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CHAPTER 1

DEVELOPMENT OF LIABILITY BASED UPON FAULT

"Tort" comes from the Latin word "tortus," which means twisted, and the French word "tort," which means injury or wrong. A tort is a civil wrong, other than a breach of contract, for which the law provides a remedy. This area of law imposes duties on persons to act in a manner that will not injure other persons. A person who breaches a tort duty has committed a tort and may be liable to pay damages in a lawsuit brought by a person injured because of that tort.

Over the years, tort law has been principally a part of the common law, developed by the courts through the opinions of the judges in the cases before them. Within some areas of tort law, however, statutes have long been common—e.g., trespass to real property, limitation of actions, wrongful death actions; and in recent years the legislature has had an increasingly more significant role in modifying the common law.

Modern Tort Law—Beyond the Casebooks Into the Field of Public Debate. From the time this casebook began with its first edition in the early 1950's, tort law was of concern primarily to law students, law professors, and attorneys who practiced in the field. The public, in general, knew very little, if anything, about the subject. In the past few decades, however, this has changed quite dramatically. Prior to coming to law school, you probably read about healthcare providers who were unable to obtain affordable medical malpractice coverage, about people injured through someone else's fault who could not recover compensation because the cost of the lawsuit would have been more than they could recover, or about manufacturers going out of business or declining to put new and useful products on the market, all because of problems in the area of "tort law."

The Federal Government and all state governments have examined these issues and legislation affecting tort law has multiplied in recent years. As you study the law of torts, you may find that you will be reading news stories about the subject from a new perspective. You may decide that many stories oversimplify the tort system and perhaps miss critical points. It is important to pay attention to these stories because the subject you are studying is dynamic, complex, and at the center of major public policy debates.

In studying the subject, you should consider the major purposes of tort law: (1) to provide a peaceful means for adjusting the rights of parties who might otherwise "take the law into their own hands"; (2) to deter wrongful conduct; (3) to encourage socially responsible behavior; (4) to restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury; and (5) to vindicate individual rights of redress. Should people always be compensated when they have been injured by the action of another? If your answer to this question is in the affirmative, think about whether it is always necessary to have a trial, with a plaintiff, a defendant, and
lawyers. On the other hand, if tort law should not compensate every person who is injured by another, what are appropriate rules and standards to determine whom to compensate and under what circumstances? This is the primary problem to which the law of torts addresses itself. Consider also how tort law evolves to meet changing circumstances—the great virtue of the common law. See Schwartz, Silverman & Goldberg, Neutral Principles of Stare Decisis in Tort Law, 58 S.C. L.Rev. 317 (2005) (suggesting principles for departure from traditional common law concepts).

The casebook will explore the system that has been accused of having caused these crises. Evaluate it carefully, and remember that you are not only learning a legal subject, but also becoming an educated citizen who can and should participate in the debate about the direction tort law should take through the 21st century.

Historical Origins. Historians have differed as to how the law of torts began. There is one theory that it originated with liability based upon “actual intent and actual personal culpability,” with a strong moral tinge, and slowly formulated external standards that took less account of personal fault. O. Holmes, The Common Law, Lecture 1 (1881). It seems quite likely that the most flagrant wrongs were the first to receive redress.

Another, and more generally accepted theory, is that the law began by imposing liability on those who caused physical harm, and gradually developed toward the acceptance of moral standards as the basis of liability. Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv.L.Rev. 315, 353 & 441 (1894). Ames, Law and Morals, 22 Harv.L.Rev. 97 (1908). An alternative theory is that there has been no steady progression from liability without fault to liability based on fault. The difference between no-fault periods and fault-based periods is, rather, one of degree. Isaccs, Fault and Liability, 31 Harv.L.Rev. 954, 965 (1918).

Certainly at one time the law was not very much concerned with the moral responsibility of the defendant. “The thought of man shall not be tried,” said Chief Justice Brian, in Y.B. 7 Edw. IV, f. 2, pl. 2 (1468), “for the devil himself knoweth not the thought of man.” The courts were interested primarily in keeping the peace between individuals by providing a substitute for private vengeance, as the party injured was just as likely to take the law into his own hands when the injury was an innocent one. The person who hurt another by unavoidable accident or in self-defense was required to make good the damage inflicted. “In all civil acts,” it was said, in Lambert v. Bessey, T.Raym. 421, 83 Eng.Rep. 220 (K.B.1681), “the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering.”

