Introduction to Torts

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I TORTS DEFINED

Non-lawyers typically respond with amusement when hearing of a law school course titled “Torts.” A frequent refrain is either “what is that?” or “isn’t that something you get at a bakery?” No, the subject you will be studying has nothing to do with food. A tort is a civil cause of action that seeks to right a wrong, historically for a claim recognized under the common law, for something other than the enforcement of a contractual promise. That is, at least, a fairly classic legal definition of a tort.

From a tort victim’s perspective, the above definition seems somewhat dry. A child suffers a serious injury while riding in the back seat of his parents’ car when it is hit from behind on the highway. A patient receives dental implants that are not placed securely and have to be removed. A schoolyard bully runs up behind a boy walking home from school and hits him over the head with a tree branch. A stalker repeatedly makes phone calls to a young lady at her home late at night threatening to break into the house to cause her bodily harm. Vandals throw paint against someone’s new automobile ruining its exterior finish. A homeowner fails to secure a gate and inadvertently permits a child from next door to wander into their yard and drown in their swimming pool. A security
Tort:
The word is derived from the Latin "tortus" which meant twisted or crooked. In the common law, a tort is a "private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."

Black's Law Dictionary

guard detains a shopper at a department store just because the customer is wearing gang attire. A husband witnesses the violent death of his wife as she crosses a street and is hit by a careless and drunk driver who has careened out of control on the city street. A mental patient confides to his psychiatrist that he is going to kill his girlfriend and the doctor fails to warn her and her death results. A jilted lover falsely tells others that his former girlfriend had a venereal disease. Or perhaps a lawyer entrusted with a new client's potential lawsuit fails to file it on time. Under the right circumstances, any of these true-to-life instances can qualify as a legitimate tort cause of action. These scenarios involve the potential violation of another citizen's civil right to be protected from certain types of harm under circumstances where the victim's rights are not defined pursuant to any contract with the defendant-tortfeasor. A tort may have occurred. A major part of your current undertaking is to acquire the knowledge and skill to look at a set of facts, and to reach an informed opinion on the question of whether a tort claim exists.

II GOALS AND CRITICISMS

From the above examples, the victims' lives might have been forever changed by these incidents. Tort law cannot undo all of these wrongs, but it can attempt to provide some civil redress, typically in the form of damages. While it is true that in exceptional circumstances the law will permit an extraordinary equitable remedy — such as for injunction — to prevent the commission of a threatened tort, most tort claims involve a request for monetary relief by the plaintiff. The subject of torts speaks in dollars and cents.

As you work through these materials, you should consider for each tort theory or doctrine the principle behind the rule of law. One fascinating aspect of legal study is the realization that the rules are not arbitrary. You may not agree with a particular doctrine — and often courts among different states will disagree about particular tort doctrines — but you can be certain that every tort doctrine had a reason for its adoption initially. As times and circumstances change, and as values evolve in our society, there are frequent occasions when a tort doctrine needs to be revisited. You will see numerous examples in the cases of courts revisiting old tort doctrines to decide if they should continue to be recognized, abandoned, or modified in some fashion. These determinations are driven by perceptions of the principles.
Likely you have heard in recent public forums debate on whether our tort system is broken and in need of serious reform. During the last few decades there have been tremendous efforts undertaken to modify common law tort doctrines either through the courts themselves or, more significantly, through legislative action. You will encounter various manifestations of judicial and legislative tort reform as you work through various portions of this book. When we get to Chapter 8 on Damages, we will encounter the tort reform movement directly. You are free to make your own assessment on the legitimacy of a torts crisis, but these materials will ask that you consider all of the evidence before reaching a conclusion. As a new lawyer (or law student) you will be asked your opinion by many laypersons about these matters. Further, if you practice tort law, you will encounter appeals to judges based upon notions that our system is broken and in need of repair. Being thoughtful in your approach to such matters will serve you well. One useful exercise for you will be to keep this issue — how well our current system is working — in the back of your mind as you read the hundreds of cases in this book. As you read each case, ask yourself, “Does it appear the current doctrines and procedural rules are already in place to avoid outrageous results?”

A. What Are the Purposes Behind Tort Law?

From a macro perspective, it is worth considering at the inception of our study the broad objectives that tort law seeks to vindicate. These objectives can be isolated and identified in many instances as we study the various tort causes of action. You may ask yourself, “what difference does it make?” There are multiple layers of response to that question. First, understanding the purposes behind tort law and its many doctrines and rules makes the study fascinating. Second, knowing the purposes behind the rules that you will discover in this book will increase the depth of your knowledge regarding those rules. A parrot might be trained to repeat certain tort phrases, but this does not make the bird into a lawyer. Being a good lawyer (or law student) is much more than memorizing a list of rules or laws. The rules themselves are very basic in terms of your education of tort law. Being able to articulate not only how a rule of law applies, but also when it applies, why it applies, and perhaps when it needs to be changed is the stuff of a torts master. Third, if you understand the rationale behind tort doctrines it will help you to articulate answers to questions that have not yet been addressed by courts. As you will see, the common law of torts evolves with every case decided because the unique facts of each case become a part of the law. Because factual circumstances underlying a tort claim are always potentially unique, judges and lawyers constantly have to determine if certain tort doctrines still apply as the facts are modified from one case to the next.

You might divide the world of tort scholars into two camps — roughly, those that believe the primary purpose of tort law is to regulate conduct by deterring (through the punishment of awards of damages) certain antisocial behavior, and
those interested in "corrective justice" between the particular litigants. When a judge requires a tortfeasor who has beaten the plaintiff with a stick to pay for the harm caused, the thought is that this tortfeasor (and others who are aware of our system of civil justice) will think twice before whacking another with a stick. In addition, when the judge awards damages in favor of the victim and against the tortfeasor, the judge is implementing justice by providing compensation in favor of a worthy victim. Some torts scholars argue that these purposes stand in conflict with one another. They assert that if you push deterrence as the principal goal, then you will be more demanding of proof of fault by the defendant before you enter judgment. On the other hand, they assert that if compensation is the chief goal then a system that rewards plaintiffs without too many legal hurdles is superior. The truth is that these rather large and general goals are not in conflict but work together:

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


Beyond these rather noble goals of regulating conduct and seeking justice, there is another important goal of tort law—resolving civil disputes in a peaceable manner. The truth is that when one person is perceived to misbehave and cause harm to another, it is important that the parties believe there is a civil justice system prepared to resolve their dispute in what is perceived to be a fair and non-arbitrary manner. It is possible to simply have a referee flip a coin to resolve such disputes, but the parties would quickly realize there was no point taking their dispute to the local government to do this. Short of a civil and peaceable system to resolve these disputes, the fear is that the parties would simply engage in violent acts to get even or extract some payment for the initial injury. At this very basic level, the civil justice system is designed to avoid gunfights in the town square. If it can regulate conduct and thereby reduce injuries or at least provide justice after an injury has occurred, that's icing on the cake.
B. Has Tort Law Gotten Out of Control?

