way to the other boys. Approximately five seconds later and five feet into the meeting room, Nicholas felt something in his right eye. When he brushed the eye, a paper clip dropped to the floor. According to Nicholas, his entire involvement in the game consumed approximately thirty seconds. . . .

The trial judge . . . found that Nicholas could not prevail on his assault and battery counts because by his actions "not only in participating in the game but pursuing . . . Billy Hamm [and Kevin McDonnell] down the hallway . . . as a matter of law he consented to the infliction of the injury upon him." We agree.

A battery consists of the unpermitted application of trauma by one person upon the body of another person. The gist of the action is not hostile intent but the absence of consent to the contact on plaintiff's part. When a plaintiff "manifests a willingness that the defendant engage in conduct and the defendant acts in response to such a manifestation," [W. Page Keeton, Prosser & Keeton on the Law of Torts (5th ed. 1984)] §18 at 113, "his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort." Id. at 112.

The circumstances leading to Nicholas's injury do not constitute an assault and battery. As stated in Prosser, §18 at 114:

> One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game. *It is only when notice is given that all such conduct will no longer be tolerated that the defendant is no longer free to assume consent.* (Emphasis supplied.)

Nicholas's willful joining in the game, without any notice of his withdrawal from participation, bars recovery from either Billy or Kevin.

NOTES TO McQUIGGAN v. BOY SCOUTS OF AMERICA

1. ***Express and Implied Consent.*** Consent may be *express* ("Go ahead and hit me!") or *implied.* Nicholas found an elastic hair band and, despite his lack of ammunition, chased Billy and Kevin. He admitted "that his actions were such as to lead Kevin or Billy to believe that he had a paper clip in his possession." There was no express consent in this case. Rather, the defendant was able to establish that the plaintiff had implied by his conduct that he consented to participate in the risky game.

The same test for whether the plaintiff impliedly consented applies to the plaintiff's withdrawal from the game. Although Nicholas said that he "stopped playing" before being hit in the eye, he did not claim that he had communicated that fact to the other boys. As a result, they could reasonably assume that his consent was still operative and were entitled by the law to do so.

Whether consent may be inferred from any particular circumstances must be decided on a case-by-case basis. Because the law uses an objective test to determine whether another could "reasonably" assume that consent was given, the customs of the community are taken into account. The Restatement (Second) of Torts §892 comment c offers two illustrations.

> Illustration 2. *A*, a young man, is alone with *B*, a girl, in the moonlight. *A* proposes to kiss *B*. Although inwardly objecting, *B* says nothing and neither resists nor protests by any word or gesture. *A* kisses *B*.
>
> Illustration 3. In the course of a quarrel, *A* threatens to punch *B* in the nose. *B* says nothing but stands his ground. *A* punches *B* in the nose.

The Restatement (Second) concludes that it is reasonable to assume consent in one of these illustrations. Is it likely that contemporary analysts, living a generation later than the authors of the Restatement (Second), would consider these two examples different?

2. *Consent to Contact Rather Than to Harm.* An actor will usually be treated as having consented to contact rather than to a particular harm. In McQuiggan v. Boy Scouts of America, Nicholas consented to relinquish his right to be free from harmful or offensive contacts. He certainly would not concede that he consented to the harm to his eye. Recall the distinction between injury and harm discussed in the notes following Nelson v. Carroll. To intend a battery, an actor must intend the injury, the invasion of another's interest, and, in dual intent states, to cause harm that would otherwise constitute a battery. But the actor need not intend the particular harm that occurred.

Consent is analyzed the same way. An actor consents to suffer the injury, the invasion of a right. Once the actor has consented to the invasion, the actor cannot recover for harms related to that invasion, even if they were unforeseeable.

An actor who consents to an invasion of an interest (to be free from harmful contact, for instance) does not thereby consent to all possible harmful conduct. If Nicholas consents to being hit with paper clips, Billy may not shoot him with a hand gun. Sometimes applying this idea is difficult, because the conduct to which an actor has consented may be defined only vaguely. The court in McQuiggan v. Boy Scouts of America quotes a treatise by Professor Keeton saying that the conduct to which one consents in a sport, game, or contest is "physical contacts consistent with the understood rules of the game." Thus, custom is relevant in determining the scope of conduct to which one has consented.

Perspective: Who Proves Consent?

There is a dispute in the common law over whether consent must be proved by the defendant as a defense or whether lack of consent must be proved by the plaintiff as an element of the plaintiff's case. This dispute matters only if the evidence of consent is "in equipoise," which means that consent and non-consent are equally likely. If the plaintiff must prove "no consent" as an element of the tort by a preponderance of the evidence, the plaintiff will lose if the evidence is in equipoise. If the defendant must prove consent as a defense, the plaintiff will win if the evidence is in equipoise. There have not been enough reported cases where the evidence of consent is in equipoise for the law of all the states to be clear and in agreement on this point. See generally Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 Am. U. L. Rev. 1, 94 n.585 (1997).

HOGAN v. TAVZEL

660 So. 2d 350 (Fla. Ct. App. 1995)

W. SHARP, J. . . .

Hogan and Tavzel were married for fifteen years but encountered marital problems which caused them to separate. During a period of attempted reconciliation

between October of 1989 and January 1990, Tavzel infected Hogan with genital warts. He knew of his condition but failed to warn Hogan or take any precaution against infecting her. The parties were divorced on May 8, 1990. Hogan brought this suit in 1993.

Tavzel moved to dismiss. . . .

We . . . turn our attention to dismissal of the battery count. Since this is a case of first impression in Florida, it is appropriate to look to other jurisdictions for guidance. A case similar to the one presented here is Kathleen K. v. Robert B., 198 Cal. Rptr. 273 (Cal. 2d Dist. 1984). There, a cause of action in battery was approved when one partner contracted genital herpes from the other partner. The facts indicated that the infecting partner had represented he was free from any sexually infectious disease, and the infected partner would not have engaged in sexual relations if she had been aware of the risk of infection. The court held that one party's consent to sexual intercourse is vitiated by the partner's fraudulent concealment of the risk of infection with venereal disease (whether or not the partners are married to each other). This is not a new theory.

The *Kathleen K.* court recognized that

> [a] certain amount of trust and confidence exists in any intimate relationship, at least to the extent that one sexual partner represents to the other that he or she is free from venereal or other dangerous contagious disease.

Kathleen K. at 198 Cal. Rptr. 273.

The Restatement of Torts Second (1977) also takes the view that consent to sexual intercourse is not the equivalent of consent to be infected with a venereal disease. Specifically, it provides the following example:

> *A* consents to sexual intercourse with *B*, who knows that *A* is ignorant of the fact that *B* has a venereal disease. *B* is subject to liability to *A* for battery.

Illus. 5 §892B. Other authorities also conclude that a cause of action in battery will lie, and consent will be ineffective, if the consenting person was mistaken about the nature and quality of the invasion intended.

We see no reason, should the facts support it, that a tortfeasor could not be held liable for battery for infecting another with a sexually transmissible disease in Florida. In so holding, we align ourselves with the well established, majority view which permits lawsuits for sexually transmitted diseases. Hogan's consent, if without the knowledge that Tavzel was infected with a sexually transmitted disease, was the equivalent of no consent, and would not be a defense to the battery charge if successfully proven.

NOTES TO HOGAN v. TAVZEL

1. ***Fraudulently Obtained or Mistaken Consent.*** The *Hogan* court refers to two different situations in which a defendant will be barred from relying on a plaintiff's consent to avoid liability for battery: (1) where the plaintiff was mistaken about the nature and quality of the invasion intended; and (2) where the defendant concealed an important fact that would have affected the plaintiff's decision to consent. Which of these circumstances is most relevant to the facts in *Hogan*?

2. ***Exceeding the Boundaries of Consent.*** Another approach to the facts of *Hogan* would be to say that the contact exceeds the bounds of permitted contact. The notes

following McQuiggan v. Boys Scouts of America stated that when Nicholas consented to be hit by paper clips, he did not consent to Billy shooting him with a handgun. The *McQuiggan* court said "One who enters a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game." Could *Hogan* be analyzed in that way?

3. ***Problem: Scope of Consent.*** In Hellriegel v. Tholl, 417 P.2d 362 (Wash. 1966), 15-year-old Dikka and his friends were hanging out on a beach at Lake Washington. After throwing pillows and grass at one another, Dikka said to the other boys "Oh, you couldn't throw me in even if you tried." According to Dikka's testimony:

> And with that the three boys, Mike, Greg and John, jumped up and, well, tried to throw me into the water. I struggled for a while and I ended up in a sitting position parallel to the lake, facing, my head facing north, and Mike was behind me. Again, I was in a sitting position and John and Greg had my legs up in the air.
>
> I was trying to get them off, and I had my hands reaching toward my legs when Mike, trying to reach my hands, must have slipped or lost his balance, and he fell on the back of my head and pushed it forward. I heard two cracks like somebody snapping his knuckles, and right after that I lost all control, I couldn't move my legs, and it was kind of a numb sensation all over.

Dikka was permanently partially paralyzed. Would Dikka's words and the context support a consent defense offered by Mike?

RICHARD v. MANGION

535 So. 2d 414 (La. Ct. App. 1988)

DOUCET, J.

Plaintiffs, James and Juanita Richard, in their individual capacity and as natural tutor and tutrix of their minor child, Shawn, appeal from a judgment dismissing their suit in favor of defendants, Mr. and Mrs. Joseph Mangion, and State Farm Fire & Casualty Insurance Company.

The issue presented on appeal is whether the trial judge erred in finding that Shawn voluntarily participated in an altercation with Jeremy Mangion, Mr. and Mrs. Mangion's son. The undisputed facts show that Jeremy and Shawn fought on the afternoon of May 8, 1985 at an outdoor hangout known as the "rope swing" located at the rear of some residential lots in their Lafayette neighborhood. During the fight Jeremy struck Shawn in his right eye causing later hemorrhaging in the eye. He underwent two operations and his parents incurred over $15,000 in related medical expenses.

Shawn was thirteen years old and Jeremy was fourteen at the time of the fight. Shawn had only recently moved into Jeremy's neighborhood. Both attended the same school, a grade apart, and rode on the same school bus each morning. Animosity between the boys developed after Jeremy made a derogatory comment to Shawn one morning regarding the trousers he was wearing. This incident occurred at a bus stop and, after Shawn retorted, "kiss my ass," Jeremy told him to move to another bus stop and kicked him in his buttocks.

Another incident occurred several days before the altercation in question. Two witnesses testified that the boys had been scheduled to fight one day but Shawn did not show up. The next day Jeremy and several boys and girls walked over to Shawn's bus

stop to ask Shawn why he hadn't appeared. Shawn testified that Jeremy came up to him and asked him if he wanted to fight. Jeremy and Shawn apparently began squaring off but no actual blows were exchanged. When they saw the school bus coming, both boys stopped. But then Jeremy made a sudden move, Shawn raised his hands or fists in a defensive gesture, and Jeremy kicked Shawn in his groin. Shawn ran home while the others boarded the school bus. As the bus proceeded down the block, Shawn's father came running up, stopped the bus, and confronted Jeremy. Shawn then got back on the bus and walked up to Jeremy, who was seated, and glared at him. Shawn testified that he did not challenge Jeremy to fight as Jeremy claimed. Mark Comeaux, a friend of Jeremy's, stated that other children on the bus chided Shawn for not showing up for the fight. Mark recalled that Shawn said to Jeremy, "Well, let's fight this afternoon." No fight occurred that day, however.

On the afternoon of the fight in question there was much talk among the children that Jeremy and Shawn were going to fight. One witness, Kevin Alexander, stated that a time and place had been set for the fight. Laura Comeaux, Mark's sister, stated that Jeremy told Mark there was going to be a fight. Mark confirmed this and stated that the agreed-upon time for the fight was 4:30 p.m. Jeremy testified that Shawn had been telling people that he wanted to fight him but did not remember that he and Shawn agreed to fight at a certain time. However, he also said that he "somehow" understood the fight was supposed to be at 4:30 p.m. at the rope swing. When questioned if he clearly understood that there was to be a fight between [him] and Jeremy at a certain time and place, Shawn answered, "not really."

Jeremy testified that he did not intend to show up for the fight but Kevin Alexander came to his home and told him Shawn was waiting at the rope swing to fight. Jeremy and Mark Comeaux went to the rope swing but no one else was there. Other youths began arriving at the scene including Mark's sister, Laura, another girl, Amity Breaux, and Chad and Todd Pruitt, the latter a friend of Shawn's. After going to Jeremy's, Kevin Alexander went to Shawn's home and told him that Jeremy was waiting for him. Shawn said he decided to go ahead and "get it over with." He admitted he was fully aware there might be a fight but also thought he and Jeremy could "talk out" their differences.

Shawn first stated that when he arrived at the rope swing Jeremy came up to him and said, "Well, you want to fight," but Shawn didn't answer. Whereupon, Jeremy pushed him and shoved his knee into his stomach. However, Shawn later changed his story, testifying that there was a pushing match between the two before the fight. He said Jeremy pushed him, he backed off, Jeremy pushed him again and that's when the fight started. He also later stated that he didn't remember what Jeremy said to him before the fight. Soon after the fight began, Jeremy got Shawn in a headlock and hit him six to eight times in his face and head. It appears that at least some of these blows were prompted by Shawn's swinging his fists around to strike Jeremy even as he was in the headlock. Shawn said he was trying to strike Jeremy to get out of the headlock. Jeremy released Shawn from the headlock and threw him into a shallow ditch. Shawn jumped up, nose bleeding, and charged at Jeremy swinging wildly. Jeremy ducked and hit Shawn once in his eye. That was the end of the fight. Jeremy started to leave but was called back by Shawn and his friend, Todd Pruitt, who were yelling that Shawn wanted to fight some more. Shawn had offered Todd $5.00 to hit Jeremy. When Jeremy walked back over, Todd hit him once and Jeremy ran away as Shawn laughed.

Jeremy testified that he didn't remember who initially charged who that day, but he basically reiterated Shawn's testimony regarding the headlock and hitting. He said he wanted to stop when he bloodied Shawn's nose, so he pushed him away into the ditch. But Shawn got up and swung at him so he hit him once more, in the eye. That last punch appears to have been the one that caused the later hemorrhaging. As a result of the injury, Shawn has a greater than normal likelihood of developing glaucoma and/or a detached retina. His vision in the affected eye has improved to 20/25, near perfect vision, but it was a long recuperative period. Shawn's sports activities are limited due to the eye injury.

There was sketchy, conflicting, and dim recollection by witnesses to the fight as to who actually made the first move. Overall, the evidence seems to preponderate in favor of a finding that Jeremy made the first move. However, it appears that both went to the scene contemplating a fight. Todd Pruitt, Shawn's friend, testified that Jeremy pushed Shawn first, Shawn swung back, and then they both started swinging and hitting each other. Todd also stated that Shawn said he was going to be there to fight and that he appeared fully willing to fight.

The trial judge found that Jeremy Mangion was the initial instigator between the boys from the first meeting. He further found that the fight appeared to have been instigated by friends of the boys. However, he further found that both Jeremy and Shawn went to the scene expecting to engage in fisticuffs, neither was the aggressor, and neither used excessive force.

On appeal plaintiffs claim that Jeremy was the aggressor in the fight and that he attacked Shawn without justification or provocation. Defendants claim that Shawn voluntarily participated in the altercation, impliedly consenting to being struck in the eye by Jeremy.

We initially recognize that the trial court's finding that Shawn voluntarily participated in the altercation and that neither boy used excessive or unnecessary force are findings of fact which may not be disturbed unless, (1) the record evidence does not furnish a sufficient basis for the finding, or (2) that finding is clearly wrong.