Forms of action. In the early English law, after the Norman conquest, remedies for wrongs were dependent upon the issuance of writs to bring the defendant into court. In the course of the thirteenth century, the principle was established that no one could bring an action in the King’s common law courts without the King’s writ. As a result of the jealous insistence of the nobles and others upon their prerogatives of their local courts, the number of writs that the King could issue was limited, and their forms were strictly prescribed. There were, in other
words, "forms of action," and unless the plaintiff's claim could be fitted into the form of some established and recognized writ, the plaintiff could not seek money damages in the King's courts. The result was a highly formalized system of procedure that governed and controlled the law as to the substance of the wrongs that might be remedied. You may learn more about how the forms of action affected the law of procedure in your civil procedure classes.

Two common law writs are the genesis of tort law—the writ of trespass and the writ of trespass on the case, often called action on the case. Here, "trespass" is used in the general sense of doing something to hurt or offend someone rather than the more specific sense of harming someone by intruding onto their land.

The form of action in trespass originally had a criminal character. It would lie only in cases of forcible breaches of the King's peace, and it was only on this basis that the royal courts assumed jurisdiction over the wrong. The purpose of the remedy was at first primarily that of punishment of the crime; but to this there was added later the satisfaction of the injured party's claim for redress. If the defendant was found guilty, damages were awarded to the successful plaintiff, and the defendant was imprisoned, and allowed to purchase his release by payment of a fine. What similarity remains between tort and crime is to be traced to this common beginning. See Woodbine, The Origin of the Action of Trespass, 33 Yale L.J. 799 (1923), 34 Yale L.J. 343 (1934); F. Maitland, The Forms of Action at Common Law, 65 (1941).

The writ of trespass on the case developed out of the practice of applying, in cases in which no writ could be found in the Register to cover the plaintiff's claim, for a special writ, in the nature of trespass, drawn to fit the particular case. Historians have differed as to the origin of this practice. Attempts to trace it are found in C. Fifoot, History and Sources of the Common Law: Tort and Contract, 66–74 (1949), and Kiralfy, The Action on the Case, Chapter I (1951).

Whatever may have been its origin, it was through this action on the case, rather than through trespass, that most of modern tort and contract law developed. Thus, in the field of tort law, actions for nuisance, conversion, deceit, defamation, malicious prosecution, interference with economic relations, and the modern action for negligence all developed out of the action on the case.

The distinction between trespass and case lay in the direct and immediate application of force to the person or property of the plaintiff. Trespass would lie only for direct and forcible injuries; case, for other tangible injuries to person or property. The classic illustration of this distinction is that of a log thrown into the highway. A person struck by the rolling log could maintain trespass against the thrower, since the injury was direct and immediate; but one who came along later and was hurt by stumbling over the stationary log could maintain only an action on the case. Leame v. Bray, 3 East 593, 102 Eng.Rep. 724 (1802).

Note that the distinction was not one between intentional and negligent conduct. The emphasis was upon the causal sequence, rather than the character of the defendant's wrong. Trespass would lie for all forcible, direct injuries, whether or not they were intended, while the
action on the case might be maintained for injuries intended but not forcible or not direct. There were two additional significant points of difference between the two actions. Trespass, because of its quasi-criminal character, required no proof of any actual damage, since the invasion of the plaintiff's rights by the criminal conduct was regarded as a tort in itself; while in the action on the case, which developed purely as a civil remedy, there could ordinarily be no liability unless actual damage was proved. Also, in its earlier stages trespass was identified with the view that liability might be imposed without regard to the defendant's fault, while case always had required proof of culpability: either a wrongful intent or wrongful conduct (negligence).

The criminal aspect of trespass disappeared in 1607, when the statute of 5-6 William & Mary, c. 12, abolished the fine and left the action as an exclusively civil remedy. Out of adherence to precedent, however, the courts continued to allow the action even though no real injury was suffered. They were, however, disinclined to extend the scope of trespass beyond the existing precedents, perhaps because of the belief that punishment was primarily the function of the criminal law and the civil action should be used only to compensate for harm done. This explains why in modern law there is a requirement of proving actual damages except in cases of assault, offensive but harmless battery, false imprisonment, and trespass to land. If harm was done, the injured party could still sue in case and recover, even though the defendant's wrong did not amount to a trespass. If no harm was done, the recovery of punitive damages in a civil action was limited to the most flagrant cases, where the criminal law did not apply or was not effective as a deterrent.

**Hulle v. Orynge**

*(The Case of Thorns)*

King's Bench, 1466.

Y.B.M. 6 Edw. IV. folio 7, plautum 18.

**BRIAN.** In my opinion if a man does a thing he is bound to do it in such a manner that by his deed no injury or damage is inflicted upon others. As in the case where I erect a building, and when the timber is being lifted a piece of it falls upon the house of my neighbor and bruises his house, he will have a good action, and that, although the erection of my house was lawful and the timber fell without my intent.