There is a good chance that you had already heard the word “torts” before starting law school because “tort reform” has pervaded the public forum in terms of political debate for several decades. You may have even formed an opinion about whether tort lawsuits are “out of control” and the “system broken.” Such is the common assertion of many partisan candidates for elected office today. Patience should be urged before forming a closed mind on this controversial issue. At the end of your study of torts you will be in a much better position to opine on that topic. Nevertheless, it is worth at least introducing the topic of tort reform at the outset because it is the elephant in the room. It is something that you should keep in the back of your mind as you begin your study of tort law. And the media’s coverage of tort reform is not always conducted at a sophisticated, academic level. Because there is a good chance you have already, therefore, become familiar with some of the arguments in favor of tort reform, you should at least be aware of some serious counterarguments. The following excerpt is a good example of such scholarship.

RULE 11 AND TORT REFORM: MYTH, REALITY, AND LEGISLATION

Aaron Hillier, 18 Geo. J. Legal Ethics 809 (2005)*

Amending modern civil procedure is a process of balance and deliberation. When any claim can be made in a federal courtroom, the system may seem overwhelmed by “frivolous” lawsuits. When heavy restrictions act as a deterrent, even legitimate claims might not have access to the system. The evolution of Rule 11 [a Federal Rule of Civil Procedure that sanctions groundless lawsuits] illustrates the need to consider both the abuse and the access ends of the equation and the dangers of mistaking harsher sanctions for genuine improvement. Good litigation reform requires poised formulation and attention to real historical trends. Moreover, good litigation reform requires good lawyers — attorneys who act, not only within the proscribed bounds of ethical codes, but to help shape those standards and conventions in a safe and responsible manner.

But American culture is saturated with the stereotyping of lawyers, and lawmakers have a tendency to cry wolf at a litigation crisis to garner easy praise and campaign support. Historical fact and current data demonstrate the folly in this approach.

Tort reform rhetoric feeds into lawyer stereotypes and is itself stereotypical. Worse than the relative predictability of the tort reform narrative, the single-minded obsession with an American litigation crisis blinds lawmakers to real

problems and effective solutions. All empirical evidence suggests that lawsuits are declining, that jury awards are shrinking, and that the costs of litigation to the overall American economy are slight if at all significant. House Resolution 4571 [proposed as an aid to strengthen Rule 11’s application] stems from, and lends authority to, a cultural bias and a mythological emergency, but it does not reflect reality or offer a desired outcome.

A. THE MYTH

The American public does not like lawyers. Maybe it never has. The cultural roots of modern anti-lawyer sentiment run deep. In 1770, the citizens of Grafton, New Hampshire, dispatched the following census report to George III:

Your Royal Majesty, Grafton County ... contains 6,489 souls, most of whom are engaged in agriculture, but included in that number are 69 wheelwrights, 8 doctors, 29 blacksmiths, 87 preachers, 20 slaves and 90 students at the new college. There is not one lawyer, for which fact we take no personal credit, but thank an Almighty and Merciful God.

About three-quarters of surveyed individuals believe that the United States has too many lawyers and over half believe that lawyers file too many lawsuits. It is true that the number of attorneys in America has nearly tripled over the last three decades, a statistic approaching 900,000 practicing lawyers. But complaints about the number of lawyers, metaphors used to describe the profession, and even lawyer jokes have been part of American social values for centuries.

[The tort reformers behind the proposed amendment to Rule 11] certainly tapped into the anti-lawyer tradition. In explaining the need for direct amendment of Rule 11, the tort reformers couch their argument in personal, anecdotal appeals to the American public. Doctors cannot help but be enraged at the story of the C.E.O. of San Antonio’s Methodist Children’s Hospital, who “was sued after he stepped into a patient’s hospital room and asked how he was doing.” Parents and community volunteers must be appalled by the tale of a New Jersey little league coach who “had to settle the case for $25,000” when angry parents sued over their son’s black eye. Americans should be dismayed—even if somewhat amused—by the narrative of the Pennsylvania man who “sued the Frito Lay Company, claiming that Doritos chips were inherently dangerous after one stuck in his throat.” Such storytelling is captivating, entertaining, and resonates with the anti-lawyer undercurrents of American culture.

As engaging as the frivolous lawsuit narratives can be, they also follow a predictable pattern and tend to be somewhat misleading. The premise and conclusion of every storyline is that the onslaught of “frivolous lawsuits” threatens to destroy the American way of life. Very little hard data is ever presented to substantiate the claim; the basis for this rather frightening statement is almost entirely anecdotal. The public has almost always heard these stories, or stories like them, before. Of course, they are increasingly recognizable because cases
like the ones described by the tort reformers receive disproportionate media attention. In the modern media culture, the line between news and entertainment is not often clear; serious coverage of the court system struggles to be heard over the din of talk radio, cable punditry, stump speeches, and election coverage. The stories that do surface are “anecdotal glimpses of atypical cases.” Cognitive biases only reinforce public misperception of the overall system — because vivid incidents are easier to recall, people tend to overestimate how frequently the most outrageous stories occur. And not even these cases are the straightforward abuses of the system they may seem.

Many Americans are familiar with the multi-million dollar punitive damages award against McDonald’s for serving coffee at scalding temperatures. Less are familiar with the facts of the case. The plaintiff, a seventy-nine-year-old woman, received acutely painful third degree burns from coffee heated to over 180 degrees. She only brought suit when McDonald’s refused to reimburse her medical expenses; at trial, the jury learned of at least 700 other McDonald’s burn victims who had been summarily dismissed by McDonald’s safety experts. The $2.3 million jury verdict was later reduced to $640,000, but the original sum represented exactly two days of coffee sales revenues for McDonald’s nationwide. Reasonable people can disagree as to whether this lawsuit was vindictive or vindication, but “what qualifies as a frivolous claim depends on the eye of the beholder.” Given all the facts, the line between frivolous lawsuit and defensible argument is harder to draw.

Lawmakers must know that the definition of “frivolous” is not straightforward when it comes to litigation — but they hammer home the perpetual crisis of legal hypochondria anyway. By characterizing the problem as too many lawyers, the tort reformers miss a more important question — not whether or not there are too many lawyers, but whether or not the legal profession is serving the American public as it should. By obscuring the facts with extravagant, yet predictable, storytelling, they miss an even larger problem — not why the American people are terrified of tort litigation, but why large numbers of Americans lack the information and resources to assert legitimate claims. Why do they do it? Says one briefing book for House Republicans: “attacking trial lawyers is admittedly a cheap applause line, but it works. It’s almost impossible to go too far when it comes to demonizing lawyers.” The tort reformers might be moved by collecting campaign contributions from corporate America or by garnering popular support by tapping into a stereotypical position, but they do not appear to be motivated by reality.