The defense of consent to an intentional tort was examined in Andrepont v. Naquin, 345 So. 2d 1216 (La. App. 1st Cir. 1977). The court stated, "The defense of consent in Louisiana operates as a bar to recovery for the intentional infliction of harmful or offensive touchings of the victim. Consent may be expressed or implied; if implied, it must be determined on the basis of reasonable appearances. When a person voluntarily participates in an altercation, he may not recover for the injuries which he incurs, unless force in excess of that necessary is used and its use is not reasonably anticipated. The use of unnecessary and unanticipated force vitiates the consent. For example, when a party voluntarily engages in a fist fight and his adversary suddenly reveals a concealed or dangerous weapon, he does not necessarily consent to the use of such an instrument." (Citations omitted.)

The evidence shows that Jeremy was the instigator of bad feelings between the boys. In fact, he committed two batteries on Shawn before the fight in question. However, we agree with the finding by the trial judge that both Jeremy and Shawn went to the rope swing prepared to engage in fisticuffs and fully contemplating the altercation. There is evidence that Shawn, in anger, challenged Jeremy to a fight. The evidence shows the idea of a fight was actively advanced by classmates. The evidence also establishes that, when Shawn left the safety of his home to meet Jeremy at the rope swing, he understood or should have understood that his showing

up would demonstrate his willingness to fight Jeremy. By showing up at the rope swing, knowing Jeremy was waiting to fight with him, Shawn implied to Jeremy that he was willing to engage in a fight and incur blows. When two parties expressly or impliedly agree to fight the consent of one is not vitiated merely because the other strikes the first blow. It is not necessary that simultaneous blows be struck. It is unfortunate that Shawn was so badly injured, but his alternative was to stay at home that afternoon. We recognize the tremendous peer pressure in these situations, but peer pressure does not vitiate consent.

We also find no error with the trial judge's finding that no unnecessary or excessive force was employed by either boy. It was a fistfight and no weapons were involved. Shawn was only a little smaller than Jeremy according to the testimony of most witnesses. Although Jeremy did hit Shawn in the face up to eight times while he had him in a headlock, we do not find that this was unnecessary or excessive force. It appears that Jeremy hit Shawn more than he would have while he had him in the headlock because he became angry when Shawn hit him. After Jeremy pushed Shawn into the ditch, Shawn charged back at Jeremy. Up until this point the only obvious injury to Shawn was a bloody nose. After Shawn charged back at him, Jeremy hit him one last time, in the eye. There is no indication at all that Jeremy intended to maim Shawn.

In conclusion, we find no error in the trial court judgment. For the reasons assigned, we affirm the judgment of the trial court. Costs of this appeal are assessed against plaintiffs-appellants.

NOTES TO RICHARD v. MANGION

1. ***Consent and Self-Defense.*** The primary issue in Richard v. Mangion is whether Shawn voluntarily participated in the fight with Jeremy. Consent may be difficult to establish when the parties were engaged in a fight because the defenses of consent and self-defense may seem to overlap. As in McQuiggan v. Boy Scouts of America, the court looked at "reasonable appearances." On the one hand, Jeremy appeared to have provoked Shawn. On the other hand, there was testimony that Shawn went to the rope swing "fully willing to fight." The court observed that peer pressure does not vitiate consent.

In understanding the court's decision, is it helpful to look at the order of events and Shawn's options at each point — from arriving at the rope swing to getting up out of the ditch and swinging at Jeremy? Does it matter who swung first?

2. ***Consent and Excessive Force.*** The court in Richard v. Mangion states that consent is vitiated by unnecessary or excessive force. Excessive force is a contact that is not "consistent with the understood rules of the game." That is not the same as saying that consent is vitiated by unanticipated results. For example, in McQuiggan v. Boy Scouts of America, while the plaintiff had not consented to the particular injury he suffered, he was barred from recovering damages for them. Was the court's conclusion that there was no excessive force in Richard v. Mangion consistent with the fact that the plaintiff suffered hemorrhaging in his eye that required two operations and $15,000 in medical bills?

3. ***Problem: Excessive Force Vitiating Consent.*** In Lane v. Holloway, 3 All Eng. Rep. 129 (Court of Appeal, 1967), there was a fight, of sorts, between Mr. Lane and Mr. Holloway. Mr. Lane, a somewhat infirm, 64-year-old retired gardener living

in England, resided in a quiet courtyard onto which backed a noisy cafe run by 23-year-old Mr. Holloway. Returning from a bar at 11 o'clock one night, Mr. Lane was chatting in the courtyard. Holloway's wife, disturbed by the noise, called out to them, "You bloody lot." The court described the subsequent events as follows:

> Mr. Lane replied: "Shut up, you monkey-faced tart." Mr. Holloway sprang up and twice said: "What did you say to my wife?" He said it twice. Mr. Lane said: "I want to see you on your own," implying a challenge to fight. Whereupon Mr. Holloway came out in his pyjamas and dressing-gown. He walked up the courtyard to the place where Mr. Lane was standing at his door. He moved up close to Mr. Lane in a manner which made Mr. Lane think that he might himself be struck by Mr. Holloway. Whereupon Mr. Lane threw a punch at Mr. Holloway's shoulder. Then Mr. Holloway drew his right hand out of his pocket and punched Mr. Lane in the eye, a very severe blow.

Mr. Lane was taken to the hospital with a very serious eye injury requiring 16 stitches that worsened his chronic glaucoma. Did Mr. Lane consent to a battery? How much force was Mr. Holloway entitled to use? Did Mr. Holloway use excessive force?

4. ***Consent to a Breach of the Peace.*** State laws differ as to whether the defense of consent is available to a defendant whose conduct is a crime. When abortion was criminalized in some states, for instance, a person performing an abortion could not use consent to contact as a defense if sued by an injured patient. Some fistfights and other activities leading to assaults and batteries are considered *breaches or disturbances of the peace*, which are crimes. In some states, perhaps the majority, consent is not an available defense if the fight is a breach of the peace.

Statute: DISTURBING THE PEACE

La. Rev. Stat. 14: 103A (2002)

A. Disturbing the peace is the doing of any of the following in such manner as would foreseeably disturb or alarm the public:

(1) Engaging in a fistic encounter; or

(2) Addressing any offensive, derisive, or annoying words to any other person who is lawfully in any street, or other public place; or call him by any offensive or derisive name, or make any noise or exclamation in his presence and hearing with the intent to deride, offend, or annoy him, or to prevent him from pursuing his lawful business, occupation, or duty; or

(3) Appearing in an intoxicated condition; or

(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or

(5) Holding of an unlawful assembly; or

(6) Interruption of any lawful assembly of people.

NOTE TO STATUTE

Defining "Disturbing the Peace." Many states have statutes defining what constitutes disturbing the peace. These statutes may distinguish between when consent to a harmful contact is a defense and when it is not. The statute reproduced above applies in

Louisiana, where the fight between Jeremy and Shawn in the Richard v. Mangion opinion occurred. Did Jeremy and Shawn's fight fit within this statute's definition of "disturbing the peace"?

B. Defense of Self and Others — The Proportionality Principle

Proportionality is central to the defenses to assault and battery. In defense of one's self, of another person, or of one's land or property, an actor may use force proportionate to: (1) the interest the actor is protecting; and (2) the injury or harm threatened by the other. The law values the interest in human life more highly than the interest in personal property. Accordingly, an actor is privileged to use greater force to protect a life than to protect an automobile. An actor is privileged to use greater force to prevent a stab than to prevent a slap. Appreciating how the law values different interests and weighs different kinds of injuries and harm makes it easier to understand how much force an actor may use in self-defense, defense of others, and defense of property.

In a case where a boy was followed home from school by another boy who threatened to beat him up, Slayton v. McDonald identifies factors relevant to determining how much force a person may use for self-defense. A general approach to this issue first requires establishing how much force may be used and then deciding whether the actual force used was greater than the allowable maximum. An actor who is entitled to use some force may still be liable for the consequences of using excessive force. Young v. Warren applies this principle to the privilege to use force to protect others.

SLAYTON v. McDONALD

690 So. 2d 914 (La. Ct. App. 1997)

WILLIAMS, J. . . .

On the afternoon of May 20, 1994, fourteen-year-old Daniel McDonald and fourteen-year-old James Slayton had a disagreement while riding the school bus to their neighboring Dubach homes. Slayton was the larger of the two boys and was attending high school. McDonald was attending junior high school. The disagreement began when Slayton threw a piece of paper at McDonald. After McDonald threw the paper back at Slayton, Slayton threatened to come to McDonald's house. McDonald told Slayton not to come to his house. When asked about Slayton's reputation as a fighter, McDonald testified he had heard that Slayton had won fights against people larger than himself, and that Slayton could "take care of himself pretty good."

Later that afternoon, after McDonald arrived at home, he went outside his house and saw Slayton walking up the long driveway toward him. Slayton testified that he went to McDonald's house because he wanted to talk to McDonald about "kicking and punching on little kids and about messing with me and stuff." There were no adults present at McDonald's home when Slayton arrived at the residence. McDonald yelled at Slayton to go home. However, Slayton kept walking up McDonald's driveway. Slayton testified that he did not hear McDonald's warning. After shouting the warning to Slayton, McDonald went into his house, got his twelve-gauge shotgun, came back

outside and loaded the gun with # 7½ shot shells. McDonald testified that Slayton saw him load the gun; Slayton said that he did not. Again, McDonald asked Slayton to leave and Slayton refused.

McDonald then retreated into his home and called 911 to request help. McDonald testified that he closed the front door of his house after retreating inside. Slayton testified that the door was open. However, it is undisputed that the front door of the McDonald home did not have a lock and anyone could open it from the outside.

As McDonald spoke to the 911 operator, Slayton came inside McDonald's house. The transcript of the 911 conversation reveals that McDonald told Slayton to leave several times, to no avail. McDonald can be heard to say: "I think he's like sixteen. He's a lot bigger than me and he's in my house"; "Don't take another step towards me"; and, "If he keeps coming toward me I'm going to shoot him."

McDonald testified that Slayton pointed at his own leg, dared McDonald to shoot, and said that McDonald "didn't have the guts" to shoot. McDonald also stated that Slayton told him he was going to teach him a lesson and "kick my [McDonald's] ass." Slayton testified that after McDonald threatened to shoot him, he told McDonald that if McDonald shot him, he would get up and beat McDonald.

When asked if he was afraid when Slayton came into his house, McDonald testified that Slayton frightened him because "he [Slayton] had a crazy look in his eye. I didn't know what he was going to do after he didn't stop for the gun, I thought he must have been crazy." McDonald also told the 911 operator that "he's kinda crazy, I think." McDonald testified that Slayton "asked me if I could get him before he got to me and got the gun first. I was afraid that if he came past the gun that he was crazy enough to kill me."

At some point during the encounter, Slayton's younger sister, Amanda, arrived at the McDonald home and asked Slayton to leave because McDonald was armed. According to McDonald, Slayton refused to leave by saying "he's too scared to shoot me. He's about to cry." The 911 operator told McDonald several times not to shoot Slayton; McDonald said "I ain't gonna shoot him but in the leg. But I have to defend myself." Slayton testified that McDonald never pointed the shotgun at his head or chest.

What happened next was a matter of some dispute. On the 911 transcript, McDonald tells Slayton that "I might just count to three." Slayton testified that he was kneeling down because he was "resting waiting for the cops to get there so I could tell my story." However, Amanda Slayton and McDonald testified that Slayton was standing. Both Amanda and James Slayton testified that Slayton did not make a move toward McDonald, and Slayton testified that at all times during the incident, he was never more than two feet inside the McDonald home. However, McDonald testified that Slayton then began to count and to move "eight feet at least" into the home. On the tape of the 911 conversation, most of what Slayton says is inaudible, but, at the point where McDonald states that he might count to three, Slayton can be heard to count "one—two—three." McDonald then shot Slayton once in the left knee. Slayton's grandmother arrived shortly thereafter, pulled Slayton out of the McDonald home and waited for the paramedics and law enforcement authorities to arrive.

McDonald testified that from his experience, a load of # 7½ shot did not do a great deal of damage to animals at ordinary hunting distance, but he had never fired his shotgun at anything so close before. On the 911 tape, McDonald can be heard saying, "I ain't got but squirrel shot in here. . . ."

Nevertheless, according to one of Slayton's doctors, Dr. Richard I. Ballard, the shot charge caused Slayton a "devastating" and "severe" injury that will require knee fusion rendering his knee permanently stiff and the injured leg at least an inch shorter than the other leg. Slayton and his parents testified that the injury had caused Slayton tremendous pain and had drastically reduced or eliminated his ability to engage in activities he used to enjoy. Slayton is also unable to perform chores around the house. Moreover, plaintiff introduced evidence that his family had incurred $43,310.51 in medical costs and had lost $1,349.00 in wages due to doctor visits at the time of trial. Further, plaintiff anticipated at least one future operation on Slayton's knee. . . .

The plaintiff contends the trial court erred in finding that [Daniel McDonald] acted reasonably under the circumstances surrounding this incident, and thus, was justified in shooting [James Slayton] in the leg. We do not find that the trial court erred. . . .

Generally, one is not justified in using a dangerous weapon in self-defense if the attacking party is not armed but only commits battery with his fists or in some manner not inherently dangerous to life. However, resort to dangerous weapons to repel an attack may be justifiable in certain cases when the fear of danger of the person attacked is genuine and founded on facts likely to produce similar emotions in reasonable men. Under this rule, it is only necessary that the actor have grounds which would lead a reasonable man to believe that the employment of a dangerous weapon is necessary, and that he actually so believes. All facts and circumstances must be taken into account to determine the reasonableness of the actor's belief, but detached reflections or a pause for consideration cannot be demanded under circumstances which by their nature require split second decisions. Various factors relied upon by the courts to determine the reasonableness of the actions of the party being attacked are the character and reputation of the attacker, the belligerence of the attacker, a large difference in size and strength between the parties, an overt act by the attacker, threats of serious bodily harm, and the impossibility of a peaceful retreat.

In the instant case, McDonald testified that he believed that Slayton had beaten up people larger than himself, and, in essence, was capable of giving McDonald a beating as well; Slayton admitted that he had been in two fights while attending junior high school but gave no details of those altercations. Moreover, Slayton exhibited marked belligerence by refusing to leave McDonald's home despite repeated demands by McDonald while the latter was on the telephone with law enforcement authorities and was armed with a loaded twelve-gauge shotgun. This combination of reputation and belligerence evidence provides support for the trial court's conclusion that "the presence of the shotgun and defendant's threats were insufficient to thwart plaintiff's advances." It is undisputed that Slayton was considerably physically larger than McDonald, and the trial court accepted McDonald's testimony that Slayton had threatened to harm him. Indeed, Slayton himself admitted that he told McDonald that if McDonald shot him, he was going to get up and beat McDonald.

The trial court's finding that McDonald shot Slayton "to stop the plaintiff's advance" is a decision based upon the court's judgment of the credibility of the witnesses. Although both Slayton and his sister contradicted McDonald's testimony that Slayton was advancing when he was shot, Slayton's testimony that he was kneeling down when he was shot is contradicted by that of his sister and McDonald. Additionally, Slayton's testimony that he never came more than two feet into the house is contradicted by McDonald's [father's] testimony that he found blood about ten feet

inside his home. Finally, the 911 tape, on which Slayton's voice became clearly audible only seconds before McDonald shot him, is further support for the conclusion that Slayton was advancing upon McDonald when shot. From its reasons for judgment, it is apparent that the trial court chose to credit McDonald's version of events over Slayton's version. Because the record supports this decision, it will not be disturbed on appeal.