Similarly, if a man commits an assault upon me and I cannot avoid him if he wants to beat me, and I lift my stick in self-defense in order to prevent him, and there is a man in back of me and I injure him in lifting my stick, in that case he would have an action against me, although my lifting the stick was lawful to defend myself and I injured him without intent.

**NOTES AND QUESTIONS**

1. This passage, translated from the Norman French, is one of the few bits and fragments of the early English law of torts that have come down to us. Although Brian, who became Chief Justice of the Court of
Common Pleas in 1471, was apparently only arguing as counsel in this case, he appears to have been summarizing accepted law.

**Weaver v. Ward**

*King's Bench, 1016.*


Weaver brought an action of trespass of assault and battery against Ward. The defendant pleaded, that he was amongst others by the commandment of the Lords of the Council a trained soldier in London, of the band of one Andrews captain; and so was the plaintiff, and that they were skirmishing with their muskets charged with powder for the exercise in re militari [in a military matter], against another captain and his band; and as they were so skirmishing the defendant casualiter & per infortunium & contra voluntatem suam [accidentally and by misfortune and against his will] in discharging his piece did hurt and wound the plaintiff, which is the same, & c. absque hoc [without this], that he was guilty aliter sive allo modo [otherwise or in another manner].

And upon demurrer by the plaintiff, judgment was given for him; for though it were agreed, that if men tilt or turney in the presence of the King, or if two masters of defence playing their prizes kill one another, that this shall be no felony; or if a lunatick kill a man, or the like, because felony must be done animo felonico [with a felonious mind]; yet in trespass, which tends only to give damages according to hurt or loss, it is not so; and therefore if a lunatick hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is in the nature of an excuse, and not of a justification, prout ei bene liceat [as is properly permitted to him]), except it may be judged utterly without his fault.

As if a man by force take my hand and strike you, or if here the defendant had said, that the plaintiff ran cross his piece when it was discharging, or had set forth the case with the circumstances, so as it had appeared to the Court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt.

**NOTES AND QUESTIONS**

1. This is the earliest known case in which it was clearly recognized that a defendant might not be liable, even in a trespass action, for a purely accidental injury occurring entirely without his fault. Note that the burden rests upon the defendant to plead and prove his freedom from all fault.

2. The next two centuries saw a gradual blurring of the distinction between trespass and case. The procedural distinction is now long antiquated, although some vestige of it still remains in jurisdictions retaining common law pleading in a modified form. Modern law has almost entirely abandoned the artificial classification of injuries as direct and indirect, and looks instead to the intent or negligence of the wrongdoer.

3. The first step was taken when the action on the case was held to cover injuries that were merely negligent but were directly inflicted, as in Williams v. Holland, 10 Bing. 112, 131 Eng. Rep. 848 (1833) (plaintiff's cart
was overturned by collision with wheel of defendant's gig, which was engaged in a race with another gig). Although this left the plaintiff an election between trespass and case, the action of case came to be used quite generally in all cases of negligence, whether direct or indirect, while trespass remained as the remedy for intentional injuries inflicted by acts of violence. Terms such as battery, assault, and false imprisonment, which were varieties of trespass, gradually came to be associated only with intent, and negligence emerged as a separate tort. The shift was a slow one, and the courts seem to have been quite unconscious of it at the time. When in the nineteenth century the old forms of action were replaced in most jurisdictions by code procedure, the new classification remained. Prichard, Trespass, Case and the Rule in Williams v. Holland, Cambridge L.J. 234 (1964). There was occasional confusion, and some talk, for example, of a negligent battery, as in Anderson v. Arnold's Ex'r, 79 Ky. 370 (1881), but, in general, these old trespass terms are now restricted to actions involving intentional conduct.

4. Although we no longer have "forms of action," it usually is helpful from the vantage point of advocacy to place one's claim under a tort label that will be familiar to the court—e.g., "battery," "assault," "negligence," "defamation," "nuisance"—and that is still the common practice in both state and federal courts.

5. With certain exceptions, actions for injuries to the person, or to tangible property, now require proof of an intent to inflict them or of failure to exercise proper care to avoid them. As to the necessity of proving actual damage, the courts have continued the distinctions found in the older actions of trespass and case. Thus, whether damage is essential to the existence of a cause of action for a particular tort depends largely upon its ancestry in terms of the old procedure.


Brown v. Kendall

Supreme Judicial Court of Massachusetts, 1850.
60 Mass. (6 Cush.) 292.

This was an action of trespass for assault and battery. [Two dogs, owned by plaintiff and defendant, were fighting. Defendant tried to separate them by hitting them with a stick. In doing so he backed up toward the plaintiff, and in raising his stick over his shoulder, struck plaintiff in the eye, injuring him.]

Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner, and what degree of care was exercised by each party on the occasion; were the subject of controversy between the parties, upon all the evidence in the case.

[The trial judge, refusing to give requested instructions to the contrary, instructed the jury that if hitting the dogs was a necessary act}
which defendant was under a duty to do, defendant was required to use only ordinary care in doing it; but if it were only a proper and permissible act, defendant was liable unless he exercised extraordinary care; and that the burden of proving the extraordinary care was on the defendant.] 

The jury under these instructions returned a verdict for the plaintiff; whereupon the defendant alleged exceptions.

SHAW, C.J. This is an action of trespass, vi et armis, brought by George Brown against George K. Kendall, for an assault and battery. *** The facts set forth in the bill of exceptions preclude the supposition, that the blow, inflicted by the hand of the defendant upon the person of the plaintiff, was intentional. The whole case proceeds on the assumption, that the damage sustained by the plaintiff, from the stick held by the defendant, was inadvertent and unintentional; and the case involves the question how far, and under what qualifications, the party by whose unconscious act the damage was done is responsible for it. We use the term "unintentional" rather than involuntary, because in some of the cases, it is stated, that the act of holding and using a weapon or instrument, the movement of which is the immediate cause of hurt to another, is a voluntary act, although its particular effect in hitting and hurting another is not within the purpose or intention of the party doing the act.

It appears to us, that some of the confusion in the cases on this subject has grown out of the long- vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass. This is very distinguishable from the question, whether in a given case, any action will lie. The result of these cases is, that if the damage complained of is the immediate effect of the act of the defendant, trespass vi et armis lies; if consequential only, and not immediate, case is the proper remedy. [Cc]

In these discussions, it is frequently stated by judges, that when one receives injury from the direct act of another, trespass will lie. But we think this is said in reference to the question, whether trespass and not case will lie, assuming that the facts are such, that some action will lie. These dicta are no authority, we think, for holding, that damage received by a direct act of force from another will be sufficient to maintain an action of trespass, whether the act was lawful or unlawful, and neither wilful, intentional, or careless. *** [Evidence showed that the striking of plaintiff was not intentional, but rather done as he was backing up and plaintiff, behind him, was moving forward.]

We think, as the result of all the authorities, the rule is correctly stated by Mr. Greenleaf, that the plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable. 2 Greenl. Ev. §§ 85 to 92; [c]. If, in the prosecution of a lawful act, a casualty purely accidental arises, no action can be supported for an injury arising therefrom. [Cc] In applying these rules to the present case, we can perceive no reason why the instructions asked for by the defendant ought not to have been given; to this effect, that if both
plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover.

In using this term, ordinary care, it may be proper to state, that what constitutes ordinary care will vary with the circumstances of cases. In general, it means that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger. A man, who should have occasion to discharge a gun, on an open and extensive marsh, or in a forest, would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. To make an accident, or casualty, or as the law sometimes states it, inevitable accident, it must be such an accident as the defendant could not have avoided by the use of the kind and degree of care necessary to the exigency, and in the circumstances in which he was placed.

We are not aware of any circumstances in this case, requiring a distinction between acts which it was lawful and proper to do, and acts of legal duty. There are cases, undoubtedly, in which officers are bound to act under process, for the legality of which they are not responsible, and perhaps some others in which this distinction would be important. We can have no doubt that the act of the defendant in attempting to part the fighting dogs, one of which was his own, and for the injurious acts of which he might be responsible, was a lawful and proper act, which he might do by proper and safe means. If, then, in doing this act, using due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he accidentally hit the plaintiff in his eye, and wounded him, this was the result of pure accident, or was involuntary and unavoidable, and therefore the action would not lie. **

The court instructed the jury, that if it was not a necessary act, and the defendant was not in duty bound to part the dogs, but might with propriety interfere or not as he chose, the defendant was responsible for the consequences of the blow, unless it appeared that he was in the exercise of extraordinary care, so that the accident was inevitable, using the word not in a strict but a popular sense. This is to be taken in connection with the charge afterwards given, that if the jury believed, that the act of interference in the fight was unnecessary, (that is, as before explained, not a duty incumbent on the defendant) then the burden of proving extraordinary care on the part of the defendant, or want of ordinary care on the part of the plaintiff, was on the defendant.