B. THE REALITY

By all available data, the litigation crisis depicted by the authors of H.R. 4571 simply does not exist. In fact, the Justice Department Bureau of Justice Statistics tracked more than a decade of litigation in the seventy-five largest counties in the United States and found the exact opposite trends. From 1992 to 2001, the overall number of civil lawsuits filed in America dropped by 47%. The number of
tort suits fell by 31.8% and the number of medical malpractice claims — an area of litigation often cited by tort reformers and insurance companies for increasing abuse — declined by 14.2%.

As the amount of litigation on the docket has declined, so have the jury awards so often decried as outrageous and skyrocketing by the tort reformers. The median jury award in 2001 was $37,000, representing a 43.1% decrease over the previous decade. Limiting that analysis to only tort cases, the median jury award stood at $28,000, a 56.3% drop since 1992. Moreover, juries rarely award punitive damages at all — less than 3% of all plaintiff winners in tort trials were awarded punitive damages; the median award was $38,000. If litigation rates are decreasing nationwide and jury awards are more conservative than they have been in twenty years, it is difficult to see where the litigation crisis exists. Not even the baseline mythology of a naturally litigious American culture is really accurate. Comparatively, the United States is far from the most litigious country in the world.

When the data contradicts their immediate claims, the tort reformers often turn to an alternative economic argument — because of frivolous lawsuits, whatever their number may be, “small businesses and workers suffer.” Consider one anecdote presented to the House Judiciary Committee in support of H.R. 4571:

This year, the nation’s oldest ladder manufacturer, family-owned John S. Tilley Ladders Co. of Watervliet, New York, near Albany, filed for bankruptcy protection and sold off most of its assets due to litigation costs. Founded in 1855, the Tilley firm could not handle the cost of liability insurance, which had risen from 6% of sales a decade ago to 29%, even though the company never lost an actual court judgment.

“We could see the handwriting on the wall and just want to end this whole thing,” said Robert Howland, a descendant of company founder John Tilley.

Neither “sales” nor the reasons behind the proportional rise in insurance costs have been explained, but the statistics quoted in the story are probably technically correct.

The economic argument takes the same narrative form as the excessive litigation claim — a personal anecdote about respected, small town folks whose hard work has been swept away by lawyers and lawsuits. But these concerns about the overall cost of litigation to the American economy are based on storytelling and dubious statistics, not hard data. One Brookings Institute expert estimates that tort liability could comprise at most 2% of the total costs of United States goods and services. At that rate, he estimates that it is “highly doubtful” legal expenditures could significantly affect the competitiveness of American products. Other experts place the total estimated business liability for all legal claims at about twenty-five cents for every one hundred dollars in revenue. The legal definition of “small business” may shift, and individual stories might invoke sympathy, but there appears to be no apparent economic facet to the litigation crisis either.
The reality is that the United States does not face a litigation crisis. Even if insurance premiums are excessively high, America’s litigation rates are neither excessive nor increasing. The most significant problems with the system involve, not too many cases or unreasonably high jury awards, but too little access to justice and unreasonably few legal services available to the general public. The “Frivolous Lawsuit Reduction Act” might dovetail nicely with a cultural bias or score well with a given political base, but it does not address any actual immediate emergency.

III CASE PROCEDURE AND DEFINITIONS

The Typical Life of a Civil Tort Suit

Pleadings → Discovery → Motion Practice → Trial → Judgment → Appeal

Cases tend to follow a certain pathway as they wind their way through our civil judicial system. You will be reading tort cases that are written at different points in time. Some opinions are rulings upon motions attacking the plaintiff's initial pleading because the defendant contends that no legitimate claim is possible under existing law. Other court opinions are written after some period of discovery has transpired and immediately before trial. These are in response to motions that argue that the evidence is so one-sided that no trial is necessary. Appellate courts write other opinions in this book, after a trial court’s entry of judgment. These procedural nuances are often important in understanding a court's opinion. You will be learning more about these procedures in your civil procedure class. An initial overview here, however, will be helpful to you in deciphering the torts cases we will be encountering in a few pages.

A. Pleadings and Attacks on Pleadings

A tort victim who files a suit is called the “plaintiff.” The alleged tortfeasor is the “defendant.” The plaintiff initiates a civil tort case by filing a so-called short and plain statement of the claim. This is essentially a formal pleading that identifies the parties, states the court’s power or “jurisdiction” over the type of claims filed and over the parties, and then articulates the factual and legal basis for the claims asserted. In short, the complaint tells the legal story of what the defendant did that was wrong and how this hurt the plaintiff. The complaint ends with a “prayer” for relief that identifies the legal remedies (e.g., the damages) plaintiff seeks against the defendant at the conclusion of the case.
“It won’t do to have truth and justice on his side, he must have law and lawyers.”

Charles Dickens

The defendant is permitted to file an initial attack on the adequacy of this pleading, denominated a “motion to dismiss.” Typically, in ruling upon these foundational attacks on the lawsuit, the court is supposed to assume that every fact plaintiff has alleged is true. The focus of the motion is not arguing the facts but arguing whether the law might possibly recognize a valid claim assuming the facts are as alleged. In run-of-the-mill cases where the law is quite settled, the defendant may not bother to file a motion to dismiss. But when the complaint asserts a tort cause of action whose existence or contour is uncertain, a motion to dismiss gives the court an early opportunity to examine the case and make an early legal ruling on a potentially dispositive matter. Some of the cases contained in this book are appeals from trial court dismissals of cases at this early stage.

B. Formal Discovery

If the trial court recognizes a legitimate claim has been stated by the plaintiff and permits the plaintiff’s claim to proceed, a period of often time-consuming and expensive pretrial practice occurs called formal discovery. Modern rules of civil procedure permit great latitude to both parties to a dispute to transmit formal requests for information and documents to which the other party is obligated to respond within a particular period of time—often 30 days. In addition, parties will frequently take oral depositions of parties and non-party witnesses. The formal purposes of this discovery are to prepare both sides for trial so that there are no ambushes in the courtroom, and to facilitate a later peek at the merits of the case before trial by the judge, typically in a motion for summary judgment. Informally, discovery of the facts also facilitates settlement by permitting the parties to gain a clearer view of how the case might appear at a trial. Such perspective often clarifies the merits of each side’s positions.

C. Motions for Summary Judgment

Often the last formal barrier to getting its jury trial that a plaintiff faces is a defendant’s motion for summary judgment arguing that no trial is needed because plaintiff lacks sufficient evidentiary support for its tort cause of action.
(Less frequently, a plaintiff can file a motion for summary judgment arguing that its claims are undisputed and that it is entitled to judgment without need for trial, in whole or part.) The parties will argue about the application of the law to the facts in a motion for summary judgment. In essence, the trial court is asking itself when ruling on such a motion, whether there is any need to convene a jury of citizens to rule upon disputed questions of fact. If not, summary judgment might well be granted and final judgment entered in an expedited fashion. Many of the cases in this book are appellate opinions reviewing the propriety of trial courts’ granting of summary judgment motions.