Finally, it is evident that McDonald was simply unable to retreat from the encounter. While retreat is not a condition precedent for a finding of self-defense using justifiable force, in our opinion, the retreat of a lawful occupant of a home into a position in his home from which he cannot escape an attacker except by the use of force is strong evidence that the occupant's use of force to prevent the attack is proper. Although a shotgun may be a deadly weapon, McDonald used the gun in a way that he calculated would stop the attack without fatally injuring Slayton. Further, as recited above, McDonald testified that he was "afraid that if he [Slayton] came past the gun that he was crazy enough to kill me." Under these circumstances, where McDonald was on the telephone with law enforcement authorities and had repeatedly demanded that Slayton leave, and Slayton continued to advance and threaten McDonald, we cannot disagree with the trial court's conclusion that McDonald used reasonable force to repel Slayton's attack. . . .

YOUNG v. WARREN

383 S.E.2d 381 (N.C. Ct. App. 1989)

GREENE, J.

In this civil action the plaintiff appeals from a final judgment entered by the trial court, pursuant to a jury verdict, denying any recovery on a wrongful death action.

The evidence introduced at trial showed that defendant shot and killed Lewis Reid Young ("Young") on 12 May 1986. The death occurred as a result of a 20-gauge shotgun blast fired at close range into the deceased's back. On 14 October 1986, the defendant pled guilty to involuntary manslaughter.

Prior to the shooting, in the early morning hours of 12 May 1986, Young, who had been dating defendant's daughter for several months, went to the home of defendant's daughter who lived with her two children within sight of the defendant's residence. Upon arriving at the defendant's daughter's home, Young threw a large piece of wood through the glass in the front door. He then entered the home by reaching through the broken window and unlocking the door. Once inside the house Young argued with the defendant's daughter and "jerked" her arm. At that point, the defendant arrived with his loaded shotgun, having been awakened by a telephone call from a neighbor, his ex-wife, who had told him "something bad is going on" at his daughter's house. When the defendant arrived at his daughter's house, he heard screaming and saw Young standing inside the door. The defendant then testified:

> *A.* I told him like, "Come on out. This doesn't make any sense," and he kind of came forward, you know, kind of had his hands up like that. (Indicating) I backed away from the door and I told him to get on out. "This can be taken care of tomorrow," or something to that effect.
>
> *Q.* You told him to get the hell out, didn't you?

A. Well, okay; something like that.
Q. Okay. And then what happened?
A. Then he walked out the door and I just backed up like he came out the door and he walked over about six feet. There is a cement porch there, and he stepped right there, and I was behind him anywhere from a foot to eighteen inches, maybe even two foot, and he stopped. And in my opinion, he started to turn around. . . .
Q. What did he do?
A. He stopped and started to lower his hands and started to turn around.
Q. What did you do?
A. I prodded him with the gun and told him to get on out, and that's when it went off.

The trial judge submitted two issues to the jury, the second issue being submitted over the objection of the plaintiff: . . .

2. Did the defendant, William S. Warren, act in the lawful defense of his daughter, Autumn Stanley, and her children, his grandchildren?
Answer: Yes.

Pursuant to the jury's answers to the issues submitted by the judge, the trial court ordered "that the plaintiff, Lewis Rankin Young, Jr., have and recover nothing of the defendant, William S. Warren, and that the costs be taxed against the plaintiff."

The determinative issue is whether the trial court erred in submitting the defense of family issue to the jury.

We first determine whether a defendant in a civil action may assert defense of family to justify assault on a third party. While self-defense and defense of family are seen more often in the context of criminal law, these defenses are nonetheless appropriate in civil actions. . . .

An assault on a third party in defense of a family member is privileged only if the "defendant had a well-grounded belief that an assault was about to be committed by another on the family member. . . ." State v. Hall, 366 S.E.2d 527, 529 (1988). However, in no event may defendant's action be in excess of the privilege of self-defense granted by law to the family member. The privilege protects the defendant from liability only to the extent that the defendant did not use more force than was necessary or reasonable. Finally, the necessity for the defense must "be immediate, and attacks made in the past, or threats for the future, will not justify" the privilege. . . .

[T]he record contains no evidence that the defendant reasonably believed his daughter was, at the time of the shooting of the plaintiff, in peril of death or serious bodily harm. At that time, the plaintiff stood outside the house with his back to the defendant. Defendant's daughter and children were inside the house, removed from any likely harm from plaintiff. Accordingly, . . . the evidence in this trial did not support the submission of the issue to the jury, and the plaintiff is entitled to a new trial. . . .

NOTES TO SLAYTON v. McDONALD AND YOUNG v. WARREN

1. ***Proportionality in Defense of Self and Others.*** Slayton v. McDonald and Young v. Warren illustrate the principle of proportionality as applied to defense of self and others. One may use *deadly force* only to prevent serious bodily harm. When an actor is faced with a battery or assault that does not involve serious bodily harm, he or

she is entitled only to use *moderate* or *reasonable force.* In Restatement (Second) of Torts §63 comment b, "serious bodily harm" means

> a bodily harm the consequence of which is so grave or serious that it is regarded as differing in kind, and not merely in degree, from other bodily harm. A harm which creates a substantial risk of fatal consequences is a "serious bodily harm." . . . The permanent or protracted loss of the function of any important member or organ is also a "serious bodily harm."

Compare the harm McDonald faced to the harm Warren's daughter faced *at the time of the shooting.* Note that Young was shot in the back, after he had left Warren's daughter's house. The privilege to use force to protect self and others is not a right to retaliate or seek revenge; it is a privilege to use force to protect. Are there any parts of Warren's testimony that, if believed, would support a privilege for Warren to use deadly force to protect himself?

Would Warren's daughter, Autumn, have been privileged to shoot Young after Young threw a large piece of wood through the glass, entered Autumn's house, and jerked Autumn's arm? If Young had been inside Autumn's house jerking Autumn's arm at the time Warren showed up with the shotgun, would Warren have been privileged to shoot Young?

2. *Objective Test for Perception of Threat.* Generally, one may not use deadly force to protect one's self or others from bodily harm that is not serious. If the actor actually fears serious bodily harm *and* a reasonable person in the actor's position would fear serious bodily harm, then the actor may defend him- or herself by using deadly force. This "reasonable person," according to the Restatement (Second) of Torts §63 comment i, must be a person of "ordinary firmness and courage." It does not matter what harm the attacker intends to inflict. The privilege arises from the reasonable perception of an impending battery.

Daniel McDonald testified that he thought James Slayton "was crazy enough to kill me." The court in Slayton v. McDonald identified six factors for determining the reasonableness of the actions of a party being attacked: (1) the character and reputation of the attacker, (2) the belligerence of the attacker, (3) differences in size and strength of the parties, (4) whether there was an overt act by the attacker, (5) whether serious bodily harm was threatened, and (6) whether a peaceful retreat was possible. A defendant need not show that all of these factors are present to be privileged to use deadly force. Which of these factors are present in Slayton v. McDonald?

Instead of the six-factor test used in Slayton v. McDonald, the Restatement (Second) of Torts focuses on the nature of the likely harm when determining the extent of force an actor may use to protect himself and others. Section 65 says that an actor may use deadly force if he reasonably believes he is "put in peril of death or serious bodily harm or ravishment." How does this test compare with the six-factor test?

3. *Extent of Force Used.* In addition to determining how much force an actor is entitled to use, the factfinder must determine how much force the actor actually did use. The extent of force used is not measured by the harm suffered but rather by the harm the defendant intended to cause or was likely to cause. Did Daniel McDonald and William Warren intend to use the same amount of force? Was it likely the force each used would cause the same amount of harm? Consider how they aimed their guns and the ammunition they used. What is the difference in the intent of McDonald and Warren?

4. *Assault in Criminal and Civil Law.* The court in Young v. Warren says that the question is "whether a defendant in a civil action may assert defense of family to justify assault on a third party." Frequently, courts use the word "assault" to indicate a harmful physical contact that tort law would describe as a "battery." In criminal law, an assault may occur even without the victim fearing an imminent contact. This difference between criminal law and the civil law action for assault will not cause confusion for readers who look carefully at the nature of the injury inflicted. Even though the court in Young v. Warren referred to the shotgun blast in the back as an assault, touching another person with shotgun pellets is certainly a harmful contact that tort law would describe as a battery.

Statute: USE OF DEADLY PHYSICAL FORCE AGAINST AN INTRUDER

Col. Rev. St. §18-1-704.5 (2006)

(1) The general assembly hereby recognizes that the citizens of Colorado have a right to expect absolute safety within their own homes.

(2) Notwithstanding the provisions of §18-1-704 [adopting a proportionate force rule for other cases], any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.

Statute: USE OF FORCE IN DEFENSE OF A PERSON

Fla. Stat. §776.012 (2006)

A person is justified in using force, except deadly force, against another when and to the extent that the person reasonably believes that such conduct is necessary to defend himself or herself or another against the other's imminent use of unlawful force. However, a person is justified in the use of deadly force and does not have a duty to retreat if:

(1) He or she reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony; or

(2) Under those circumstances permitted pursuant to §776.013.

Statute: HOME PROTECTION; USE OF DEADLY FORCE; PRESUMPTION OF FEAR OF DEATH OR GREAT BODILY HARM

Fla. Stat. §776.013(1)(a), (b) (2006)

(1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using

defensive force that is intended or likely to cause death or great bodily harm to another if:

(a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and

(b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

NOTES TO STATUTES

1. *The "Make My Day" Myth?* Current street wisdom holds that a homeowner is entitled to shoot anyone who enters the home uninvited. Many state statutes make special mention of people's right to be secure in their dwellings. The Colorado statute, for instance, recognizes "that the citizens of Colorado have a right to expect **absolute safety** within their own homes," although, as the second paragraph of that section reveals, the right has substantial qualifications. The recently adopted Florida statute, which has been copied by some other states, has fewer qualifications. Does the Florida statute in effect allow individuals to kill others in defense of property?

2. *The Obligation to Retreat.* Jurisdictions differ with respect to the obligation of a person to retreat. The court in Slayton v. McDonald considers the possibility of retreat as merely one factor to be considered in determining the amount of force one is privileged to use. The Restatement (Second) §65 denies the privilege to use deadly force in self-defense to one who "correctly or reasonably believes that he can safely avoid the necessity of so defending himself by . . . retreating" unless he is attacked in a dwelling place. The dwelling place exception is sometimes called the "castle doctrine." When is a person obliged to retreat under the Florida statute?

C. Defense of Land and Personal Property

The privilege to use force to defend land and personal property is also based on the principle of proportionality. Because the law values human life more than land or other possessions, there is less justification for the use of deadly force in these cases than in cases involving defense of people. Woodard v. Turnipseed involves a farmer's use of force, allegedly to protect himself and his property. The majority opinion and the concurrence treat separate issues: One discusses the right to use force to prevent harm to one's self and one's property, and the other discusses the right to use force to prevent intruders from being on one's land without permission.

WOODARD v. TURNIPSEED

784 So. 2d 239 (Miss. Ct. App. 2000)

IRVING, J.

Kenwyon Woodard, a minor, by his father and next friend, filed a complaint against John Turnipseed in the Choctaw County Circuit Court seeking personal injury

damages. The complaint arises from an assault and battery committed with a broom against him by Turnipseed, a large dairy farmer. . . .

The jury returned a verdict for Turnipseed. After the denial of his post-trial motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, Kenwyon has appealed. . . .

On September 7, 1996, Kenwyon [Woodard] was employed as a minimum wage milker with Turnipseed Dairy Farms of Ackerman, Mississippi. He had been working for Turnipseed Dairy Farms approximately six months during his latest employment but had worked for the dairy once before. His first employment with the dairy ended when he, according to Turnipseed, was fired by Turnipseed for not cleaning the cows prior to attaching the milker. On September 7, he was fired again for the same reason. According to Kenwyon, he did not know why he was fired the first time.

On September 7, according to Turnipseed, Kenwyon, along with two other boys, were preparing cows to be milked. One boy was driving the cows into the stalls, another was dipping the cows' udders in disinfectant, and Kenwyon was using paper towels to clean the udders. Turnipseed observed that Kenwyon had passed over three filthy cows. Upon making this observation, Turnipseed told Kenwyon, "you are fired, and go punch out."

Turnipseed claims that when he fired Kenwyon the first time Kenwyon had threatened to get him. Specifically, Kenwyon had said at that time, "I will get you for this." Remembering the previous threat, Turnipseed "thought this boy may vandalize my time clock." Because of this, Turnipseed decided to escort Kenwyon to the time clock. According to Turnipseed, Kenwyon started with a verbal assault as they walked out of the barn. Turnipseed heard the same threat he had heard upon the first firing of Kenwyon. In any event, Turnipseed escorted Kenwyon to the time clock, and Kenwyon changed clothes and telephoned his father to get a ride home. . . .

Turnipseed gave this account of the physical assault:

> And now listen to this. Shirley is my foreman. I told her Shirley, I don't care if the cows go dry, don't allow this boy back on the farm. I passed him off to her and went back to the barn and milked. . . . Ten minutes later I step out of the barn and there is Kenwyon. I said Kenwyon, didn't I tell you not to come back on my farm. Which wasn't quite the truth because I didn't address him. I addressed her in his presence. . . .
>
> Kenwyon didn't say anything. I said Kenwyon I am telling you to get off my property. Kenwyon said I am not going anywhere. I stood there a minute. I looked down. There was a broom leaning against the barn. I picked the broom up. I said Kenwyon, you see this broom. I am telling you to get off my property. Kenwyon didn't respond in any way. I walked the eight steps to Kenwyon, and I hit him three times with the broom. The last lick I hit him, the broom handle cracked. Didn't break. Cracked. Kenwyon decided he wanted to leave my farm, and he did.

As a result of the attack, Kenwyon suffered a hematoma of the right flank, a contusion of the left forearm and some contusion to the kidney. . . .

Turnipseed contends that he attacked Kenwyon in defense of self and property. Turnipseed argues that because Kenwyon had threatened to get him on a previous occasion as well as on the occasion giving rise to this appeal, he reasonably feared for his safety and the safety of his property. He contends that this is particularly true in light of the fact that he told Kenwyon to leave, but Kenwyon refused to do so.

We first recognize that if the facts showed that Turnipseed or his property were imperiled by Kenwyon, he would have had a legitimate right to defend himself and his

property, but using only such force as would have been reasonably necessary to accomplish the task. Did the facts show any such peril? The answer is an emphatic "no."

We look to the evidence in the light most favorable to Turnipseed. Turnipseed testified that, while he was escorting Kenwyon out of the barn to the time clock, Kenwyon repeated over and over again that Kenwyon was going to get Turnipseed. Kenwyon did nothing other than make this threat. Turnipseed went back into the barn and began to assist with the milking operation. Ten minutes later, Turnipseed sees Kenwyon sitting on a car parked on Turnipseed's property. Kenwyon has nothing in his hands and is doing nothing other than sitting on the car. Turnipseed says to Kenwyon, "didn't I tell you not to come back on my farm," and Kenwyon did not say anything. Turnipseed then tells Kenwyon to get off Turnipseed's property. Kenwyon says, "I am not going anywhere." Turnipseed picks up a broom and again tells Kenwyon to get off Turnipseed's property. Kenwyon does not respond. Turnipseed then walks eight steps to Kenwyon and hits him three times with the broom.

This evidence clearly shows that neither Turnipseed nor his milking operation was in any danger of being attacked by Kenwyon, the ninety-five pound minor. Turnipseed knew that Kenwyon had not been able to reach anyone to get a ride off the property because Turnipseed was there when the unsuccessful calls were made. Further, Turnipseed knew that Kenwyon did not possess his own transportation and that Kenwyon's father or mother transported him to and from work at Turnipseed's Dairy Farm.