The court are of opinion that these directions were not conformable to law. If the act of hitting the plaintiff was unintentional, on the part of the defendant, and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case, and the burden of proof was on the plaintiff to establish it. [Cc]

Perhaps the learned judge, by the use of the term extraordinary care, in the above charge, explained as it is by the context, may have
intended nothing more than that increased degree of care and diligence, which the exigency of particular circumstances might require, and which men of ordinary care and prudence would use under like circumstances, to guard against danger. If such was the meaning of this part of the charge, then it does not differ from our views, as above explained. But we are of opinion, that the other part of the charge, that the burden of proof was on the defendant, was incorrect. Those facts which are essential to enable the plaintiff to recover, he takes the burden of proving. The evidence may be offered by the plaintiff or by the defendant; the question of due care, or want of care, may be essentially connected with the main facts, and arise from the same proof; but the effect of the rule, as to the burden of proof, is this, that when the proof is all in, and before the jury, from whatever side it comes, and whether directly proved, or inferred from circumstances, if it appears that the defendant was doing a lawful act, and unintentionally hit and hurt the plaintiff, then unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some fault, negligence, carelessness, or want of prudence, the plaintiff fails to sustain the burden of proof, and is not entitled to recover.

New trial ordered.

NOTES AND QUESTIONS

1. Why a new trial? Why not simply a judgment for the defendant?
2. What has gone on in the law since Hull v. Oryng in 1466? How would Justice Shaw have decided Weaver v. Ward?
3. This decision is the earliest clear statement of the rule commonly applied: liability must be based on legal fault.
4. While Brown v. Kendall dealt with a defendant who was separating dogs, many tort defendants in Massachusetts at the time were industrial employers. Does this fact, plus the social policy of the time, have a bearing on the legal change reflected in the opinion? See Schwartz, The Character of Early American Tort Law, 36 U.C.L.A. L. Rev. 641, 667-670 (1989).
5. In some jurisdictions, the old distinction between trespass and case survived into the Twentieth Century, in the form of decisions holding that if the injury is one for which trespass would lie, the defendant must sustain the burden of proving that he was not at fault, while if only case would lie the burden of proving fault is on the plaintiff. The distinction was not finally abandoned in England until Fowler v. Lanning, [1959] 1 Q.B. 428.

Cohen v. Petty

Court of Appeals of the District of Columbia, 1933.
62 App D.C. 157, 69 F.2d 890.

Groner, Associate Justice. Plaintiff's declaration [complaint] alleged that on December 14, 1930, she was riding as a guest in defendant's automobile; that defendant failed to exercise reasonable care in its operation, and drove it at a reckless and excessive rate of speed so that
he lost control of the car and propelled it off the road against an embankment on the side of the road, as the result of which plaintiff received permanent injuries. The trial judge gave binding instructions [directed a verdict], and the plaintiff appeals.

There were four eyewitnesses to the accident, namely, plaintiff and her sister on the one side, and defendant and his wife on the other. All four were occupants of the car. Defendant was driving the car, and his wife was sitting beside him. Plaintiff and her sister were in the rear seat. *** After passing the Country Club, and when somewhere near Four Corners and five or six miles from Silver Spring, the automobile suddenly swerved out of the road, hit the abutment of a culvert, and ran into the bank, throwing plaintiff and her sister through the roof of the car onto the ground.

Plaintiff's sister estimated the speed of the car just before the accident somewhere between thirty-five and forty miles an hour, and plaintiff herself, who had never driven a car, testified she thought it was nearer forty-five. The place of the accident was just beyond a long and gradual curve in the road. Plaintiff testified that just before the accident, perhaps a minute, she heard the defendant, who, as we have said, was driving the car, exclaim to his wife, “I feel sick,” and a moment later heard his wife exclaim in a frightened voice to her husband, “Oh, John, what is the matter?” Immediately thereafter the car left the road and the crash occurred. Her sister, who testified, could not remember anything that occurred on the ride except that, at the time they passed the Country Club, the car was being driven about thirty-five or forty miles an hour and that the occupants of the car were engaged in a general conversation. The road was of concrete and was wide. Plaintiff, when she heard defendant’s wife exclaim, “What is the matter?” instead of looking at the driver of the car, says she continued to look down the road, and as a result she did not see and does not know what subsequently occurred, except that there was a collision with the embankment.

Defendant’s evidence as to what occurred just before the car left the road is positive and wholly uncontradicted. His wife, who was sitting beside him, states that they were driving along the road at the moderate rate of speed when all of a sudden defendant said, “Oh, Tree, I feel sick”—defendant’s wife’s name is Theresa, and he calls her Tree. His wife looked over, and defendant had fainted. “His head had fallen back and his hand had left the wheel and I immediately took hold of the wheel with both hands, and then I do not remember anything else until I waked up on the road in a strange automobile.” The witness further testified that her husband’s eyes were closed when she looked, and that his fainting and the collision occurred in quick sequence to his previous statement, “Oh, Tree, I feel so sick.” The defendant himself testified that he had fainted just before the crash, that he had never fainted before, and that so far as he knew he was in good health, that on the day in question he had had breakfast late, and had had no luncheon, but that he was not feeling badly until the moment before the illness and the fainting occurred. ***
The sole question is whether, under the circumstances we have narrated, the trial court was justified in taking the case from the jury. We think its action was in all respects correct.