D. Trial

At trial, the plaintiff has the opportunity to present evidence to demonstrate the merit of the particular tort cause(s) of action being pursued. This proof will come both from the witness stand in the form of live testimony from witnesses under oath, and from other tangible forms of evidence such as photographs, documents, videotapes, or other objects (e.g., an allegedly defective tire) relevant to the matter. The defendant has a chance to cross-examine each of the plaintiff’s witnesses. After the plaintiff rests, the defendant is given an additional opportunity to challenge the sufficiency of the plaintiff’s evidence in the form of a motion for directed (or instructed) verdict. This is an odd name for a motion. Its roots lie in an ancient practice: After granting a motion, the judge would direct the jury to enter a particular finding. Nowadays, courts granting the motion do not direct the jury to do anything other than to go home because their service is no longer necessary. Theoretically, the same basis for a directed verdict motion should have been available prior to trial in the form of a motion for summary judgment. A defendant whose motion for summary judgment was denied is often undeterred in arguing the same points later during the trial in the directed verdict motion. If this motion is denied, the defendant has the same opportunity as the plaintiff to call witnesses and introduce exhibits that support the defendant’s position. At the conclusion of all the evidence being submitted, the lawyers present closing arguments to the jury and the court instructs the jury on the law they are to apply in reaching its verdict. Trials are the pinnacle of both exhilaration and stress for both the litigants and their lawyers. Other cases in this book are appellate opinions concerning alleged errors that occurred at trial, such as ruling on evidentiary matters; the validity of the trial court’s instructions on the law to the jury; and the sufficiency of the evidence to support the jury’s verdict.

E. Entry of Judgment

If the jury cannot reach a verdict (in federal court a unanimous verdict is required) the trial judge declares a “mistrial” and resets the case for a new
trial in the future. If the jury does render a verdict, the court will entertain motions by the prevailing party to enter judgment in conformity with that verdict, and motions by the losing party to disregard the verdict as against the great weight of the evidence. Once the trial court enters a final judgment, it loses jurisdiction over the case and the case becomes an appellate matter.

F. Appeal

Appeals are subject to their own unique procedures and rules, and many lawyers specialize in handling appeals. Litigants are typically entitled to one appeal as of right from a final judgment to an intermediate court of appeals. Beyond that, review is typically discretionary at the highest court — usually, but not always, referred to as a “supreme court.”

The losing party filing the appeal is referred to as the “appellant” and the prevailing party at the trial court level is called the “appellee.” The appellant is given a certain number of days after the final judgment to file an appellate brief with the appeals court pointing out reversible errors made by the trial judge in either granting or denying a motion, or in failing to enter judgment in conformity with the verdict, or in failing to disregard the verdict. Further, trials are filled with many evidentiary objections, which can be the subject of a possible appeal. Appeals can take months to years to resolve.

IV  CASE BRIEFING

Your professor may expect you to prepare and bring to class a “case brief” for each of the cases you are assigned to read from these materials. Whether formally assigned this task or not, it is a wise practice, particularly for a beginning law student. A case brief is a summary or synopsis of the important aspects of a case and should reflect your thoughtful reflections on the court’s analysis.

A. Reasons for Briefing a Case

There are two reasons you should brief your cases even if not required by your professor. First, case briefing will help you to understand the case better by focusing your attention upon important aspects of the court’s written opinion. Second, the case brief will be a useful tool during class as well as later during the term, when you are preparing your course “outline.”

Even beyond law school, good lawyers brief cases they read as they practice law. Their case brief may not be as formal as what you will likely prepare as a law student, but the lawyer’s notes on the cases she reads in the firm library will
generally contain similar categories to your case briefs, and help to focus the lawyer's attention on key components of the case. Doing so helps the lawyer utilize the case either in a written brief or in preparing for oral arguments at a motion hearing or on appeal.

B. Preparation of a Case Brief

The most important aspect of briefing a case is reading the case carefully and repeatedly. Particularly for the new law student, it is likely impossible to write a good case brief as you are reading through the case the very first time. If you attempt to do so you will include unnecessary information. This is because information in the opinion that might appear to be highly important at first may turn out to have no bearing on the court’s analysis or holding. The best tip is to simply read the case through the first time without attempting to write the brief, and perhaps without even marking the case or taking any notes. This first read should be to give you general familiarity with the case and the court’s ultimate outcome. Once you have completed this first careful read of the case, you are ready to re-read the case and to draft your case brief.

Case briefs generally having the following sections: Facts, Procedural History, issue, Rule, Analysis, and Holding. Variations and additional categories are added by some but are not always necessary. Let’s explore each briefly.

1. Facts

The goal in this section of the brief is to recite the most critically important factual details providing the backdrop for the court’s legal discussion. The goal is not to sharpen your typing skills by simply being a scrivener and re-writing all the facts that are already contained in the opinion. After all, you already have the case on the printed page with all the facts to begin with. Including all the facts in your case brief would serve no purpose.

Which facts to include depends upon the issues and analysis in the court’s opinion. Some basic information is almost always helpful, such as the identity of the key parties, the nature of the case, and the basic story behind the issues. Whether the events took place on a Tuesday or Wednesday might be irrelevant. The dates of the events may or may not be important. The color of the car might be irrelevant while the color of a traffic light might be essential to recall, at least in a traffic intersection tort case.

2. Procedural History

It is useful to note the procedural posture of the case when the trial court ruled upon the issue that is the subject of the appellate opinion. Was it a preliminary
motion to dismiss for failure to state a claim? Did the case come up for appeal following a summary judgment order? Did the trial court grant a judgment notwithstanding the jury’s verdict? Is the appeal just an attack upon the sufficiency of the evidence underlying a final judgment following the jury trial? This should be succinctly stated in your case brief.

3. Issue

There is a reason the case was appealed. There is also a reason the author of your casebook included the case in the book. And there is a reason your professor assigned the case to read and cover in class. Identifying the primary legal issues in the opinion should help to reveal these reasons. Sometimes the court in its opinion will simply say, “The issue for resolution in this case is . . .” In these cases, identifying and articulating the legal issue should be quite easy. But even if the court has not given you this cheat for your case brief writing, your careful reading of the case and understanding of the court’s analysis should enable you to identify the question, or questions, the court is trying to resolve on appeal. It might be a purely legal question, such as “what level of intent is necessary in the State of Indiana to give rise to a cause of action for battery?” Other times it might involve the application of facts to the law, such as “did the defendant have a reasonable basis for his belief that force was necessary to defend himself from the threats of the plaintiff?”