When Turnipseed approached Kenwyon just before the attack, Kenwyon was not near any of the milking operations. He had not come back into the barn or given any indications that he was attempting to do so. It had been at least ten minutes since he had been escorted out of the barn. Surely, that was enough time for him to return and launch any attack he wanted to make if indeed he had planned to do so.

The record is unclear as to how far Kenwyon lived from Turnipseed's dairy farm, but there is some indication that it was at least between five and ten miles. Having failed to reach anyone at his home or his grandmother's house, Kenwyon was left with the options of walking the distance, however far, or waiting until his friend got off work. Under these circumstances, it was not unreasonable for Kenwyon to wait for a ride home. Granted, when he was accosted by Turnipseed and told to leave, he should have left, but his failing to do so did not justify the brutal attack by Turnipseed, especially considering the fact that Kenwyon was a minor with no available means of leaving except on foot.

Moreover, the record is clear that Turnipseed really never viewed Kenwyon as a threat to either his person or his property. Consider this testimony:

> *Q.* And when you struck him, did he get off your property?
> *A.* The first two times he stood there and glared at me. After the third blow he started off my property.
> *Q.* And he—did he run off the property?
> *A.* I just observed the first few steps. I was satisfied that he was no longer an immediate threat, and I went back to work.

Surely, if Turnipseed had been concerned that Kenwyon had intentions of attacking him or sabotaging his milking operations, he would have observed Kenwyon for more than "the first few steps," and he certainly would not have gone immediately back to work. He would have stayed around to see just what Kenwyon was going to do.

The evidence leads us to the inevitable conclusion that the trial court erred in not granting Kenwyon's motion for a directed verdict. Viewing the evidence in the light most favorable to Turnipseed, as we are required to do and have done in the preceding discussion, we are convinced that reasonable and fairminded persons could not have concluded that Turnipseed, a fifty-seven year old mature man weighing one hundred forty-five pounds, believed himself or his property in danger of attack from 4′ 9″, ninety-five pound Kenwyon. Accordingly, we reverse and render on the question of Turnipseed's liability but remand the case for a new trial on damages only. . . .

SOUTHWICK, P.J., concurring.

I agree that there was no evidence to support a defense of self or property from imminent harm. . . .

The final possible justification is a subset of what has just been described, but it is worth discussing as a separate matter. This justification does not require a threat of imminent harm, but it is the right of a person in possession of property to use reasonable force to evict a trespasser. The harm is just the presence of an obstinate trespasser. The rule permits a landowner whose demand upon a trespasser to leave has been ignored, to use the force reasonably perceived as necessary to remove the intruder. Cited for this proposition was a criminal case holding "that a person has the right to preserve the peace at his own home and to evict from his home and premises persons who are creating disturbances upon his premises." Cotton v. State, 100 So. 383 (Miss. 1924).

However, this rule goes beyond threatened or existing "disturbances." I find the following to be an apt statement of the elements:

> An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if
>
> (a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and
>
> (b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and
>
> (c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made.

Restatement (Second) of Torts §77 (1965). This rule would not permit the use of deadly force, but it strikes a balance short of such severe measures by assuring that people without authorization to be on property can be physically removed without having to await the commission of an overtly menacing act.

[The concurring judge concluded that Turnipseed had not properly raised the specific defense of eviction of a trespasser, but it would have failed anyway because Turnipseed used unreasonable force.]

NOTES TO WOODARD v. TURNIPSEED

1. ***Reasonable Force to Protect Land and Chattels.*** Farmer John Turnipseed claimed that he was privileged to beat Kenwyon Woodard with a broomstick because Turnipseed was protecting himself and his property. Moderate but not deadly force may be used to prevent harm to real or personal property. The time clock is an example

of a *chattel*, the legal term for *personal property*, sometimes called "personalty," such as a car, a hat, or one's wallet. Interests in land, such as the right to possess land, are interests in *realty* or *real property*. Tort law analyzes defense of property the same way it analyzes defense of self or others. The amount of force one is entitled to use depends on what is threatened. Because property is valued less highly than human life, deadly force may not be used to protect property alone.

Turnipseed claimed that he was concerned about Woodard vandalizing the time clock and about the threat implicit in "I will get you for this." How does the force justified by these concerns compare to the force used?

2. ***Reasonable Force to Eject Trespassers.*** Judge Southwick's concurring opinion in Woodard v. Turnipseed introduces a justification for the use of reasonable force even when harm to person or property is not threatened. Recall the distinction between injury and harm discussed in the notes following Nelson v. Carroll. An injury is an invasion of a legally protected interest, while a harm is an actual detriment. One interest related to land is the right to exclusive possession of the land. A person who intentionally enters another's land without permission or invitation is a trespasser and interferes with that right to exclusive possession. The person with the legal interest in land has the right to use reasonable force to prevent intrusions onto the land, as described by Judge Southwick in his quotation from Restatement (Second) of Torts §77. What actions would the law permit Turnipseed to take to defend his interest in exclusive possession of his property?

3. ***Problem: The Proportionality Principle and Defense to Assault and Battery.*** The proportionality principle helps to explain many privileges. The defense of arrest, for instance, creates a privilege for an actor to use reasonable force to arrest and detain someone who has or is committing a crime. In Mississippi, for instance, a private citizen may arrest any person without a warrant for an offense such as trespass on another's land or for a breach of the peace "attempted or threatened in his presence." See Whitten v. Cox, 799 So. 2d 1 (Miss. 2000). Police and private citizens alike are free from tort liability for the use of reasonable force when making a legal arrest. Applying the usual values the law assigns to life and property and the rules governing privileges to use force discussed in the cases in this section, consider the facts of Whitten v. Cox:

> On Sunday afternoon, March 19, 1995, Cox, Spinosa and Logan drove a pickup truck onto a tract of land which was being farmed and leased by Cox's brother. Cox claims he was inspecting the condition of the land at his brother's request to see whether it was ready to be worked. They attempted to access this land through a dirt road which crossed Whitten's land and then alongside an airstrip on property adjacent to Whitten's land. Whitten did not own the land that the airstrip was on, but he had built the airstrip with the permission of the owner of that land and was permitted to use it as such. Whitten also owned a camp and a firing range on his own land adjacent to the airstrip. The plaintiffs drove past the Whitten camp and drove the pickup down the center of the grass runway toward the field that Cox was going to inspect. Whitten saw the truck driving down the runway and ran after the truck, shouting for it to stop. When the truck did not stop Whitten drew his side arm, a .45 caliber semi-automatic pistol, and fired several shots. Whitten claims that he fired the shots into the air and at an angle away from the pickup in order to get the attention of the driver. Cox claims Whitten was shooting at the truck and that he heard a bullet pass by the open window. The truck then turned and came back towards the Whitten

camp, this time along the side of the runway. Whitten placed himself in front of the truck and ordered the driver to stop the truck.

At this point, the facts become starkly disputed. Whitten claims that the driver of the truck refused to stop, forcing him to jump to one side, and hitting him with the side view mirror. The plaintiffs claim that the truck was slowing down, at idle speed, and that the driver was pumping the brakes, attempting to stop. The plaintiffs' recollection was that Whitten slipped in the mud and then grabbed onto the side mirror to support himself. It is undisputed that at this time Whitten shot out one of the back tires on the pickup. Whitten then ordered the plaintiffs out of the truck.

Again the facts are disputed. The plaintiffs claim that Whitten pointed the cocked pistol directly at them, waving it in their faces, shouting, cursing, and ordering them out of the truck and onto the ground. Cox claims that Whitten pressed the barrel of the gun to Cox's temple and told Cox he ought to kill him or "kick his face in" for being on the runway. Whitten denies pointing the gun at anyone, though it is undisputed that he was armed, that his friends standing around were armed with loaded assault rifles and that Whitten ordered the plaintiffs to kneel on the ground. Once they were out of the truck, Whitten informed all three that they were under arrest for trespass. One of Whitten's sons who was present brought some handcuffs from a nearby vehicle. It is undisputed that Whitten ordered one of the other men to handcuff Cox prior to taking him to a building at his camp. Cox claims that Whitten asked the other two plaintiffs whether they thought Cox could swim in the nearby Buzzard Bayou with those handcuffs on. Cox also claims that when he rose to his knees, Whitten pulled the bill of his cap down over his eyes and knocked his sunglasses off. Once the three plaintiffs were escorted back to Whitten's camp, Whitten unsuccessfully tried to telephone the Sheriff. Whitten then recognized Cox as the brother of the person who leased some farmland on the neighboring property where the airstrip was located. At this point Cox recalled that Whitten began to calm down and discuss how to resolve the situation. . . .

Did Whitten assault or batter Cox? Does the defense of arrest provide a privilege for Whitten? Consider first the extent of force justified and then the extent of force used.

Statute: FORCE IN DEFENSE OF PROPERTY

Utah Stat. §76-2-406 (2002)

A person is justified in using force, other than deadly force, against another when and to the extent he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property: (1) lawfully in his possession, (2) lawfully in the possession of a member of his immediate family, or (3) belonging to a person whose property he has a legal duty to protect.

Statute: USE OF FORCE IN DEFENSE OF PREMISES AND PROPERTY

N.D. Stat. §12.1-05-06 (2001)

Force is justified if it is used to prevent or terminate an unlawful entry or other trespass in or upon premises, or to prevent an unlawful carrying away or damaging of property, if the person using such force first requests the person against whom such

force is to be used to desist from his interference with the premises or property, except that a request is not necessary if it would be useless or dangerous to make the request or substantial damage would be done to the property sought to be protected before the request could effectively be made.

Statute: USE OF FORCE IN DEFENSE OF PREMISES OR PERSONAL PROPERTY

N.J. Stat. §2C:3-6(b)(3) (2002)

Use of deadly force. The use of deadly force is not justifiable [in defense of premises] unless the actor reasonably believes that:

(a) The person against whom the force is used is attempting to dispossess him of his dwelling otherwise than under a claim of right to its possession; or

(b) The person against whom the force is used is attempting to commit or consummate arson, burglary, robbery or other criminal theft or property destruction; except that

(c) Deadly force does not become justifiable . . . unless the actor reasonably believes that:

(i) The person against whom it is employed has employed or threatened deadly force against or in the presence of the actor; or

(ii) The use of force other than deadly force to terminate or prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of bodily harm. An actor within a dwelling shall be presumed to have a reasonable belief in the existence of the danger. . . .

NOTES TO STATUTES

1. ***Limitations on the Use of Reasonable Force.*** While some statutes privilege the use of reasonable force to protect property, as Utah's statute illustrates, others qualify the privilege. Requiring a request to desist is a common limitation, though a request is required only when it is reasonable, as the North Dakota statute indicates. Other statutes explicitly deny the privileged use of force when the actor knows that exclusion of the trespasser will expose the trespasser to a "substantial risk of serious bodily harm." See, e.g., N.J. Stat. §2C:3-6b(2).

2. ***Limitations on the Use of Deadly Force.*** While some states privilege use of deadly force to prevent serious crimes, others qualify the privilege. New Jersey's statute lists a number of crimes that justify the use of deadly force but qualifies the privilege by requiring that there also be threat of bodily harm to a person.

V. Infliction of Emotional Distress

The tort of *intentional infliction of emotional distress* protects a person's right to be free from serious emotional distress. This tort is also known as the *tort of outrageous conduct*, or, simply, the *tort of outrage*. Certain attributes of emotional distress have

made it a complicated issue in tort law. Mental anguish occurs from time to time in everyone's life, it can be hard to measure, and a plaintiff can easily lie about it. For these reasons, courts have sought to limit the circumstances in which plaintiffs can recover damages from defendants whom they claim have caused them to suffer emotional distress. Nevertheless, tort doctrines sometimes permit plaintiffs to recover for emotional distress. For example, recovery of emotional distress damages is permitted when the distress is caused by an assault or a battery.

The development of the intentional infliction of emotional distress tort reflects the concerns about the universality of some mental suffering in human life and the problems of measurement and possible exaggeration. Plaintiffs are permitted to recover only if a defendant's conduct is "outrageous" and the resulting mental distress is "severe." These limitations may prevent plaintiffs from seeking damages when they suffer only the kind of sadness that is common in life, and may filter out cases in which lying or exaggerating about emotional impact would be likely.

A. Outrageousness

Liability for intentional infliction of emotional distress is based on proof of outrageous conduct. This leads to some basic questions: Just how outrageous must the conduct be in order to impose liability? Whose frame of reference counts in assessing outrageousness? Should the judge or the jury (if there is a jury) evaluate the defendant's conduct? Courts ordinarily use an *objective test* to determine whether conduct is outrageous, just as they use an objective test for offensiveness in battery cases. Zalnis v. Thoroughbred Datsun Car Company and Strauss v. Cilek introduce the outrageousness tort and deal with many of these issues.

ZALNIS v. THOROUGHBRED DATSUN CAR CO.

645 P.2d 292 (Colo. Ct. App. 1982)

KELLY, J.

Plaintiff, Christiane Zalnis, appeals the partial summary judgment dismissing her outrageous conduct claim against defendants. We reverse.

The following facts appear from viewing the record in a light most favorable to the plaintiff. In January 1978, Zalnis contracted with defendant Thoroughbred Datsun for the purchase of a 1978 Datsun automobile. She took possession of the car on that day, and paid the balance of the purchase price two days later. Zalnis dealt directly with Linnie Cade, a salesperson employed by Thoroughbred Datsun. Defendant Trosper, President of Thoroughbred Datsun, approved the transaction based on representations by Cade which were later determined to be based upon erroneous calculations. When Trosper discovered several days later that Cade had sold the car at a loss of approximately $1,000, he instructed Cade and the sales manager to make good the loss by either demanding more money from Zalnis, retrieving the car, or repaying the difference out of Cade's salary.

Cade refused to follow any of Trosper's alternative instructions, but another sales employee, defendant Anthony, telephoned Zalnis and told her to return her car to the dealership because it was being recalled. When Zalnis arrived at Thoroughbred Datsun,

she refused to give up possession of her car without a work order explaining the need for the recall. Nevertheless, her car was taken from her. During the next few hours, Zalnis alleges that Anthony called her a "French whore," followed her throughout the showroom, told her they were keeping her automobile, yelled, screamed, used abusive language, grabbed her by the arm in a threatening manner, and continually threatened and intimidated her when she attempted to secure the return of her automobile by telling her to "shut up."

During this period, Zalnis telephoned her attorney, who then telephoned Trosper and eventually obtained the return of her car. During their conversation, Trosper told the attorney that Zalnis had "been sleeping with that salesman and that's the only reason she got the deal she got." Trosper had known Zalnis for many years, and had told Cade and the sales manager that she was crazy and she had watched her husband kill himself.

. . . Thoroughbred Datsun and Trosper moved for partial summary judgment on the outrageous conduct claim. The trial court granted the motion, determining that, although the conduct was "almost shocking to the conscience and person of anyone observing that behavior," it did not amount to outrageous conduct under Colorado precedent.

In Rugg v. McCarty, 476 P.2d 753 ([Colo.] 1970), the Supreme Court recognized the tort of outrageous conduct and adopted the definition set forth in the Restatement (Second) of Torts §46: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." Although the question whether conduct is sufficiently outrageous is ordinarily a question for the jury, the court must determine in the first instance whether reasonable persons could differ on the outrageousness issue.