It is undoubtedly the law that one who is suddenly stricken by an illness, which he had no reason to anticipate, while driving an automobile, which renders it impossible for him to control the car, is not chargeable with negligence. [Cc]

In the present case the positive evidence is all to the effect that defendant did not know and had no reason to think he would be subject to an attack such as overcame him. Hence negligence cannot be predicated in this case upon defendant’s recklessness in driving an automobile when he knew or should have known of the possibility of an accident from such an event as occurred.

As the plaintiff wholly failed to show any actionable negligence prior to the time the car left the road, or causing or contributing to that occurrence, and as the defendant’s positive and uncontradicted evidence shows that the loss of control was due to defendant’s sudden illness, it follows the action of the lower court was right. Even if plaintiff’s own evidence tended more strongly than it does to imply some act of negligence, it would be insufficient to sustain a verdict and judgment upon proof such as the defendant offered here of undisputed facts, for in such a case the inference must yield to uncontradicted evidence of actual events.

Affirmed.

NOTES AND QUESTIONS

1. Defendant, asleep on the rear seat of an automobile, unconscious pushed with his foot against the front seat in which plaintiff, the driver, was sitting. Plaintiff’s arms were forced off the wheel, the car crashed into a culvert and overturned, and plaintiff was injured. Is defendant liable? Lober v. Pack, 337 Pa. 103, 9 A.2d 365 (1919) (defendant not liable because he did not act with volition). The Restatement (Third) of Torts note that the cases are “impressively unanimous” in finding no liability for injuries that occur due to an actor’s sudden and unforeseeable seizure or loss of consciousness. Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 11(b), comment d (2010) and Reporters’ Notes thereto.

2. Defendant, driving an automobile, fell asleep at the wheel. The car went into the ditch and injured the plaintiff. Is defendant liable for his conduct while he is asleep? What if he knew that he was getting sleepy and continued to drive? Is this not always the case? At least one court has found that falling asleep at the wheel of a car is always negligence unless the driver was suddenly overcome with illness. Bushnell v. Bushnell, 103 Conn. 583, 131 A. 432 (1925). Defendant became so frightened when she realized that her brakes were not working that she fainted and was thus unconscious when she collided with plaintiff’s car. Liability? Kohler v. Sheffert, 250 Iowa 899, 96 N.W.2d 911 (1959) (fact that she was unconscious at time of collision did not excuse previous negligence in causing the situation that frightened her).
3. Knowing that he was subject to epileptic seizures, driver had a seizure while driving and lost control of the car, which ran into the plaintiff and injured him. Is driver liable? Eleason v. Western Casualty & Surety Co., 254 Wis. 134, 35 N.W.2d 301 (1948) (liability based on testimony that driver knew he was subject to "spells" that could render him unconscious even though he did not know he had epilepsy). What if he had never had a seizure before? Moore v. Capital Transit Co., 226 F.2d 57 (D.C.Cir.1955), cert. denied, 350 U.S. 966 (1956) (no liability because never had spell before and no reason to anticipate).

4. A patient was given prescription drugs and discharged from the hospital, without being warned that they would impair his mental and physical abilities. The patient drove his automobile, lost control and struck a tree, injuring his passenger. Is the driver liable to his passenger? Is his doctor? Is the manufacturer of the drugs? Cf. Kirk v. Michael Reese Hospital and Medical Center, 117 Ill.2d 507, 111 Ill.Dec. 944, 513 N.E.2d 387 (1987) and McKenzie v. Hawaii Permanente Medical Group, Inc., 98 Haw. 293, 47 P.3d 1209 (2002).

5. Do you agree with the result of the principal case? What about the argument that anyone who drives an automobile should bear the risk that others will be injured if he loses consciousness while driving, and should be liable for their loss? In a case where an epileptic had an unanticipated seizure, plaintiff’s counsel argued most strongly that since defendant had liability insurance, he should bear the risk. Do you find this argument for strict liability persuasive? See Hammontree v. Jenner, 20 Cal.App.3d 528, 97 Cal.Rptr. 738 (1971). The court rejected this contention.

Spano v. Perini Corp.
Court of Appeals of New York, 1969.

FULD, CHIEF JUDGE. The principal question posed on this appeal is whether a person who has sustained property damage caused by blasting on nearby property can maintain an action for damages without a showing that the blaster was negligent. Since 1893, when this court decided the case of Booth v. Rome, W. & O. T.R.R. Co., 140 N.Y. 267, 35 N.E. 592, 24 L.R.A. 105, it has been the law of this State that proof of negligence was required unless the blast was accompanied by an actual physical invasion of the damaged property—for example, by rocks or other material being cast upon the premises. We are now asked to reconsider that rule.