4. Rule

Legal analysis necessarily involves applying legal principles or rules to the facts of the case. These rules of law may or may not be disputed in a particular case. In order to permit the analysis to proceed, the court must articulate the applicable legal rule that will guide the court’s decision. What rule of law does the court invoke as the foundation for declaring the litigation winner and loser? In the context of a tort claim, often the legal rule involves some statement of the elements of the particular tort cause of action involved. For example, in the context of a tort claim for battery, a legal rule might be that one is not liable for battery unless she intends to cause a harmful contact to the plaintiff. Once the court has identified, clarified, or found the applicable legal rule it can then continue its analysis by applying the circumstances (i.e., the facts) of the case to that rule. Your brief should reference the guiding legal principle or rule used by the court.

5. Analysis

The analysis is arguably the most important aspect of the brief. It really answers the implicit question, “why did the court reach its holding in this case?” All law
professors will spend considerable time during class addressing the court’s analysis in a case, trying to understand the rationale for the court’s opinion and for any rule of law or doctrine adopted or applied by the court. This is the most interesting aspect of case briefing and will provide the most help to you in understanding any given area of the law. The analysis will be critical to the course outline you prepare on a later date. Focusing upon the courts’ analyses in the cases as you read through this book will also prepare you for your final exam, because a traditional torts essay exam demands that you be able to analyze in hypothetical factual contexts how a court would reach particular conclusions. You will do this by demonstrating familiarity with the rules of law and dexterity at using the facts to reach particular reasoned conclusions. Thus, at the intersection of the rules and the facts you find legal analysis.

6. **Holding**

The holding should provide the answer to the issue you articulated earlier in your case brief. It can often be stated as a “yes” or “no” with explanation. There can be two aspects to correctly stating the case holding. First, who prevails on the appeal on the primary issues? Second, what rule of law is the court choosing to provide the foundation for declaring the winner and loser of the appeal? For example, your statement of the holding to the issue from the preceding paragraph about the self-defense case might be: “Yes, the court ruled that the defendant did have a reasonable belief that his force was necessary, because the court held that information that was unavailable to the defendant at the time he acted cannot be used to undermine his assertion of self-defense.”

How long your case brief needs to be depends upon the case. In general, your case brief should be substantially shorter than the court’s opinion you are studying. Almost always it should comfortably fit on one typed page. But remember, the length of the effective case brief is not proportional to its quality. A good case brief should be as short as possible while communicating the basic information outlined above.

**Upon Further Review**

Despite its ancient roots, tort law continues to evolve as times and circumstances change. These changes can take many forms, from newly created causes of action, to discarded theories of liability and constantly tweaked doctrines and claims. These changes tend to occur at the intersection where relatively constant tort principles meet changed values, experiences, and even technology. This book will present both the principles underlying tort doctrines as well as demonstrate how these doctrines impact litigants seeking justice in the courtroom — the modern practice of tort law. Key concepts like the desire to compensate worthy victims, to punish
wrongdoers, and to deter future harm can be seen throughout the many tort concepts you will study in this book. Look for these themes particularly when courts face difficult choices between competing doctrines.

While understanding core concepts and their application should strike you as worthy goals, your primary concern as you embark on this journey may be more practical. How do I read these cases? How do I prepare my case briefs? How do I avoid getting embarrassed on the first day of class when I hear my professor call my name? Although the above materials attempt to help answer some of these questions with detailed information, the best advice is simply to pour yourself into the academic inquiry. Try to absorb the law at both the macro and micro levels — be able to restate the elements of each tort cause of action quickly but, even more importantly, be prepared to explain the thought behind each of these elements. This will all take practice. Be patient with yourself and pay close attention to your professor. She has spent considerable time absorbing the material. Most importantly, enjoy the learning process. Law school should be a fascinating entry to your new, chosen profession.
CHAPTER 2

Intentional Torts

I. Overview
II. Battery
III. Assault
IV. False Imprisonment
V. Trespass
VI. Intentional Infliction of Emotional Distress

I OVERVIEW

Many torts classes begin with a study of a category of tort claims entitled “intentional torts.” And this book will do likewise. This chapter will explore many of the classic intentional tort claims. These stalwarts of tort law include battery, assault, false imprisonment, and trespass. Another important, though relatively new, tort cause of action will also be covered in this chapter — intentional infliction of emotional distress.

PRINCIPLES

Degrees of Fault or Wrongfulness:

- Intentional Torts
- Accidental Torts
  - Recklessness
  - Negligence
- Strict Liability Torts
Beyond this category of intentional torts, two other general categories of tort claims exist: accidental torts (divided between claims involving recklessness and ordinary negligence) and strict liability torts (often called a "no fault" cause of action). These other varieties of tort claims will be covered in subsequent chapters.

Of the three broad categories of tort claims, intentional tort claims are generally considered to involve the worst, most reprehensible misconduct, though as you will see, this does not always ring true. This category is referred to as "intentional" because the tortfeasor must intend something specific, subjectively, in order to trigger liability. But exactly what it is that has to be intended by the tortfeasor varies widely among the various intentional tort claims. Some intentional tort claims require that something relatively bad be intended, such as "outrageous conduct," but others do not require such malevolent intent. The point is that for each intentional tort claim, as you are learning the elements of the claim, you need to pay close attention to what exactly must be intended, and what elements need not be intended.

Because intentional tort claims often involve quite reprehensible misconduct, in addition to claims for recovery of actual, "compensatory" damages, plaintiffs suing on intentional tort theories often include an additional prayer for "punitive" or exemplary damages. Such damages are covered extensively later in this book but, for now, just be aware that punitive damages are exceptional, awarded only in a small percentage of tort claims, and are designed specifically to punish the tortfeasor rather than to provide compensation to the tort victim.

II  BATTERY

A. Introduction

Battery is a classic intentional tort. You have probably heard the phrase "assault and battery." Assault is technically different, though related, tort from battery. You will need to learn how they are related but separate. Battery is designed to protect our bodily integrity; that is, our right to be free from certain unwanted physical contacts. We are daily faced with physical contacts from others, most of which are desired, unnoticed, or harmless. But certain other contacts might be physically harmful to us or unpleasant and disagreeable. The tort of battery
recognizes that we are entitled to some level of autonomy over our own bodies. It provides redress where that autonomy is violated in certain ways. Pay close attention to the elements of this cause of action as you read the next set of cases. Also remember that the same notion of autonomy that gives rise to a tort claim for battery when we are subjected to unwanted contacts, also necessarily gives rise to the consent defense where we have permitted contacts to occur, even where they later turn out to be harmful. The separate defense of consent is covered along with other defenses to intentional torts in the next chapter.