The defendants argue that their actions here were no more than "mere insults, indignities, threats, annoyances, petty oppressions, and other trivialities." Restatement (Second) of Torts §46, Comment d. However, the defendants did not merely threaten and insult Zalnis; they took away her car and repeatedly harassed her. Conduct, otherwise permissible, may become extreme and outrageous if it is an abuse by the actor of a position in which he has actual or apparent authority over the other, or the power to affect the other's interests. Restatement (Second) of Torts §46, Comment e.

The conduct here is not a mere insistence on rights in a permissible manner. See Restatement (Second) of Torts §46, Comment g. Rather, the defendants' recall of the car was to avoid a bad bargain, and accordingly, the conduct was not privileged.

Defendants assert that their actions must be judged by the impact they would have on an ordinary person with ordinary sensibilities. We disagree. The outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress by reason of some physical or mental condition or peculiarity. Restatement (Second) of Torts §46, Comment f. In Enright [v. Groves, 560 P.2d 851 (Colo. Ct. App. 1977)], outrageous conduct was found where a police officer effecting an illegal arrest grabbed and twisted the plaintiff's arm even after she told him her arm was easily dislocated. In the instant case, plaintiff was peculiarly susceptible to emotional distress because she had witnessed her husband's suicide, and Trosper and Anthony knew about her susceptibility. Here, as in *Enright*, the defendants' knowledge exacerbated the conduct.

. . . Zalnis has sufficiently alleged that Trosper and Anthony acted with the intent to bully her into giving up her car. In view of their knowledge of her emotional

susceptibility, they could be considered to have acted intentionally or recklessly in causing her severe emotional distress.

The defendants argue that we should observe a distinction between a single outrageous occurrence and an outrageous course of conduct. While it is true that "the courts are more likely to find outrageous conduct in a series of incidents or a 'course of conduct' than in a single incident," it is the totality of conduct that must be evaluated to determine whether outrageous conduct has occurred. Our evaluation of the totality of the conduct leads to the conclusion that reasonable persons could differ on the question whether there was outrageous conduct, and thus, summary judgment was improper. . . .

NOTES TO ZALNIS v. THOROUGHBRED DATSUN CAR CO.

1. ***Intent.*** The intent element for the tort of outrageous conduct may be established by proof that the defendant either (a) intended to cause or (b) recklessly caused the plaintiff's severe emotional distress. Reckless infliction of emotional distress is discussed later in this chapter. "Intent" has the same meaning for this tort as for the torts of battery and assault. What evidence supports a conclusion that Trosper and Anthony intended to cause Zalnis severe emotional distress?

2. ***Particular Sensitivity.*** The test for outrageousness is an objective test, based on a typical community member's assessment of the challenged conduct. When deciding whether conduct is outrageous, an average member of the community would likely consider whether the defendant knew that the plaintiff was, for some idiosyncratic reason, particular likely to suffer severe emotional distress. The Restatement (Second) of Torts §46 comment j states: "The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, *unless it results from a peculiar susceptibility to such distress of which the actor has knowledge.*" (Emphasis added.) What evidence permitted consideration of Ms. Zalnis's peculiar susceptibility? How did this evidence contribute to the court's conclusion that a reasonable person could find this conduct outrageous?

3. ***Person in Position of Authority or Power.*** Conduct that would otherwise not be outrageous might appear outrageous if one party has actual or apparent authority over the other or the power to affect the other's interests. The Restatement (Second) of Torts §46 comment e, illus. 5, provides an example of that principle:

> *A*, private detective, calls on *B* and represents himself to be a police officer. He threatens to arrest *B* on a charge of espionage unless *B* surrenders letters of a third person which are in her possession. *B* suffers severe emotional distress and resulting illness.

Would the intent and outrageous conduct elements be satisfied in this illustration?

STRAUSS v. CILEK

418 N.W.2d 378 (Iowa Ct. App. 1987)

SACKETT, Judge.

The sole issue in this interlocutory appeal is whether the trial court erred in denying defendant's motion for summary judgment on plaintiff's claim of intentional

infliction of emotional distress arising from defendant's romantic and sexual relationship with plaintiff's wife.

Defendant's affair with plaintiff's wife lasted one year. Plaintiff did not learn about the affair until after it was over. Plaintiff and his wife were in the process of obtaining a divorce at the time plaintiff initiated the present action for actual and punitive damages. The issue whether plaintiff in this case can maintain a claim for intentional infliction of emotional distress that arises out of a failed marital relationship may be appropriately resolved upon presentation of evidence through summary judgment.

. . . The elements of the tort of intentional infliction of emotional distress are as follows:

(1) Outrageous conduct by the defendant;

(2) The defendant's intention of causing, or reckless disregard of the probability of causing emotional distress;

(3) The plaintiff's suffering severe or extreme emotional distress; and

(4) Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

In overruling defendant's motion for summary judgment, the trial court declined to rule as a matter of law that defendant's actions were not outrageous. We find the evidence in the summary judgment record insufficient to demonstrate a genuine issue of fact on the outrageous conduct element.

It is for the court to determine in the first instance whether the relevant conduct may reasonably be regarded as outrageous. To be outrageous the conduct must be so extreme in degree as to go beyond all possible bounds of decency to be regarded as atrocious and utterly intolerable in a civilized community.

In Roalson v. Chaney, 334 N.W.2d [754,] 755 [(Iowa 1983)], Chaney asked Roalson's wife to marry him while she and Roalson were still married. The Iowa Supreme Court held no trier of fact could reasonably find Chaney's conduct outrageous. More recently, in Kunau v. Pillers, Pillers & Pillers, 404 N.W.2d 573, 576 (Iowa App. 1987), we held the facts of a case in which Kunau's wife had a lengthy sexual and romantic affair with her dentist could not support a conclusion the dentist's conduct was outrageous.

Plaintiff claims defendant's conduct in the present case is outrageous because plaintiff and defendant had known each other since elementary school and were good friends. We do not say that sexual relations between a plaintiff's friend and spouse would never give rise to a finding of outrageous conduct. We find the facts in this case, however, do not support a conclusion defendant's conduct is outrageous.

Defendant and plaintiff's wife kept their relationship secret until after it was over. Personal letters written by defendant to plaintiff's wife reveal defendant's genuine intention to leave his wife and children and to create a permanent relationship with plaintiff's wife. Plaintiff did not discover these letters discussing defendant's plans for the future until after he knew the affair had occurred. The record also reveals plaintiff's wife was unhappy in her marriage. She had previously engaged in an extramarital affair that lasted for five years with another of plaintiff's good friends.

We do not condone promiscuous sexual conduct. However, we do not find defendant's conduct in participating in a sexual relationship with a married woman, his friend's wife, who willingly continued the affair over an extended period, is atrocious and utterly intolerable conduct so extreme in degree as to go beyond all possible

bounds of decency. The parties are residents of Iowa City, a community of 50,000 and the home of the University of Iowa. A recitation of the facts of this case to an average member of the community would not lead him to exclaim, "Outrageous!"

The trial court erred in overruling defendant's motion for summary judgment. We reverse and remand the case for entry of an order granting defendant's motion for summary judgment.

NOTES TO STRAUSS v. CILEK

1. ***Exclaiming "Outrageous!"*** The court's use of the concept "lead him to exclaim, 'Outrageous!'" refers to Restatement (Second) of Torts §46 comment d. That comment, which has been highly influential, states that

> Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

How does the court characterize the community in which the defendant's conduct took place? Does that characterization support its conclusion?

2. ***Interference with Spousal Relations.*** American tort law once recognized causes of action related to a defendant's conduct that could affect a plaintiff's relationship with the plaintiff's spouse. These were referred to as "heart balm" torts. Adultery could be the basis of civil liability in a tort action known as "criminal conversation." Depriving a plaintiff of the affection, love, and companionship of his or her spouse could make a defendant liable for "alienation of affections." By the midpoint of the twentieth century, these and other similar causes of action had been abolished in the vast majority of states. While the *Strauss* court does not refer to this history, it may have been affected by the possibility that allowing recovery for the plaintiff might contradict the public policy against allowing damages for alienation of affections.

3. ***Problem: Establishing Outrageous Conduct.*** Do the following facts, taken from Dominguez v. Equitable Life Assurance Society, 438 So. 2d 58 (Fla. Dist. Ct. App. 1983), describe outrageous conduct on the part of the insurance agent?

> In 1973, Equitable issued Dominguez a disability income policy of insurance which provided for $500 per month income for accidental total disability for the insured's lifetime. Shortly after the policy issued, Dominguez was involved in an automobile accident which "caused severe injuries to his body and extremities, including both eyes being knocked out of their sockets, brain damage, multiple large scars, psychiatric problems, periodic incontinence, paralysis of nerve in eye and other physical and mental problems, and mental injuries as well, which resulted in his total disability." Equitable paid Dominguez the disability income through August 1979 and then stopped making payments.
>
> On April 21, 1980, Equitable sent an agent, Millie Dirube, to the home of Dominguez in Miami, Florida. Millie Dirube falsely represented to Dominguez that she had received a letter from the eye doctor saying that his eye(s) were OK now and that Dominguez was no longer disabled and falsely represented to Plaintiff that he was no longer totally disabled, that he was no longer covered under the policy, that the policy was no longer in force, that he had to sign a paper agreeing that no further payments were due under the policy, that it no longer covered him, that he was no longer entitled to receive benefits under the policy and that he was giving up the policy voluntarily. At the time said Millie Dirube made said misrepresentation she knew them to be false and

they were in fact false and she made them with the intention and expectation . . . that Dominguez be deceived and defrauded thereby and sign the paper and surrender the policy. A relative of Dominguez overheard and intervened at the last minute and prevented Dominguez from signing the paper and surrendering the policy.

B. Severe Emotional Distress

In addition to establishing outrageous conduct, the plaintiff in an intentional infliction of emotional distress or outrageousness tort action must also establish that he or she suffered severe emotional distress as a consequence of the defendant's conduct. Because of this requirement, some very reprehensible conduct may escape tort liability if its intended victim happens to tolerate it without suffering significant harm. This limitation on a plaintiff's ability to obtain redress may restrict the outrageousness action to circumstances where it is highly likely that the underlying conduct was outrageous and where the victim's suffering is genuine. Miller v. Willbanks evaluates the function of the severe emotional distress element and also considers how a plaintiff may prove the existence of that level of distress.

MILLER v. WILLBANKS

8 S.W.3d 607 (Tenn. 1999)

BARKER, J. . . .

On September 19, 1995, Elizabeth Ann Miller gave birth to Heather Nicole Miller at the Morristown-Hamblen Hospital Association ("the Hospital"). . . . The next day, the Hospital discharged Mrs. Miller but kept Heather pursuant to its policy of providing care for 48 hours to infants delivered by caesarean section.

Early September 21, Heather awoke with an elevated body temperature, heart rate, and respiratory rate. A nurse contacted Dr. Willbanks concerning Heather's condition. Dr. Willbanks went to the Hospital, examined Heather, and diagnosed her as suffering from Drug Withdrawal Syndrome (DWS). Dr. Willbanks, though, did not test Heather for the presence of drugs or discuss his diagnosis with Mrs. Miller. By contacting relatives of Mrs. Miller, the Hospital alerted Heather's parents to the infant's condition. After becoming aware of Heather's condition, Wayne Miller, Elizabeth Ann Miller's husband and Heather's father, contacted the Hospital by telephone and spoke with Dr. Willbanks. Dr. Willbanks informed Mr. Miller that Heather was "in distress" and possibly suffering from sepsis, but he would not elaborate in response to questioning by Mr. Miller. Dr. Willbanks also notified Mr. Miller that he would be performing a lumbar puncture on Heather, though he would not explain the purpose for the procedure, indicating only that it was necessary. . . .

When Dr. Willbanks . . . met with the Millers, he explained that Heather had been acting jittery and crying excessively. He asked Mrs. Miller if she used any drugs during her pregnancy. . . . Despite Mrs. Miller's denials, Dr. Willbanks said that he did not believe her and that he had frequently seen DWS in infants. Dr. Willbanks stated that he was positive of his diagnosis and that he would continue treating Heather for DWS. Mrs. Miller then agreed to Dr. Willbanks's request that she take a drug test.

Following the meeting between Dr. Willbanks and the Millers, rumors that Heather was a "drug baby" began circulating throughout the Hospital. A Hospital social worker approached the Millers later in the day and questioned them concerning their past drug use, backgrounds, living arrangements, and other children. In addition, Mr. Miller overheard two unidentified people discussing the "drug baby" in the ward. Hospital nurses began treating the Millers rudely, and when Mr. Miller's parents visited the Hospital, they left angry believing Mrs. Miller was responsible for Heather's medical problems.

Throughout the day, the Millers unsuccessfully sought information concerning the drug tests and Heather's condition. At approximately 8:00 p.m., the head nurse finally informed Mr. Miller that the drug tests administered to Mrs. Miller and Heather came back negative at 11:00 a.m. The following day, Dr. Toffoletto, who was an associate of Dr. Willbanks, confirmed the nurse's statement that the drug tests revealed no problems and informed the Millers that the DWS treatments were being continued only as a precaution.

Disregarding the negative drug test results, Dr. Willbanks reported his suspicions concerning Mrs. Miller's alleged drug use to the Grainger County Health Department. Within one week, a social worker and nurse from the Department visited the Millers' home, interviewed the Millers, inspected their living arrangements, and examined Heather—all over Mr. Miller's objections. . . .

The Millers sued Dr. Willbanks . . . for the tort of intentional infliction of emotional distress. The defendants then moved for dismissal or summary judgment, which the trial court granted due to the plaintiffs' lack of expert evidence to support their claims of serious mental injury. The Court of Appeals affirmed the decision of the trial court.

We granted the plaintiffs' appeal to decide whether the Court of Appeals erred in holding that expert medical or scientific proof of a serious mental injury was required to support the plaintiffs' claim for the intentional infliction of emotional distress. . . .

In the brief history of the tort of intentional infliction of emotional distress, this Court has not examined whether expert testimony is required to establish the existence of a serious mental injury. Other courts, however, that have examined this issue have come to markedly different conclusions.

A minority of jurisdictions requires expert medical or scientific proof of serious mental injury to maintain a claim for intentional infliction of emotional distress. These courts reason that expert proof is necessary to prevent the tort from being reduced to a single element of outrageousness, so by requiring expert proof, the elements of outrageous conduct and serious mental injury remain distinct. Moreover, courts expressing the minority view contend that because expert proof can be easily obtained, it must be used to prove serious mental injury. . . . These courts assert that due to the wide availability of expert proof, plaintiffs will encounter "little difficulty in procuring reliable testimony as to the nature and extent of their injuries."

A majority of courts that have examined this issue, however, have concluded that expert proof is generally not necessary to establish the existence of a serious mental injury. The flagrant and outrageous nature of the defendant's conduct, according to these courts, adds weight to a plaintiff's claim and affords more assurance that the claim is serious. Moreover, expert testimony is not essential because other reliable forms of evidence, including physical manifestations of distress and subjective testimony, are available. Courts following the majority approach also contend that expert

testimony is normally not necessary because a jury is generally capable of determining whether a claimant has sustained a serious mental injury as a proximate result of the intentional conduct of another person. Additionally, courts expressing the majority view reason that the very nature of the tort of intentional infliction of emotional distress "makes it impossible to quantify damages mainly on expert medical evidence." . . .

We recognize that legitimate concerns of fraudulent and trivial claims are implicated when a plaintiff brings an action for a purely mental injury. Thus, safeguards are needed to ensure the reliability of claims. . . .