The plaintiff Spano is the owner of a garage in Brooklyn which was wrecked by a blast occurring on November 27, 1962. There was then in that garage, for repairs, an automobile owned by the plaintiff Davis which he also claims was damaged by the blasting. Each of the plaintiffs brought suit against the two defendants who, as joint venturers, were engaged in constructing a tunnel in the vicinity pursuant to a contract with the City of New York. ** *

It is undisputed that, on the day in question (November 27, 1962), the defendants had set off a total of 194 sticks of dynamite at a construction site which was only 125 feet away from the damaged
premises. Although both plaintiffs [also] alleged negligence in their complaints, no attempt was made to show that the defendants had failed to exercise reasonable care or to take necessary precautions when they were blasting. Instead, they chose to rely, upon the trial, solely on the principle of absolute liability ***

The concept of absolute liability in blasting cases is hardly a novel one. The overwhelming majority of American jurisdictions have adopted such a rule. [Cf. Indeed, this court itself, several years ago, noted that a change in our law would "conform to the more widely (indeed almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass". [C]

We need not rely solely however upon out-of-state decisions in order to attain our result. Not only has the rationale of the Booth case [c] been overwhelmingly rejected elsewhere but it appears to be fundamentally inconsistent with earlier cases in our own court which had held, long before Booth was decided, that a party was absolutely liable for damages to neighboring property caused by explosions. (See, e.g., Hay v. Cohoes Co., 2 N.Y. 156; Heeg v. Licht, 80 N.Y. 579.) In the Hay case (2 N.Y. 159, supra), for example, the defendant was engaged in blasting an excavation for a canal and the force of the blast caused large quantities of earth and stones to be thrown against the plaintiff’s house, knocking down his stoop and part of his chimney. The court held the defendant absolutely liable for the damage caused ***

Although the court in Booth drew a distinction between a situation—such as was presented in the Hay case—where there was "a physical invasion" of, or trespass on, the plaintiff’s property and one in which the damage was caused by "setting the air in motion, or in some other unexplained way." [C], it is clear that the court, in the earlier cases, was not concerned with the particular manner by which the damage was caused but by the simple fact that any explosion in a built-up area was likely to cause damage. Thus, in Heeg v. Licht, 80 N.Y. 579, the court held that there should be absolute liability where the damage was caused by the accidental explosion of stored gunpowder, even in the absence of a physical trespass (p. 581):

"The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. *** The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character. *** In such a case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application."

Such reasoning should, we venture, have led to the conclusion that the intentional setting off of explosives—that is, blasting—in an area in which it was likely to cause harm to neighboring property similarly results in absolute liability. However, the court in the Booth case rejected such an extension of the rule for the reason that "Ito exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between
conflicting rights, but an extinguishment of the right of the one for the benefit of the other” [c]. The court expanded on this by stating, “This sacrifice, we think, the law does not exact. Public policy is sustained by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this.”

This rationale cannot withstand analysis. The plaintiff in Booth was not seeking, as the court implied, to “exclude the defendant from blasting” and thus prevent desirable improvements to the latter’s property. Rather, he was merely seeking compensation for the damage which was inflicted upon his own property as a result of that blasting. The question, in other words, was not whether it was lawful or proper to engage in blasting but who should bear the cost of any resulting damage—the person who engaged in the dangerous activity or the innocent neighbor injured thereby. Viewed in such a light, it clearly appears that Booth was wrongly decided and should be forthrightly overruled **

[The court then remanded the case to the appellate division to determine the sufficiency of the evidence on causation because the appellate division had affirmed the trial court judge on the sole ground that no negligence had been proven and thus had no occasion to consider whether the blasting caused the plaintiffs’ damage.]

NOTES AND QUESTIONS

1. The early common law absolute or strict liability of the Weaver v. Ward type has persisted stubbornly in connection with trespass to real property and has been exercising only in mid-Twentieth Century. Thus, in Randall v. Shelton, 293 S.W.2d 559 (Ky.1956), defendant’s truck ran over a large stone in the gravel highway and the tire cast it out so that it hit plaintiff, who was standing in her yard, and injured her. The appellate court found no negligence and held that the defendant’s motion for judgment notwithstanding the verdict should have been granted. To do this, it had to overrule an earlier Kentucky case in which a runaway street car invaded plaintiff’s property and did damage. The special rule for trespass explains some of the early New York cases discussed in the opinion of the principal case.