B. Intent

The elements of a civil cause of action are those things that the plaintiff bears the burden of proving that are considered essential to the claim. If any element is lacking, the plaintiff's cause of action fails. You might consider the elements of a tort claim to be analogous to the necessary ingredients in a recipe. Leaving out one key ingredient means that you have not succeeded in preparing your dish. For each tort cause of action, you should look within the case opinions you are reading for some indication of the elements or key ingredients. In most of the cases the parties are disputing whether the factual record supports the existence of a particular element.

As already mentioned, every intentional tort claim requires something specific to be intended. How courts interpret and apply the word "intent" in the context of intentional torts is not entirely intuitive for law students. Battery is an intentional tort and our first case will begin to delineate what is meant in tort law by the word intent. One meaning—a desire to bring about a certain result—is the definition of intent you have used in your pre-law school life. There is an additional definition that might surprise you. The Garratt case below discusses these two traditional meanings of the word "intent." These dual meanings apply with equal force to any intentional tort claim. Thus, while different intentional tort claims involve something different being intended, once you grasp the concept of intent you will be equipped to analyze any intentional tort. With respect to the claim for battery, begin to focus upon what exactly must be intended. This will be a subject revisited within this section, as the final case on battery—White v. Muniz—will come back and provide an important final clarification.

GARRATT v. DAILEY

270 P.2d 1091 (Wash. 1955)

Hill, J.

The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in
the backyard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the backyard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

III. ... that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question he did not have any wifeful or unlawful purpose in doing so; that he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff. (Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be eleven thousand dollars. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions (See Bohlen, "Liability in Tort of Infants and Insane Persons," 23 Mich. L. Rev. 9), state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be. Paul v. Hummel (1868), 43 Mo. 119, 97 Am. Dec. 381; Hucthing v. Engel (1863), 17 Wis. 237, 84 Am. Dec. 741; Briese v. Maechtle (1911), 146 Wis. 89, 130 N. W. 893; 1 Cooley on Torts (4th ed.) 194, §66; Prosser on Torts 1085, §108; 2 Kent's Commentaries 241; 27 Am. Jur. 812, Infants, §90.

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.
It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, §13, as:

An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if

(a) the act is done with the intention of bringing about a harmful or offensive contact to the other, and

(b) the contact is not consented to by the other [or the other's consent thereto is procured by fraud or duress], and

(c) the contact is not otherwise privileged.

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says:

Character of actor's intention. In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced.

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. Vasburg v. Putney (1891), 80 Wis. 523, 50 N. W. 403; Briese v. Maechtle, supra.

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (i.e., that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the "Character of actor's intention," relating to clause (a) of the rule from the Restatement heretofore set forth:

It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this Section.
A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. Mercer v. Corbin (1889), 117 Ind. 450, 20 N.E. 132, 3 L. R.A. 221. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair, and, there being no wrongful act, there would be no liability.

While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge, the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. Vosburg v. Putney, supra. If Brian did not have such knowledge, there was no wrongful act by him, and the basic premise of liability on the theory of a battery was not established.

It will be noted that the law of battery as we have discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for eleven thousand dollars in her favor on the record now before us.

Nor do we find any error in the record that warrants a new trial.

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

Remanded for clarification.
NOTES AND PROBLEMS

1. Intent. The court's opinion enumerates the elements of a common law civil tort claim for battery. Which of these elements was in dispute? The court describes two meanings to the word "intent" as used in tort law. What are those two meanings? Why did the court remand the case to the trial court? If you were the attorney for the plaintiff cross-examining Brian Garratt, what additional lines of inquiry might you pursue to prove he had the requisite intent?

2. Restatements. The court found certain passages from the Restatement of Torts persuasive in explaining the law of battery. The Restatement of Torts is not a statute that is controlling on the courts. It is written by scholars to try to explain common law principles as an aid to courts and the legal profession. Courts are free to accept its contents or reject it, and there are many examples of each such treatment. The Restatement of Torts (Second) has been highly persuasive. A third version has appeared in print but has not yet been as widely accepted by courts.

3. Problems. In which of the following circumstances do you think the evidence demonstrates the necessary intent to be liable for battery?

A. Tommy was a high school student who loved to play in the snow but was not very athletic. One day as he was having a snowball fight with some friends by the side of a highway, he noticed a car coming toward him with the driver's window down. On an impulsive whim he decided to throw a snowball at the driver, assuming there was no way he could hit an open window on a car driving so fast. To his surprise and horror, his snowball flew through the car's open window, hit the driver in the face and caused the car to crash into a tree.

B. A drunk driver was speeding through a school zone distracted as she attempted to find better tunes on the radio, when she struck a young child attempting to cross the street.

C. A pedestrian was walking on an elevated bridge that went over a busy interstate highway during rush hour traffic. As the pedestrian finished drinking his bottled beverage, he nonchalantly tossed it over the bridge railing. It fell and hit a motorist in a convertible, causing an irreparable eye injury.

WATERS v. BLACKSHEAR
591 N.E.2d 184 (Mass. 1992)

WILKINS, J.

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

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

We start with the established principle that intentional conduct cannot be negligent conduct and that negligent conduct cannot be intentional conduct. Sabatinelli v. Butler, 363 Mass. 565, 567 (1973). The only evidence of any conduct of the defendant on which liability could be based, on any theory, is that the defendant intentionally put a firecracker in one of Maurice’s sneakers and lit the firecracker.

The defendant’s conduct was a battery, an intentional tort. See Restatement (Second) of Torts §13 (1965) (“An actor is subject to liability to another for battery if [a] he acts intending to cause a harmful or offensive contact with the person of the other, and [b] a harmful contact with the person of the other directly or indirectly results”); 1 F.V. Harper, F. James, Jr., & O.S. Gray, Torts §3.3, at 272-273 (2d ed. 1986) (“to constitute a battery, the actor must have intended to bring about a harmful or offensive contact. A result is intended if the act is done for the purpose of accomplishing the result or with knowledge that to a substantial certainty such a result will ensue” [footnote omitted]); W.L. Prosser & W.P. Keeton, Torts, §9, at 41 (5th ed. 1984) (“The act [of the defendant] must cause, and must be intended to cause, an unpermitted contact”).

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

If the jury believed, as they must have, that the defendant did what the uncontroverted testimony indicated he did, as a matter of law the defendant acted intending to cause a harmful contact with Maurice. In short, there was no room for the jury to believe the uncontroverted evidence and to conclude nevertheless that the contact with Maurice was not intentionally harmful but was merely negligent.

### NOTES AND PROBLEMS

1. **Legal Theory.** The plaintiff gets to choose which legal theory, or theories, to pursue for her claim. That theory may or may not prevail. In this case, the plaintiff chose to pursue a theory of an accidental tort, a negligence claim. The court inferred elsewhere in the opinion that this was due to the fact that the defendant had an insurance policy that provided for coverage for accidents but not for intentional torts. Plaintiff's strategy was based upon the pragmatic consideration that the defendant might not have sufficient assets to recover against other than a potentially applicable insurance policy. The court rejected the attempt to apply the theory of negligence because the court found that the defendant had, as a matter of law, committed an intentional tort instead.