With regard to intentional infliction of emotional distress, the added measure of reliability, i.e., the insurance against frivolous claims, is found in the plaintiff's burden to prove that the offending conduct was outrageous. This is an exacting standard requiring the plaintiff to show that the defendant's conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts §46 cmt. d (1965). Such conduct is "important evidence that the distress has existed," id. §45 cmt. j, and from such conduct, more reliable indicia of a severe mental injury may arise. The outrageous nature of the conduct, therefore, vitiates the need for expert testimony in a claim for intentional infliction of emotional distress. The risk of frivolous litigation, then, is alleviated in claims for intentional infliction of emotional distress by the requirement that a plaintiff prove that the offending conduct was so outrageous that it is not tolerated by a civilized society. . . .

The Restatement (Second) of Torts, the framework for intentional infliction of emotional distress in Tennessee, couches the tort in terms indicating that expert testimony should not be required. Pursuant to the Restatement, the tort typically exists when "the recitation of the facts [of a commission of the tort] to an average member of the community would arouse his resentment against the actor, and lead him to exclaim 'Outrageous!'" Restatement (Second) of Torts §46 cmt. d (1965). The kinds of emotional distress that may be remedied include "fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." Restatement (Second) of Torts §46 cmt. j (1965). Such emotional responses are not so esoteric that they occupy a dimension beyond the cognitive grasp of the average layperson and are therefore accessible only to the expert. . . . Accordingly, we conclude that the trier of fact can normally ascertain the existence of a serious mental injury caused by the intentional infliction of emotional distress, thus obviating the necessity of expert proof.

In summary, we hold that expert medical or scientific proof of a serious mental injury is generally not required to maintain a claim for intentional infliction of emotional distress. Accordingly, we reverse the judgments of the trial court and the Court of Appeals and remand to the trial court for further proceedings.

NOTES TO MILLER v. WILLBANKS

1. *Evidence of Severe Emotional Distress.* The element of severe emotional distress involves two related issues. The first is how serious a plaintiff's emotional distress must be to allow recovery. The second is whether the legal system should require the plaintiff to make that showing in a particular way, such as by introducing an expert's testimony. The *Miller* court considered the second of these issues.

The outrageousness of the act may influence the factfinder's decision about whether there was intent ("so outrageous that the defendant must have intended serious emotional harm") and whether the plaintiff actually suffered such harm ("so outrageous she must have suffered severe emotional distress"). The *Miller* court was strongly influenced by the outrageous conduct element of the tort in deciding whether to allow a plaintiff to satisfy the severe emotional harm element without expert testimony. What is it about the required proof of outrageousness in *Miller* that influenced the court's decision?

2. ***Restatement Definition of "Severe Emotional Distress."*** The requirement that plaintiffs must prove severe emotional distress prevents recovery for minor disturbance to one's emotional tranquility. Perhaps because the Restatement (Second) of Torts was written when courts had only recently begun to recognize the tort of infliction of emotional distress, §46 and its comment j explicitly limit recovery to cases of severe harm:

> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquillity is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed.

Creating a category of *severe* emotional harm mirrors the Restatement (Second) of Torts characterization of some bodily harm as *serious* bodily harm. See Restatement (Second) of Torts §63, discussed above in Note 1 following Young v. Warren on page 64.

3. ***Problem: Evaluating Factual Showings of Severe Emotional Distress.*** Severe emotional distress is required for recovery in a variety of areas of tort law. Can the types and intensities of emotional distress described in the following cases be ranked from most severe to least severe? Are there any in which a court could sensibly say the plaintiff had failed to provide evidence of severe emotional distress?

A. In David Katterhenrich v. Federal Hocking Local School District Board of Education, 700 N.E.2d 626, 633-634 (Ohio Ct. App. 1997), the plaintiff alleged "humiliation, serious emotional distress [and] loss of self-esteem." However, the plaintiff continued "to teach, to drive a car, and to be a father and husband. He now performs more household chores than before the incident of which he complains and, 'outwardly,' is operating normally. He is able to do the normal things that he would have done" before the incident. "In fact, appellant testified that he applied for, and was given, the position of junior high football coach for the 1994-1995 school year. Additionally, appellant testified that he has seen his family doctor and has spoken to his pastor, but that he has not sought treatment from a psychologist or psychiatrist."

B. In Nadel v. Burger King Corporation, 695 N.E.2d 1185 (Ohio Ct. App. 1997), the only evidence of any emotional distress as a result of the incident is

(1) one plaintiff's statement that she was "worried," though not enough to seek psychological treatment; and (2) the other's statement that while receiving psychological treatment for depression resulting from his divorce and stress, the incident "came up," although it was not a contributing reason for seeking or receiving counseling.

C. In Kurtz v. Harcourt Brace Jovanovich, Inc., 590 N.E.2d 772, 775-776 (Ohio Ct. App. 1990), the appellant claimed that he suffered emotional distress as a result of an employment termination. The appellant "explained that he worried about his future and caring for his family, that he was upset and 'just couldn't believe' he had been let go," while acknowledging "that he resolved these concerns without the aid of psychological or medical assistance."

D. In Escalante v. Koerner, 28 S.W.3d 641, 647 (Tex. Ct. App. 2000), after the incident in question, the plaintiff broke down for three hours and could not get up, and continued to have emotional distress until the day of trial some three years later.

E. In GTE Southwest, Inc. v. Bruce, 998 S.W.2d 605, 618 (Tex. 1999), as a result of the employer's behavior, employees experienced crying spells, emotional outbursts, nausea, stomach disorders, headaches, difficulty in sleeping and eating, stress, fear, anxiety, and depression, and sought medical treatment for these problems, and an expert testified that employees suffered from post-traumatic stress disorder.

F. In Stokes v. Puckett, 972 S.W.2d 921, 924-926 (Tex. Ct. App. 1998), the plaintiff suffered from anxiety with symptoms of arousal intrusion, humiliation, self-deprecation, inferiority, inadequacy, and significant symptoms of depression.

C. Intent and Recklessness

Although typical terminology refers to the tort of intentional infliction of emotional distress or to the intentional tort of outrage, most states permit recovery if the plaintiff can show either that the defendant's conduct was intentional or that it was reckless. Chapter 3 covers recklessness in more detail. In Dana v. Oak Park Marina, Inc., the court describes the essential distinguishing characteristic of recklessness, the defendant's disregard of a substantial probability of serious harm associated with his conduct.

DANA v. OAK PARK MARINA, INC.

660 N.Y.S.2d 906 (N.Y. App. Div. 1997)

BALIO, J.

Defendant Oak Park Marina, Inc. (corporation), owns and operates a marina on the shore of Lake Ontario in North Rose, New York. The individual defendants are officers of the corporation and operators of the marina. One of the buildings on the marina site includes an office area where employees, including lifeguards, are allowed to change. It also includes men's and ladies' rest rooms for use by marina patrons and

their guests. The rest rooms include a changing area, shower facilities and toilets. In 1993 the corporation installed a video surveillance camera in each of the rest rooms purportedly for the purpose of detecting and curbing vandalism. The following year the corporation installed two video surveillance cameras in the office area purportedly for the purpose of detecting theft of marina property. Plaintiff, a marina patron who utilized the ladies' rest room, commenced this action by filing the summons and complaint with the Monroe County Clerk on February 26, 1996. The amended complaint, which seeks relief for plaintiff and all others similarly situated, alleges that defendants videotaped about 150 to 200 female patrons and guests in various stages of undress without their knowledge or consent; that the videotapes were viewed by defendants and others; and that the tapes were displayed to others for purposes of trade. The amended complaint asserts causes of action [including] reckless infliction of emotional distress. . . .

Defendants brought a pre-answer motion to dismiss the causes of action for reckless infliction of emotional distress. . . .

Supreme Court . . . denied the . . . motion. Defendants appeal.

Defendants contend that New York does not recognize a cause of action for the reckless infliction of emotional distress. We disagree. Although the Court of Appeals has not held that a cause of action exists in a case factually involving reckless, but not intentional, infliction of emotional distress, that Court, in a series of cases, has "adopted" the rule formulated in section 46(1) of the Restatement (Second) of Torts that "[o]ne who by extreme and outrageous conduct intentionally *or recklessly* causes severe emotional distress to another is subject to liability for such emotional distress [emphasis added]" (see, Howell v. New York Post Co., 81 N.Y.2d 115, 121). Moreover, the Court has stated that the tort has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, *or disregard of a substantial probability of causing*, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" [emphasis added] (Howell v. New York Post Co., supra, at 121). The italicized phrase comports with general descriptions of recklessness in tort and is similar to the Restatement's description of recklessness (see, Restatement [Second] of Torts §46[1], comment i; §500). The Third Department similarly has considered reckless conduct to be encompassed within the tort that is commonly referred to as the intentional infliction of emotional distress and the Second Department has concluded that a complaint alleging reckless conduct states a cause of action for intentional infliction of emotional distress.

In our view, reckless conduct is encompassed within the tort denominated intentional infliction of emotional distress. We thus conclude that a complaint alleging that defendants acted "recklessly and with utter disregard that the Plaintiff and others would be harmed, humiliated and suffer extreme mental anguish and distress" alleges that defendants disregarded "a substantial probability of causing" severe emotional distress (Howell v. New York Post Co., supra, at 121). Further, the amended complaint alleges that defendants surreptitiously videotaped plaintiff without her consent, viewed videotapes of plaintiff and others in various stages of undress for personal and unjustifiable purposes and displayed those tapes to others for purposes of trade, thereby sufficiently alleging conduct that a jury could find to be extreme and outrageous (see, Liberti v. Walt Disney World Co., 912 F. Supp. 1494, 1505-1506). Thus, we conclude that the amended complaint states a cause of action for reckless infliction of emotional distress [and affirm the trial court's denial of the defendants' motion]. . . .

NOTES TO DANA v. OAK PARK MARINA, INC.

1. ***Reckless and Intentional Infliction.*** The court in *Dana* concludes that "reckless conduct is encompassed within the tort denominated intentional infliction of emotional distress." The result is that proof of either recklessness or intent will support recovery. Recklessness, an unintentional tort, has two distinguishing elements. First, while the defendant did not intend the harm in the sense of desiring it or being substantially certain it would occur, the defendant must have consciously disregarded the risk of harm. Second, the risk must have been very serious in terms of the substantial probability of causing serious emotional distress.

2. ***Elements of Recklessness.*** The *Dana* court referred to the definition of "recklessness" in Restatement (Second) of Torts §500, which appears as follows:

> Reckless Disregard of Safety Defined: The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, [1] knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also [2] that such risk is substantially greater than that which is necessary to make his conduct negligent. (Numbering added.)

From what evidence is it reasonable to conclude that the defendant in *Dana* was aware of the substantial probability of harm? Why would the court conclude that the likely emotional harm would be severe?

3. ***Problem: Reckless Infliction of Emotional Distress.*** A parent of a school-age child made allegations of sexual misconduct against a school bus driver based on a complaint by the child after two independent investigators found no evidence of misconduct. Would the parent's conduct satisfy the required intent or reckless element even if there was no direct evidence that the parent desired to make the driver emotionally upset? See Kraemer v. Harding, 976 P.2d 1160 (Or. Ct. App. 1999).

Perspective: Frontiers of the Outrage Tort

Aaron Goldstein, *Intentional Infliction of Emotional Distress: Another Attempt at Eliminating Native American Mascots*, 3 J. Gender, Race & Just. 689, 710-711 (2000), argues that the tort of intentional infliction of emotional distress ought to be modified to recognize a cause of action for those who suffer emotional harm from sports teams' use of Native American Mascots:

> First, these mascots cause serious emotional pain to people. Second, these mascots are part of a long history of Native American imagery used to socialize people to accept adverse policies against Native Americans. Speech and imagery can be quite harmful to individuals. No one enjoys being insulted, but to insult someone's race and culture has a much weightier impact. As explained in Bailey [v. Binyon, 583 F. Supp. 923 (W.D. Ill. 1984)], this type of language and imagery "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." . . .

> Native American mascots are not "rough language" that merely hurts someone's feelings. These mascots are insults of the strongest proportion and have done a lot more than merely hurt people's feelings.
>
> Second, these mascots are part of a long line of Native American imagery used to justify and socialize people to accept adverse policies against Native Americans. Put simply, Native American mascots and Native American racial imagery is a part of genocide. Native American racial imagery has been used to create images that justify genocide. But Native American racial imagery along with Native American mascots are also contributing to cultural genocide. It is because of this imagery's terrible impact that the law must allow for redress of these problems. . . .

What obstacles to recovery confront a Native American attempting to recover for emotional harm suffered from a particular baseball team's use of a Native American mascot?

D. Transferred Intent for Infliction of Emotional Distress

Intentional infliction of emotional distress doctrines recognize the *transfer of intent between people*, as do assault and battery doctrines. For both assault and battery, an actor who intends an act to cause a harmful or offensive contact or apprehension of such a contact to one person is potentially liable to another person who suffers the contact or apprehension. That transfer of intent among people can create a large class of potential plaintiffs. For intentional infliction of emotional distress, the class of people to whom intent may be transferred is more narrowly defined, as Green v. Chicago Tribune Company illustrates.

GREEN v. CHICAGO TRIBUNE COMPANY

675 N.E.2d 249 (Ill. App. Ct. 1996)

O'Brien, J.

Plaintiff, Laura Green, filed an amended complaint against defendant, the Chicago Tribune Company (hereinafter Tribune), alleging . . . intentional infliction of emotional distress. . . .

The trial court dismissed plaintiff's amended complaint against the Tribune. . . . Plaintiff appeals.

. . . [P]laintiff pleaded the following allegations which must be assumed true for purposes of the motion: Tribune staffers photographed her son, Calvin Green, on December 30, 1992, while he was undergoing emergency treatment at Cook County Hospital for a bullet wound. The Tribune never asked plaintiff's permission to photograph Calvin. After attempts to resuscitate Calvin failed, medical personnel moved him to a private hospital room to await the coroner. The coroner pronounced Calvin dead at 12:10 a.m. on December 31, 1992. Around that time, a reporter for the Tribune asked plaintiff for a statement regarding her son's death. She refused to make a statement. Meanwhile, Tribune staffers entered the private hospital room and took

further unauthorized photographs of Calvin. While photographing Calvin, they prevented plaintiff from entering the room. When plaintiff did enter the room, the Tribune staffers listened to her statements to Calvin.

On January 1, 1993, the Tribune published a front-page article, about Chicago's record homicide rate. The article included the following quotes from plaintiff's statements to Calvin on December 31: "I love you, Calvin. I have been telling you for the longest time about this street thing." "I love you, sweetheart. That is my baby. The Lord has taken him, and I don't have to worry about him anymore. I accept it." "They took him out of this troubled world. The boy has been troubled for a long time. Let the Lord have him." The Tribune also published one of the unauthorized photographs taken of Calvin after he died. In a January 3, 1993, article, the Tribune published one of the unauthorized photographs taken of Calvin while undergoing medical treatment.

. . . To state a cause of action for intentional infliction of emotional distress, plaintiff must allege facts establishing: (1) the Tribune's conduct was extreme and outrageous; (2) the Tribune either intended its conduct should inflict severe emotional distress, or knew a high probability existed its conduct would cause severe emotional distress; and (3) the Tribune's conduct in fact caused severe emotional distress.

. . . The trial court determined the Tribune's conduct was not extreme and outrageous as a matter of law, and it dismissed the complaint. Extreme and outrageous conduct sufficient to create liability for intentional infliction of emotional distress is defined as conduct going beyond all possible bounds of decency. Such conduct must extend beyond mere insults, indignities, threats, annoyances, petty oppressions or trivialities.

This case is similar to Miller v. National Broadcasting Co., 232 Cal. Rptr. 668 (1986). There, an NBC camera crew entered Dave and Brownie Miller's apartment without their consent to film the activities of paramedics called to the Miller home to administer life-saving techniques to Dave Miller, who had suffered a heart attack in his bedroom. NBC used the film on its nightly news without obtaining anyone's consent, and after Brownie Miller and her daughter complained to NBC, it used portions of the film in a commercial advertising an NBC mini-documentary about the paramedics' work.

