense of a person or property is different from the defense of consent, because it does not require a showing that the alleged victim had ever agreed to be threatened or touched.

A. Consent

Generally, an actor may give up the interests in freedom from harmful or offensive contact and from imminent apprehension of such contact. McQuiggan v. Boy Scouts of America focuses on the evidence from which consent and the withdrawal of consent may be inferred. It also describes whether injured parties may recover damages for harms suffered that were not anticipated when consent was given.

The law only allows people to give up their rights when the people know what they are doing and are acting willingly. Consent must be knowing, informed, and voluntary. Hogan v. Tavzel illustrates this idea in the context of sexual contact resulting in transmission of a disease.

Richard v. Mangion introduces the distinction between consent and self-defense in a case involving a fight between two boys. A fight may involve a battery, may involve conduct that would be a battery but is protected by a self-defense privilege, or may involve conduct to which both parties have agreed. Even when an actor has given consent to some types of conduct, that actor may claim that the other person exceeded the consent given. In Richard v. Mangion, the court considered whether the defendant used force that went beyond the type of force to which the plaintiff had consented.

McQUIGGAN v. BOY SCOUTS OF AMERICA

536 A.2d 137 (Md. Ct. Sp. App. 1987)

GILBERT, C.J.

The main question presented in this case is whether a twelve-year-old boy should be barred from recovery for an eye injury he sustained when he voluntarily participated in a paper clip shooting "game."

Nicholas Alexander McQuiggan, by and through his guardian, Jerome Keith Bradford, brought an action in tort against: the Boy Scouts of America . . . and Billy Hamm and Kevin McDonnell, fellow Boy Scouts. Nicholas alleged that . . . the minor defendants, Billy and Kevin, are liable for assault and battery. . . .

[A]t the conclusion of Nicholas's case, the court granted a motion for judgment in favor of all the defendants. Aggrieved by the trial court's action, Nicholas has appealed to this Court.

The events giving rise to this litigation date from April 8, 1981, when sometime between 7:10 and 7:15 p.m. Nicholas was dropped off by his mother at the Epworth Methodist Church in Montgomery County to attend a Boy Scout meeting. The meeting was scheduled to start at 7:30 p.m. When Nicholas arrived, he noticed several of the other scouts engaged in a game in which they shot paper clips at each other from rubber bands they held in their hands. The paper clips were pulled apart on one end and squeezed closed on the other. At trial, Nicholas demonstrated how the clip was shot by placing the closed end of the clip in a rubber band stretched between two upright fingers in the form of a "v" and pulling back on the open end of the paper clip and releasing it. Nicholas testified that when he arrived at the church, two Assistant Scoutmasters, William H. Hamm Sr. and Keith D. Rush, were present in the meeting room. Another Assistant Scoutmaster, Edmund Copeland, arrived after Nicholas but before the meeting actually started.

Upon arriving at the meeting room, Nicholas sat at a table and began to read his Boy Scout Handbook. Between four and eight other scouts had been playing the paper clip shooting game and running in and out of the hallway leading to the meeting room for about ten minutes before Nicholas decided to join them. Prior to his joining the game, no one had shot paper clips at him. When one of the boys asked Nicholas to join in the game, he did so freely, feeling no pressure to participate. Nicholas further related that he knew that the object of the game was to shoot paper clips; he knew that paper clips would be shot at him; he knew that there was a chance he would be hit with a paper clip.

When he decided to join in the game, Nicholas looked through some material on a shelf, and he located an elastic hair band with which he intended "to chase" the other boys. Nicholas and an unidentified Boy Scout then chased Billy Hamm Jr. and Kevin McDonnell up the hallway. Nicholas said he had no paper clips, but the boy with him was shooting them. Nicholas admitted at trial that his actions were such as to lead Kevin or Billy to believe that he had a paper clip in his possession. Nicholas further narrated that he was actively "participating" in the game.

After Nicholas had chased Billy and Kevin down the hallway for about ten feet, the two boys turned around and chased Nicholas back down the hall. Nicholas said that he dropped the hair band and entered the meeting room. He then stopped running, "split apart" from the unidentified boy, and started to walk toward a table. He told the court that at that point he "stopped playing," but he did not communicate that fact in any