2. **Liability for Unintended Results.** The court held that defendant might not have appreciated or intended the actual full results of his conduct — the severity of the burns. Nevertheless, the court held that his conduct would still constitute a battery. How does the court find that he had the requisite intent to be liable on an intentional tort theory even though the actual result obtained was possibly accidental?

3. **Problem.** What would be the result in *Waters* if the firecracker was a dud and failed to explode? Obviously this would reduce the damages obtainable, but would there still have been a battery? Consider the types of contacts that give rise to battery liability in light of the cases below.
C. Offensive, Indirect, and Intangible Contacts

The prior cases involve claims of wrongful conduct that resulted in harmful contacts. Courts have long held, however, that a battery would be recognized where the resulting contact involved offensive contacts as well. Even if the actor intends an offensive contact but physical harm results, liability will attach. There are some instances where a contact might be characterized as either harmful or offensive and the plaintiff's counsel might have strategic reasons to characterize it as one or the other. Finally, case law has also developed around instances where the contact involved was somewhat intangible or indirect, yet still harmful or offensive. Consider the nature of each of the types of contacts in the following three cases and whether it makes sense to hold the defendant liable for battery in each instance.

FISHER v. CARROUSEL MOTOR HOTEL, INC.

424 S.W.2d 627 (Tex. 1967)

GREENHILL, J.

This is a suit for actual and exemplary damages growing out of an alleged ... battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. The question before this Court [is] whether there was evidence that an actionable battery was committed.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but
he did testify that he was highly embarrassed and hurt by Flynn’s conduct in the presence of his associates.

The jury found that Flynn “forcibly dispossessed plaintiff of his dinner plate” and “shouted in a loud and offensive manner” that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn’s malicious conduct.

The Court of Civil Appeals held that there was no [battery] because there was no physical contact. However, it has long been settled . . . that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. 1 Harper & James, The Law of Torts 216 (1956); Restatement of Torts 2d, §§18 and 19. In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

The interest in freedom from intentional and unpermitted contacts with the plaintiff’s person is protected by an actio n for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff’s clothing, or with a cane, a paper, or any other object held in his hand will be sufficient. . . . The plaintiff’s interest in the integrity of his person includes all those things which are in contact or connected with it.

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff’s plate constituted a battery. The intentional snatching of an object from one’s hand is as clearly an offensive invasion of his person as would be an actual contact with the body. “To constitute an assault and battery, it is not necessary to touch the plaintiff’s body or even his clothing; knocking or snatching anything from plaintiff’s hand or touching anything connected with his person, when done in an offensive manner, is sufficient.” Morgan v. Loyacoma, 1 So. 2d 510 (Miss. 1941).

Such holding is not unique to the jurisprudence of this State. In S.H. Kress & Co. v. Brashier, 50 S.W.2d 922 (Tex. Civ. App. 1932, no writ), the defendant was held to have committed “an assault and trespass upon the person” by snatching a book from the plaintiff’s hand. The jury findings in that case were that the defendant “dispossessed plaintiff of the book” and caused her to suffer “humiliation and indignity.”

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d §18 (Comment p. 31) as follows:

Since the essence of the plaintiff’s grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that
the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person.

We hold, therefore, that the forceful dispossessing of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Restatement of Torts 2d §18. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. Prosser, supra; *Wilson v. Orr*, 97 So. 133 (Ala. 1923). We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.

The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest from the date of the trial court's judgment, and for costs of this suit.

**RICHARDSON v. HENNLY**

434 S.E.2d 772 (Ga. 1993)

SMITH, J.

[Plaintiff Bonnie Richardson filed suit against her former employer and a co-worker alleging battery. The co-worker, J.R. Hennly, Jr., was successful in obtaining a summary judgment in the trial court. Plaintiff appeals from that order.]

The record reveals that Richardson had been working as a receptionist at First Federal for a number of years when Hennly, an administrative officer, began working at her branch. Richardson's work station was in the lobby of First Federal, and Hennly worked in an office approximately 30 feet from her desk. Hennly had been a pipe smoker for a number of years, and continued to smoke his pipe at work. Richardson immediately began to have difficulty with Hennly's pipe smoke, to which she apparently had an allergic reaction that caused nausea, stomach pain, loss of appetite, loss of weight, headaches, and
anxiety. She discussed this problem with her superiors, and several air cleaners were purchased, which were placed in the interior of Hennly's office and adjacent to his door. For a time Hennly switched to cigarettes, which did not bother Richardson as much, but he resumed smoking his pipe, stating that he wished to avoid becoming addicted to cigarettes. Richardson was twice hospitalized because of her adverse reactions. Shortly after Richardson returned to work from her second hospitalization her employment was terminated, primarily for excessive absenteeism.

In opposition to the motion for summary judgment Richardson presented medical evidence attributing her adverse reactions to the pipe smoke. This evidence was not rebutted. It is uncontested that Hennly was aware of Richardson's adverse reactions to his pipe smoke and that she was twice hospitalized. The evidence is in conflict regarding whether Hennly ever smoked anywhere at work other than in his office; whether he intentionally smoked around Richardson to annoy her; and whether he made teasing or offensive remarks regarding his smoking.

Hennly moved for summary judgment as to Richardson's claim of battery on the ground that pipe smoke is an immaterial substance incapable of battering another. Richardson maintains the trial court erred by granting partial summary judgment to Hennly on this claim.

Our courts have recognized an interest in the inviolability of one's person and, along with most other jurisdictions have followed the common law rule that any unlawful touching is actionable as a battery. *Halle v. Pittman*, 389 S.E.2d 564 (Ga. 1989). Such a cause of action will lie even in the absence of direct physical contact between the actor and the injured party: "The unlawful touching need not be direct, but may be indirect, as by the precipitation upon the body of a person of any material substance." *Hendricks v. Southern Bell Tel. &c. Co.*, 387 S.E.2d 593 (Ga. 1989).

We note that Richardson has not alleged that *any* or *all* smoke with which she came into contact would constitute battery. Instead, she has alleged that Hennly, knowing it would cause her to suffer an injurious reaction, intentionally and deliberately directed his pipe smoke at her *in order* to injure her or with conscious disregard of the knowledge that it would do so. We decline to hold that this allegation must fail as a matter of law. We are not prepared to accept Hennly's argument that pipe smoke is a substance so immaterial that it is incapable of being used to batter indirectly. Pipe smoke is visible; it is detectable through the senses and may be ingested or inhaled. It is capable of "touching" or making contact with one's person in a number of ways. Since no other element of the tort has been conclusively negated, Hennly has not shown as a matter of law that he is entitled to judgment. Moreover, a jury question remains regarding whether Hennly actually directed his pipe smoke at Richardson. We conclude . . . the trial court erred in granting summary judgment in favor of Hennly on the battery claim.
LEICHTMAN v. WLW JACOR COMMUNICATIONS, INC.
634 N.E.2d 697 (Ohio Ct. App. 1994)

PER CURIAM.