The issue on appeal was whether Brownie had stated a cause of action for intentional infliction of emotional distress. The appellate court found that she had:

> With respect to [Brownie's] cause of action, we leave it to a reasonable jury whether the defendants' conduct was "outrageous." Not only was her home invaded without her consent, but the last moments of her dying husband's life were filmed and broadcast to the world without any regard for the subsequent protestations of [Brownie and her daughter] to the defendants. Again, the defendants' lack of response to these protestations suggests an alarming absence of sensitivity and civility. The record reflects that defendants appeared to imagine that they could show or not show Dave Miller in extremis at their pleasure, and with impunity. *Miller*, 187 Cal. App. 3d at 1488, 232 Cal. Rptr. 668.

Similarly, plaintiff pleaded that the Tribune entered Calvin's room on December 31 without plaintiff's consent in order to photograph him as he lay dying, and even prevented plaintiff from entering until they had finished. Although plaintiff told the Tribune reporter in the hospital that she wanted to make no public statement about Calvin's death, the Tribune published a story on January 1 co-authored by that same reporter featuring plaintiff's comments to Calvin and a photograph of his dead body.

Reasonable people could find that like NBC's actions in *Miller*, the Tribune's actions on December 31 and January 1 suggest an alarming lack of sensitivity and civility, and reasonable people, in essence, a jury, could find the Tribune's behavior extended beyond mere indignities, annoyances, or petty oppressions and constituted extreme and outrageous conduct.

Further, reasonable people, a jury, could find that the Tribune knew a high probability existed its actions on December 31 and January 1 would cause plaintiff to suffer severe emotional distress. Plaintiff also adequately pleaded that she did in fact suffer severe emotional distress. . . .

We hold plaintiff stated a cause of action for intentional infliction of emotional distress caused by the Tribune when it barred her from seeing her dead son on December 31 while it photographed him, and when it published the January 1 article featuring her statements to her son and the photograph of him lying dead.

Plaintiff also pleaded intentional infliction of emotional distress for the January 3, 1993, article that included one of the December 30, 1992, photographs of her son undergoing medical treatment. The Tribune argues a cause of action based on the intentional infliction of emotional distress is a purely personal one. Therefore, because the January 3 publication never mentions plaintiff, her action must be dismissed.

The Restatement (Second) of Torts recognizes in some instances a plaintiff can bring an intentional infliction of emotional distress action based on conduct directed at a third person. Section 46(2) of the Restatement provides:

> Where [outrageous] conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress
>
> (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or
>
> (b) to any other person who is present at the time, if such distress results in bodily harm.

Restatement (Second) of Torts Sec. 46(2), at 72 (1965).

The Tribune's publication of the January 3 article four days after plaintiff's son's death, which did not include any mention of plaintiff, does not fall under section 46(2)(a) or (b) of the Restatement. Accordingly, plaintiff cannot recover for intentional infliction of emotional distress based on the Tribune's January 3 publication.

Similarly, plaintiff's intentional infliction of emotional distress action based on the Tribune's conduct on December 30, 1992, when it photographed her son undergoing medical treatment, also must be dismissed. Plaintiff did not allege in her amended complaint that she was present when the Tribune photographed her son on December 30. Therefore, the Tribune's December 30 conduct does not fall under section 46(2)(a) or (b) of the Restatement. . . .

NOTES TO GREEN v. CHICAGO TRIBUNE CO.

1. ***Factual Theories and Transferred Intent.*** In Green v. Chicago Tribune Company, the plaintiff claims that the defendant should be liable on three factual theories.

One description of the facts involves a course of conduct on December 31st and January 1st that included the Tribune reporter entering her son's hospital room without the plaintiff's consent to photograph the dying son, preventing the plaintiff

from entering the room until the reporter was done, and publishing a story featuring the plaintiff's words to her son despite her statement that she wanted to make no public comments. Was the plaintiff successful in showing that she was personally involved in each of these acts and was thus a target of the Tribune's conduct?

The plaintiff's second description of relevant facts was based on the Tribune's publication of an article on January 3rd including photographs of her son undergoing medical treatment. The court accepted the defendant's characterization of the article as *not* directed at the plaintiff. This led the court to consider Restatement (Second) of Torts §46(2) to see if a transferred intent theory was available to the plaintiff. In applying that section, who must the court have considered to have been a "third person," and how did the court apply the Restatement provision to the plaintiff's claim?

The plaintiff's third factual theory was based on the Tribune's photographing her son on December 30th. For what reasons did the court analyze this conduct as similar to the publication of the January 3rd article and photographs?

2. *Transfer of Intent and Guarantees of Genuineness.* For infliction of emotional distress, intent may be transferred to a person who was not an intended target of the defendant's conduct *only* if that person was present. There is an additional obstacle for people who are not members of the target's immediate family. Restatement (Second) of Torts §46(2)(b) requires that a nonfamily member suffer bodily harm before being allowed to recover for severe emotional distress. The Restatement (Second) of Torts §46 comment l suggests that these limitations are more practical than principled:

> The limitation may be justified by the practical necessity of drawing the line somewhere, since the number of persons who may suffer emotional distress at the news of an assassination of the President is virtually unlimited, and the distress of a woman who is informed of her husband's murder ten years afterward may lack the guarantee of genuineness which her presence on the spot would afford.

The *guarantee of genuineness* to which the Restatement (Second) refers is the reliability or verifiability of the claim of emotional distress described in the materials introducing this tort. Because people are more likely to suffer harm from conduct directed at third parties if they are family members who are present at the time, their claims of emotional distress are more believable. For nonfamily members, the bodily harm they suffer from conduct directed at third parties provides another *indicator of reliability* for their claim of severe emotional distress.

CHAPTER 3

NEGLIGENCE: THE DUTY OF REASONABLE CARE

I. Introduction

Unintentional Harms. This chapter introduces the topic of accidental injuries. In modern life, injuries that happen by accident are much more common than intentional harms. For example, a patient may be harmed if a doctor makes a mistake in diagnosing an illness, or someone shopping in a store may slip and fall if a store employee cleans a floor in a way that makes it extremely slippery. A very large segment of modern tort law involves sorting out the consequences of accidental injuries. The legal system treats these cases with the doctrines known as *negligence* law.

A common analysis of negligence cases involves four elements. A plaintiff may recover damages if the defendant (1) *owed the plaintiff a duty* to act in a certain way, the defendant (2) *breached the duty* by failing to act as well as the duty required, and the defendant's conduct (3) *caused* some (4) *harm* to the plaintiff. These elements of a negligence case are usually summarized in the phrase "duty, breach, causation, and damages." Most of the time, a defendant's duty was to act as a reasonable person would act in the circumstances that led to an injury.

Illustration. A case involving a collision between a pedestrian and a car illustrates these concepts. If the injured pedestrian sought damages from the driver of the car, the pedestrian would have to establish that the law imposes a duty on drivers to act with some degree of care toward pedestrians. To show breach of duty, the pedestrian would have to show that the driver drove the car less well than the duty of care requires. To show causation and damages, the pedestrian would have to show that he or she had suffered some harm and that the collision had caused that harm.

This illustration is typical of the many cases in modern tort law where the defendants concede that they owed the plaintiff a duty to act reasonably. This chapter explores these kinds of cases to develop understanding of the reasonable care concept. Situations in which there is a dispute about whether any duty exists are treated in Chapters 6 and 11. In some situations, tort law evaluates conduct with standards other than "reasonable care." A "reckless" standard is examined at the end of this chapter, and variations other than reasonable care are treated in Chapters 9, 10, and 11.

In cases where a duty exists, tort law identifies a *standard of care* for the jury to use in evaluating the conduct of any actor whose actions might be relevant to resolving the case. In this way, our legal system controls a fundamental societal issue. It tells us how careful some people are supposed to be to protect some other people from some types of injuries. This puts significant limits on the jury's discretion. In every tort case, the jury decides certain questions of historical fact: how the injury happened and whose actions or inaction contributed to it. As long as they act in a way that is consistent with legal standards, juries have freedom in reaching those conclusions. But once a jury has decided who did what, the next issue (the one that matters the most to the parties) is determining who should bear the financial cost of the injury. Our legal system *refuses* to allow the jury to select whatever it thinks is the wisest and fairest result based on whatever factors it might choose to consider. Instead, the trial judge instructs the jury to compare what it believes the actors did to a particular standard of care chosen by the legal system. The judge bases that instruction on the jurisdiction's tort doctrines established in appellate court decisions and in statutes.

Power of the Jury. Even though the jury must apply the standard of care the judge tells it to use, if that standard is vague or subject to interpretation, members of a jury will apply it to the case by using their own ideas about safety and how people should act. A common standard of care requires that a person act "as a *reasonable person* would act." When a case involves that standard, the jury has considerable leeway in deciding exactly what conduct is reasonable in the specific circumstances that led to the injury. So, while the jury does not get to decide what standard to use (because the judge requires it to apply the reasonable person standard), the jury has significant control over the outcome of the case. It decides what the standard means in the specific factual context of the case.

Illustration. In a car accident case, the jury might decide that a driver's eyes were very sensitive to light and that the driver had been driving on a sunny day without wearing sunglasses when a collision occurred. That conclusion would not, by itself, support a jury verdict in favor of someone the driver hit. To decide whether the driver should pay damages, the jury must decide whether the driver's conduct did or did not live up to the standard of care that the legal system requires. In this type of case, the reasonable person standard would apply. This means that the jury must decide in good faith how carefully it thinks a reasonable person would have driven under the circumstances. It then compares how the defendant drove with the way it concludes a reasonable person would have driven. The jury is forbidden to use other standards — for example, it cannot decide that the defendant should pay the victim because the defendant is rich. It cannot decide that the defendant should pay the victim because the defendant did not have a good reason for driving that day. Note, though, that even though the jury must use the reasonable person standard, it is usually allowed to decide what kind of specific conduct that standard requires.

II. The "Reasonable Person" Standard

When a duty does exist, people are usually required to act in accordance with the "reasonable person" standard. Sometimes courts add the word "prudent" and refer to

the "reasonable prudent person" standard. The conduct of entities like corporations may also be judged by that standard, since they do their work through actions by individual employees whose conduct can be compared with what a reasonable person would do.

One explanation for the acceptance of this standard is that it simplifies life. We can assume that other people will be "reasonably" careful not to injure us, and we do not need to anticipate their particular personalities and capabilities. If they fail to act in a reasonable way and their conduct harms us, we can expect to be compensated with tort damages.

A. Defining and Justifying the "Reasonable Person" Standard

The reasonable person standard has dominated tort law since the early nineteenth century. Vaughan v. Menlove is the leading case articulating support for the standard: Should the conduct of someone who built a haystack that started a fire be compared with that person's best possible farm work or with the farm work that a reasonable person would do? Parrot v. Wells, Fargo & Co. shows that understanding the overall factual setting is crucial for applying the standard: Is opening a crate of nitroglycerine with a mallet reasonable conduct?

VAUGHAN v. MENLOVE

132 Eng. Rep. 490 (C.P. 1837)

[The defendant built a hayrick near his neighbor's land. The hayrick caught fire due to spontaneous combustion, and the fire spread to cottages on the neighbor's land and destroyed them. The neighbor sought damages, alleging that the defendant had built the hayrick badly in a way that facilitated the combustion. The trial court instructed the jury that the defendant was required to have acted as a prudent man would have acted under those circumstances. Following a verdict for the plaintiff, the defendant won an order ("rule nisi") requiring a new trial. That order was obtained] on the ground that the jury should have been directed to consider, not whether the Defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion, but whether he had acted bona fide to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. . . .

[Reviewing that grant of a new trial, the Court of Common Pleas stated:] It is contended . . . that the question ought to have been whether the Defendant had acted honestly and bona fide to the best of his own judgment. That, however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment. . . . The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

NOTES TO VAUGHAN v. MENLOVE

1. ***Alternative Standards of Care.*** The court compares two rules that might be used for evaluating a defendant's conduct. What are those rival standards? Which one did the court adopt?

2. ***Evidence of Breach of the Standard of Care.*** To decide a case under either of the standards examined in Vaughan v. Menlove, a jury would need information. Compare the types of information parties would present to the jury under the two rival standards.

3. ***The Reasonable Person.*** The Restatement (Second) of Torts provided the following description of the reasonable person (using the then-current term "reasonable man"), highlighting the idea that the reasonable person is not a typical person but a hypothetical person who is always reasonably prudent. Analyze whether this formulation is consistent with the one adopted in Vaughan v. Menlove.

> Sometimes this person is called a reasonable man of ordinary prudence, or an ordinarily prudent man, or a man of average prudence, or a man of reasonable sense exercising ordinary care. It is evident that all such phrases are intended to mean very much the same thing. The actor is required to do what this ideal individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. He is not to be identified with the members of the jury, individually or collectively. It is therefore error to instruct the jury that the conduct of a reasonable man is to be determined by what they would themselves have done.

Restatement (Second) of Torts Section 283 comment c (1965).

Perspective: Law and Gender

Modern courts almost always use the expression "reasonable person" instead of the expression "reasonable man." An alternative approach would add "reasonable woman" to the law's terminology, to make both "reasonable man" and "reasonable woman" standards available to juries. Proponents of this view believe that using these gender-specific standards instead of the gender-neutral "reasonable person"standard can affect the outcomes of cases. Would analysis of this question depend on the type of case (for example, sexual harassment, bad driving, or substandard building of a hayrick)? See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 Yale L.J. 1177 (1990).

PARROT v. WELLS, FARGO & CO. (THE NITRO-GLYCERINE CASE)

82 U.S. 524, 21 L. Ed. 206, 15 Wall. 524 (1872)

Parrot brought an action in the court below against certain defendants who composed the well-known firm of Wells, Fargo & Co., express carriers, to recover damages for injuries to certain large buildings owned by him in the city of San Francisco, caused in April, 1866, by the explosion of nitro-glycerine whilst in charge of the said defendants. . . .

[In 1866, the properties of nitroglycerine were not well known. It had only recently been invented, and some small initial efforts were being made to promote its use in mining. An individual paid the defendant to ship a 329-pound crate from New York City to San Francisco via the isthmus of Panama. When the crate] was taken from the steamer and placed upon the wharf, . . . it was discovered that the contents were leaking. These contents had the appearance of sweet oil. Another box of similar size had been stained by the contents leaking and appeared to be damaged. On the 16th of April, in accordance with the regular and ordinary course of the defendants' business, when express freight is found to be damaged, the two boxes were taken to the defendants' building, the premises in question, for examination. . . . A representative of the [steamship] company accordingly attended, and in his presence, and in the presence of an agent of the defendants, and of other persons, an employee of the defendants, by their direction, with a mallet and chisel, proceeded to open the case, and while thus engaged the substance contained in it exploded, instantly killing all the parties present, and causing the destruction of a large amount of property, and the injuries to the buildings occupied by the defendants, for which the present action was brought. Upon subsequent examination it was ascertained that the substance contained in the case was nitro-glycerine or glonoin oil. The other box contained silverware. . . .

[The court held that the defendant had no liability for damage to property other than property its lease required it to repair.] To review this judgment the plaintiff sued out a writ of error from this court.

Mr. Justice FIELD, after stating the facts of the case, delivered the opinion of the court, as follows: . . .

The question presented to us is, whether upon this state of facts the plaintiff is entitled to recover for the injuries caused by the explosion to his buildings, outside of that portion occupied by the defendants under their lease. . . .