The plaintiff-appellant, Ahron Leichtman, appeals from the trial court’s order dismissing his complaint against the defendants-appellees, WLW Jacor Communications ("WLW"), William Cunningham and Andy Furman, for battery. ... In his single assignment of error, Leichtman contends that his complaint was sufficient to state a claim upon which relief could be granted and, therefore, the trial court was in error when it granted the defendants’ motion. We agree in part.

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

Under the rules of notice pleading, Civ. R. 8(A)(1) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” When construing a complaint for failure to state a claim, under Civ. R. 12(B)(6), the court assumes that the factual allegations on the face of the complaint are true. Because it is so easy for the pleader to satisfy the standard of Civ. R. 8(A), few complaints are subject to dismissal.

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

An actor is subject to liability to another for battery if:

(a) he acts intending to cause a harmful or offensive contact with the person of the other, and
(b) a harmful contact with the person of the other directly or indirectly results; or
[c] an offensive contact with the person of the other directly or indirectly results.

In determining if a person is liable for a battery, the Supreme Court has adopted the rule that “[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact.” Love v. Port Clinton (1988) 524 N.E.2d 166, 167. It has defined “offensive” to mean “disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness.” State v. Phipps (1979), 389 N.E.2d 1128, 1131. Furthermore, tobacco smoke, as “particulate matter,” has the physical properties capable of making contact.
As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. *Lacey v. Laird* (1956), 139 N.E.2d 25. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury — that others will commit no intionted aggressions upon them." Pound, An Introduction to the Philosophy of Law (1922) 169.

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. *Richardson v. Hennly* (Ga. App. 1993), 871, 434 S.E.2d 772, 774-775. We do not, however, adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a non-smoker. Ezra, Smoker Battery: An Antidote to Second-Hand Smoke (1990), 63 S. Cal. L. Rev. 1061, 1090. Whether the "substantial certainty" prong of intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in employment cases as defined by the Supreme Court in *Fyffe v. Jeno's, Inc. (Ohio 1991)*, 570 N.E.2d 1108, need not be decided here because Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act.

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court.

This case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case. Some need a forum in which they can express corrosive contempt for another without dragging their antagonist through the expense inherent in a lawsuit. Until such an alternative forum is created, Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.

Judgment accordingly.

**NOTES AND PROBLEMS**

1. *Harmful vs. Offensive Contacts Defined.* The cases in the preceding section involved harmful or offensive contacts. Harmful contacts are defined by the Restatement as "any physical impairment of the condition of another's body, or physical pain or illness." Restatement (Second) of Torts §16. This is a fairly easy test for evaluating whether the resulting contact qualifies for a battery. Except in cases where the only claimed harm is the plaintiff's experience of pain, most harmful contacts are confirmed through objective evidence of the
harm — the bruised knee, the cut on the arm, the black eye, the missing limb, the burnt skin, or the gunshot wound. The test for an offensive contact is easily stated but tends to cause a bit more controversy in terms of its application. The test is considered to be objective rather than subjective, because it is generally insufficient if the only person to consider the contact offensive is the plaintiff. The Restatement indicates a contact is offensive only if it "offends a reasonable sense of dignity." The comments add that:

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

Restatement (Second) of Torts §19, cmt. a (1965). Under these standards, would the contact involved in the preceding cases meet the test for a harmful or offensive contact, or both? As the courts have held, a battery can also be established by proof that the contact was offensive rather than harmful. Further, the Fisher court held that a battery was possible even with no actual physical contact with the plaintiff so long as contact occurred with an object closely associated and connected with the plaintiff. Can you imagine any contacts that might constitute both harmful and offensive contacts?

2. Indirect and Intangible Contacts. Deciding that smoke has physical properties and is capable of touching someone, the courts in Hennley and Leichtman permitted potential recoveries. Is there any risk of recognizing such intangible contacts as sufficient to impose battery liability? What about breathing on another person? While imposing liability for blowing smoke may seem a fair result in one case, do you recognize how expanding the tort in this manner creates uncertainty in terms of the potential application to other intangible contacts? Is this uncertainty and lack of predictability an acceptable price to pay for reaching what seems to be a fair result in one case?

3. Problems.
A. Would the following contacts give rise to a claim for battery, assuming the other elements were satisfied? Might there be circumstances that might change your opinion?

1. Being spit upon.
2. A handshake.
3. A kiss upon the cheek.
4. A slap to the face.
5. A pat on the back.

B. In early 2017, a journalist received a Twitter message that read, "You deserve a seizure for your posts." When the message was clicked on, it triggered
a blinding strobe light. The journalist was known to suffer from a form of epilepsy that is triggered by such lights. The man who sent the message apparently was aware of the journalist’s condition and advised others of his desire to cause the journalist to suffer such a reaction. Reports indicate that the victim had been critical of President Trump and the man accused of sending the tweet was a vocal Trump supporter. Authorities explored criminal charges while the journalist filed a tort claim for battery. Should this type of behavior qualify as a battery? What barriers to recovery exist?

D. Scope of Liability for Battery

We have already seen in the Waters v. Blackshear case that courts will hold intentional tortfeasors liable even where the harm is greater in degree from that which was originally intended. A slightly more difficult question is whether liability for a battery will result when the nature of the contact intended is qualitatively different from that which actually occurs as a consequence of the defendant’s action. In such an instance, does it even make sense to consider application of an intentional tort theory rather than an accidental tort such as negligence? The following case tackles this problem.

NELSON v. CARROLL

735 A.2d 1096 (Md. Ct. App. 1999)

CHASANOW, J.

This case requires that we determine the extent to which a claim of accident may provide a defense to a civil action for battery arising out of a gunshot wound. Charles A. Nelson, the plaintiff in this case . . . asserts that the trial court should have held Albert Carroll . . . liable for the tort of battery as a matter of law, sending to the jury only the issue of damages. We agree with Nelson that a claim of “accident” provides no defense to a battery claim where the evidence is undisputed that Nelson was shot by Carroll as Carroll threatened and struck him on the side of his head with the handgun.

[The court summarized the facts as follows:]

Carroll shot Nelson in the stomach in the course of an altercation over a debt owed to Carroll by Nelson. The shooting occurred on the evening of July 25, 1992, in a private nightclub in Baltimore City that Nelson was patronizing. Carroll, who was described as being a 'little tipsy,' entered the club and demanded repayment by Nelson of the $3,800 balance of an $8,000 loan that Carroll had made to Nelson. Nelson immediately offered to make a payment on account but that was unsatisfactory to Carroll. At some point Carroll produced a handgun from his jacket.