To fasten a further liability on the defendants, and hold them for injuries to that portion of the buildings not covered by their lease, it was contended in the court below, and it is urged here, that, as matter of law, they were chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with it, and were consequently guilty of negligence in receiving, introducing, and handling the box containing the nitro-glycerine.

If express carriers are thus chargeable with notice of the contents of packages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the information given by the owner. They must be at liberty, whenever in doubt, to require, for their satisfaction, an inspection even of the contents as a condition of carrying the packages. This doctrine

would be attended in practice with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered as a condition of carrying them. . . .

It not, then, being his duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicions as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged as matter of law with notice of the properties and character of packages thus received. The first proposition of the plaintiff, therefore, falls, and the second, which depends upon the first, goes with it.

The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. "Negligence" has been defined to be "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances. . . .

This action is . . . brought upon . . . the negligence of the defendants: unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of. . . .

[This] case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune.

This principle is recognized and affirmed in a great variety of cases. . . . The rule deducible from them is, that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own. . . .

Judgment affirmed.

NOTES TO THE NITRO-GLYCERINE CASE

1. ***A Reasonable Person's Knowledge of Risks.*** The reasonableness of an actor's conduct will usually depend on the knowledge that the actor had about the riskiness of a situation. Tort law could treat an actor as possessing: (1) full knowledge of all the risks of his or her situation; (2) all of the knowledge a reasonable person would have had; or (3) only the knowledge the actor actually had. Which treatment of the defendant's

knowledge did the plaintiff seek? Which treatment did the court apply, and how did the court justify that choice?

2. *Problems.* Would a jury be justified in finding the defendant negligent in the following cases?

A. The plaintiff's house was damaged by water that forced its way through the ground when a water main constructed and maintained by the defendant froze and broke. The winter frost that caused the break "penetrated to a greater depth than any which ordinarily occurs south of the Polar regions." See Blyth v. Birmingham Water Works, 156 Eng. Rep. 1047 (Ex. 1856).

B. The defendant suffered an epileptic seizure and became unconscious while driving his car. He collided with the plaintiff, injuring her. The defendant had been treated by his doctor for epilepsy for many years and had not suffered a seizure for 14 years prior to the one involved in the injury to the plaintiff. The defendant had a valid driver's license, issued under terms that required him to have his treating physician report his condition to the Department of Motor Vehicles once a year. See Hammontree v. Jenner, 97 Cal. Rptr. 739 (App. Ct. 1971).

Perspective: Social Costs and Benefits

The court refers to "inconvenience" that would be associated with a rule that required common carriers to know the contents of packages people asked them to ship. This is really an economic analysis. What the court refers to as "inconvenient" could certainly be accomplished, with a consequence of making shipping slower and more costly. Could considering whether there might be benefits that would make those costs worthwhile have altered the court's result?

B. Reasonable Conduct as a Balancing of Costs and Benefits

May reasonableness be defined in terms of costs and benefits? Many theorists and judges have sought to clarify the apparent vagueness of the reasonableness standard by proposing a systematic evaluation of costs and benefits. McCarty v. Pheasant Run illustrates an economic framework for defining reasonable conduct: Is it reasonable for a person to expose others to a costly risk that the person could have prevented with a small expenditure?

McCARTY v. PHEASANT RUN, INC.

826 F.2d 1554 (7th Cir. 1987)

POSNER, J.

. . . Dula McCarty, a guest at the Pheasant Run Lodge in St. Charles, Illinois, was assaulted by an intruder in her room, and brought suit against the owner of the resort. The suit charges negligence, and bases federal jurisdiction on diversity of citizenship.

The parties agree that Illinois law governs the substantive issues. The jury brought in a verdict for the defendant, and Mrs. McCarty appeals. . . .

In 1981 Mrs. McCarty, then 58 years old and a merchandise manager for Sears Roebuck, checked into Pheasant Run — a large resort hotel on 160 acres outside Chicago — to attend a Sears business meeting. In one wall of her second-floor room was a sliding glass door equipped with a lock and a safety chain. The door opens onto a walkway that has stairs leading to a lighted courtyard to which there is public access. The drapes were drawn and the door covered by them. Mrs. McCarty left the room for dinner and a meeting. When she returned, she undressed and got ready for bed. As she was coming out of the bathroom, she was attacked by a man with a stocking mask. He beat and threatened to rape her. She fought him off, and he fled. He has never been caught. Although Mrs. McCarty's physical injuries were not serious, she claims that the incident caused prolonged emotional distress which, among other things, led her to take early retirement from Sears.

Investigation of the incident by the police revealed that the sliding glass door had been closed but not locked, that it had been pried open from the outside, and that the security chain had been broken. The intruder must have entered Mrs. McCarty's room by opening the door to the extent permitted by the chain, breaking the chain, and sliding the door open the rest of the way. Then he concealed himself somewhere in the room until she returned and entered the bathroom.

Mrs. McCarty argues that the judge should have granted her motion for judgment notwithstanding the jury's verdict for the defendant. . . .

As [a] ground for denying the motion for judgment n.o.v., the district judge correctly pointed out that the case was not so one-sided in the plaintiff's favor that the grant of a directed verdict or judgment n.o.v. in her favor would be proper. Her theories of negligence are that the defendant should have made sure the door was locked when she was first shown to her room; should have warned her to keep the sliding glass door locked; should have equipped the door with a better lock; should have had more security guards (only two were on duty, and the hotel has more than 500 rooms), . . . should have made the walkway on which the door opened inaccessible from ground level; should have adopted better procedures for preventing unauthorized persons from getting hold of keys to guests' rooms; or should have done some combination of these things. The suggestion that the defendant should have had better procedures for keeping keys away from unauthorized persons is irrelevant, for it is extremely unlikely that the intruder entered the room through the front door. . . . The other theories were for the jury to accept or reject, and its rejection of them was not unreasonable.

There are various ways in which courts formulate the negligence standard. The analytically (not necessarily the operationally) most precise is that it involves determining whether the burden of precaution is less than the magnitude of the accident, if it occurs, multiplied by the probability of occurrence. (The product of this multiplication, or "discounting," is what economists call an expected accident cost.) If the burden is less, the precaution should be taken. This is the famous "Hand Formula" announced in United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.), an admiralty case, and since applied in a variety of cases not limited to admiralty. . . .

We are not authorized to change the common law of Illinois, however, and Illinois courts do not cite the Hand Formula but instead define negligence as failure to use

reasonable care, a term left undefined. . . . But as this is a distinction without a substantive difference, we have not hesitated to use the Hand Formula in cases governed by Illinois law. . . . The formula translates into economic terms the conventional legal test for negligence. This can be seen by considering the factors that the Illinois courts take into account in negligence cases: the same factors, and in the same relation, as in the Hand Formula. . . . Unreasonable conduct is merely the failure to take precautions that would generate greater benefits in avoiding accidents than the precautions would cost.

Ordinarily, and here, the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytic than operational significance. Conceptual as well as practical difficulties in monetizing personal injuries may continue to frustrate efforts to measure expected accident costs with the precision that is possible, in principle at least, in measuring the other side of the equation — the cost or burden of precaution. . . . For many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula; and so long as their judgment is reasonable, the trial judge has no right to set it aside, let alone substitute his own judgment.

Having failed to make much effort to show that the mishap could have been prevented by precautions of reasonable cost and efficacy, Mrs. McCarty is in a weak position to complain about the jury verdict. No effort was made to inform the jury what it would have cost to equip every room in the Pheasant Run Lodge with a new lock, and whether the lock would have been jimmy-proof. . . . And since the door to Mrs. McCarty's room was unlocked, what good would a better lock have done? No effort was made, either, to specify an optimal security force for a resort the size of Pheasant Run. No one considered the fire or other hazards that a second-floor walkway not accessible from ground level would create. A notice in every room telling guests to lock all doors would be cheap, but since most people know better than to leave the door to a hotel room unlocked when they leave the room — and the sliding glass door gave on a walkway, not a balcony — the jury might have thought that the incremental benefits from the notice would be slight. . . .

Affirmed.

NOTES TO McCARTY v. PHEASANT RUN, INC.

1. ***The Learned Hand Formula for Negligence.*** The "Hand formula" (described by Judge Learned Hand in *Carroll Towing*) was expressed algebraically, stating that conduct would be negligent if $B < PL$. In that expression, B stands for the burden of prevention or avoidance, and an actor is negligent if that burden is less than P, which stands for the probability of loss, multiplied by L, which stands for the magnitude of loss that would be avoided with the possible prevention or avoidance. From whose perspective is it "reasonable" for one person to spend a small amount of money to protect another person from suffering a significant physical injury or a large financial loss? Would that make sense to the first person, the other person, or to society as a whole?

2. ***Evidence of Reasonable Conduct.*** Judge Posner discounts the value of posting notices in the hotel's rooms by saying that people generally know that it is a good idea to lock doors. Would a notice have helped avoid the injury in this case if it had alerted

the victim that there was a sliding glass door behind the room's closed curtains? That possibility apparently was presented weakly or not at all at the trial. It is important to notice, however, that once the jury has reached its decision, it is very difficult for a judge to rule that the jury has so severely misapplied the reasonable person standard that a new trial or judgment as a matter of law must be granted to reject the jury's verdict.

3. *Costs and Benefits in Non-Economic Terms.* Some social values may be hard to quantify and therefore difficult to recognize in a cost-benefit analysis. Tort law, however, ordinarily recognizes a broad range of factors in defining *reasonable care.* For example, the definitions of *costs* and *benefits* contained in the Restatement (Second) of Torts definitions of *reasonable care* take societal values into account.

> SECTION 291. UNREASONABLENESS; HOW DETERMINED; MAGNITUDE OF RISK AND UTILITY OF CONDUCT
>
> Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.
>
> SECTION 292. FACTORS CONSIDERED IN DETERMINING UTILITY OF ACTOR'S CONDUCT
>
> In determining what the law regards as the utility of the actor's conduct for the purpose of determining whether the actor is negligent, the following factors are important:
>
> (a) the social value which the law attaches to the interest which is to be advanced or protected by the conduct;
>
> (b) the extent of the chance that this interest will be advanced or protected by the particular course of conduct;
>
> (c) the extent of the chance that such interest can be adequately advanced or protected by another and less dangerous course of conduct.
>
> SECTION 293. FACTORS CONSIDERED IN DETERMINING MAGNITUDE OF RISK
>
> In determining the magnitude of the risk for the purpose of determining whether the actor is negligent, the following factors are important:
>
> (a) the social value which the law attaches to the interests which are imperiled;
>
> (b) the extent of the chance that the actor's conduct will cause an invasion of any interest of the other or of one of a class of which the other is a member;
>
> (c) the extent of the harm likely to be caused to the interests imperiled;
>
> (d) the number of persons whose interests are likely to be invaded if the risk takes effect in harm.

4. *Problems: The Reasonable Person Standard*

A. A large hospital operates several parking lots. One lot is used only by doctors, who in general have higher than average incomes and are thought of as performing work that is very important to everyone. The other lots are open to the general public. On average, the value of cars parked in the doctors' lot is greater than the value of cars parked in the other lots. In order to avoid tort liability, should the hospital allocate its resources for maintenance and snow removal evenly among all the parking lots, or should it spend more on the "doctors only" lot?

B. Plaintiff was injured one day while he was shopping in FoodPlace, a large supermarket. As he was walking down an aisle, a fairly heavy box of cake mix fell from the top of a large display. Someone brushed lightly against the display, causing the box to fall and hit plaintiff's face. The display was a pyramidal structure built about six feet high. It contained about 200 cake mix boxes. Plaintiff has sued FoodPlace, alleging that the display was set up negligently, both in terms of its location and its size, so that anyone brushing against it would cause some of its highest boxes to fall. See Cardina v. Kash N'Karry Food Stores, Inc., 663 So. 2d 642 (Fla. App. 1995).

(1) You are the plaintiff's lawyer. What kinds of information would you like to present at the trial to persuade the jury that FoodPlace's conduct related to the display fell below the reasonable person standard?

(2) Based on what you know about the reasonable person standard, analyze the following jury instructions. Does each one properly present the reasonable person standard to the jury? (These hypothetical instructions only cover part of what a jury would have to decide in the case. They don't cover causation or damages, for example.)

1. "Find in favor of the plaintiff if the evidence persuades you that FoodPlace set up its display in a way that created a risk of injury."

2. "Find in favor of the plaintiff if the evidence persuades you that the way FoodPlace set up its display was less safe than the way FoodPlace has set up other displays in the past."

3. "Find in favor of the plaintiff if the evidence persuades you that FoodPlace set up its display in a way that was less safe than the way a reasonable operator of a supermarket would have set up a display."

4. "Find in favor of the plaintiff if the evidence persuades you that FoodPlace set up its display in a way that was less safe than you would have done if you were the operator of a supermarket like FoodPlace."

Perspective: Law and Economics

Judge Posner is a leading scholar in the field known as "law and economics," so it is understandable that he would provide a detailed and persuasive description of the Hand formula, even though its direct application to the case is subject to the limits he described. Economic analysis may have great explanatory power for the analysis of tort doctrines and particular tort cases. It may also be a way of thinking that can develop and justify particular policy choices.

A controversial issue in law and economics involves the ways in which economic analysis does or does not reflect people's moral, spiritual, and irrational preferences. If the difficulty in quantifying those factors is large, it could be a reason to reject economic analysis of legal issues altogether or to understand that economic analysis can illuminate important aspects of a problem even if it cannot resolve all of its issues.

III. The Range of Application of the Reasonable Person Standard

The reasonable person standard can accommodate the evaluation of injuries involving many diverse factors. While there are some circumstances in which tort law replaces the reasonable person test with different standards, courts generally have shown great confidence in the ability of jurors to use the reasonable person test in many contexts.

A. Especially Dangerous Instrumentalities

Many injuries involve especially dangerous activities or things. Gasoline, for example, presents risks that are significantly greater than the risks presented by lots of other substances in common use. Stewart v. Motts presents an analysis of whether the reasonable person test can produce satisfactory results in cases where an injury involves something as dangerous as gasoline.

STEWART v. MOTTS

539 Pa. 596, 654 A.2d 535 (1995)

MONTEMURO, J.

Appellant, Jonathon Stewart, appeals from an order and memorandum opinion of the Superior Court affirming a judgment of the Court of Common Pleas of Monroe County following a verdict in favor of appellee, Martin Motts, in this action for personal injuries. . . .

The sole issue presented before us is whether there exists a higher standard of "extraordinary care" for the use of dangerous instrumentalities over and above the standard of "reasonable care" such that the trial court erred for failing to give an instruction to the jury that the Appellee should have used a "high degree of care" in handling gasoline. Because we believe that there is but one standard of care, the standard of "reasonable care," we affirm.

The pertinent facts of this case are simple and were ably stated by the trial court:

> On July 15, 1987, Plaintiff, Jonathon Stewart, stopped at Defendant, Martin Motts' auto repair shop and offered assistance to the Defendant in repairing an automobile fuel tank. . . . While the exact sequence of events was contested, the tragic result was that the car backfired, caused an explosion and resulted in Plaintiff suffering severe burns to his upper body. . . .

Stewart v. Motts, No. 52 Civil of 1988, slip op. at 1 (Court of Common Pleas of Monroe County, Dec. 18, 1992).

The only issue raised before this Court is the refusal of the trial court to read Stewart's requested point for charge No. 4. This point for charge reads:

> We are instructing you that gasoline due to its inflammability, is a very dangerous substance if not properly handled. . . . With an appreciation of such danger, and under conditions where its existence reasonably should have been known, there follows a high degree of care which circumscribes the conduct of everyone about the