2. The procedural distinction long made in New York, between an action of trespass for blasting causing physical invasion by casting rocks on the plaintiff’s land, for which there was strict liability, and the action of nuisance for vibration or concussion that shook plaintiff’s house to pieces, which would require proof of negligence, was denounced as a marriage of procedural technicality with scientific ignorance. This distinction, abandoned by New York in the principal case, has lost its significance in states that apply strict liability to blasting operations because blasting is an abnormally dangerous activity. See, e.g., Stocks v. CFW Construction Co., Inc., 472 So.2d 1044 (Ala.1985). The question of strict liability for damage by blasting and other activities that have been deemed extrahazardous or abnormally dangerous is considered at greater length in Chapter 14.
3. For the present, it is sufficient to note that this case represents one type of situation in which strict liability may be applied, without any showing of intent or negligence, by the majority of the courts that have considered the question. This has sometimes been called absolute liability, or liability without fault. The first Restatement of Torts § 519 (1938) conferred the name of "ultrahazardous activities" upon these cases. The drafters of Restatement (Second) of Torts § 519 (1977) concluded that a better name is "abnormally dangerous activities," since the emphasis is more upon the abnormal character of what the defendant does in relation to the surroundings than upon the high degree of danger. That label was retained by the drafters of Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 20 (2010).

4. Strict liability also has been imposed upon manufacturers of products when defects in their wares have caused injury. This position is now generally followed when the defect causing the injury is due to an error in the manufacturing process. There is less agreement as to the application of strict liability for failure to use a safer design or to warn of dangers. This application of strict liability to products liability is discussed in Chapter 15.

5. Strict liability involves a good many issues that are to be considered later in Chapters 14 and 15. For present purposes, note merely that there are three possible bases of tort liability:
   A. Intentional conduct.
   B. Negligent conduct that creates an unreasonable risk of causing harm.
   C. Conduct that is neither intentional nor negligent but that subjects the actor to strict liability because of public policy.

6. These will be considered in turn, which will carry us through Chapter 15. The remainder of this book covers particular fields of case law in which special problems arise, and in most of which intent, negligence, and strict liability are all involved and intermingled as possible bases for recovery.
CHAPTER 2

INTENTIONAL INTERFERENCE WITH PERSON OR PROPERTY

1. INTENT

Garratt v. Dailey
Supreme Court of Washington, 1955.
46 Wash.2d 197, 279 P.2d 1091.

HILL, JUSTICE. 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 back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard 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 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 wilful 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 Garrett'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 $11,000. 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, state that when a minor has committed a tort with force he is liable to be proceeded against as any other person would be. ***

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. ***

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) of § 13, 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." [C]

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. [Cc]

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 Restatement, (First) Torts, 29, § 13:

"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
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. [C] 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.

[C] 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 $11,000 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.

[On remand, the trial judge concluded that it was necessary for him to consider carefully the time sequence, as he had not done before; and this resulted in his finding “that the arthritic woman had begun the slow process of being seated when the defendant quickly removed the chair and seated himself upon it, and that he knew, with substantial certainty, at that time that she would attempt to sit in the place where the chair had been.” He entered judgment for the plaintiff in the]
amount of $11,000, which was affirmed on a second appeal in Garratt v. Dailey, 49 Wash.2d 499, 304 P.2d 681 (1956).]

NOTES AND QUESTIONS

1. The trial court judge found that plaintiff suffered damages in the amount of $11,000. For most intentional torts, the court will award nominal damages even if no actual damages were proved. Of course, if the plaintiff does prove actual damages, as she did in this case, defendant is liable for those actual damages. How would Ms. Garratt’s lawyer prove actual damages? See Chapter 10, Damages.

2. Note that the trial judge was the finder of fact both times. Why do you think his findings of fact were different the second time? Might he have been influenced by the appellate court’s view of the facts as well as its pronouncement of the law?

3. Can a child five years and nine months old have an intent to do harm to another? And if so, how can that intent be “fault”? Suppose that a boy of seven, playing with a bow and arrow, aims at the feet of a girl of five but the arrow hits her in the eye. Is he liable? Weisbart v. Flohr, 260 Cal.App.2d 281, 67 Cal.Rptr. 114 (1968) (yes).


5. At common law, parents are not liable for the torts of their children unless the plaintiff can show some fault on the part of the parents through, for example, negligence in supervising the child. (We will explore Negligence in Chapter 4.) Some states enacted statutes that make parents liable for their child’s malicious torts. Can a young child commit a tort in a “malicious” state of mind? Ortega v. Montoya, 97 N.M. 159, 637 P.2d 841 (1981) (eight-year-old boy could be capable of willful and malicious conduct and it was for jury to determine whether he had acted in such a manner).

Wagner v. State
Supreme Court of Utah, 2005.
2005 UT 54, 122 P.3d 599.

[Mrs. Wagner was standing in line at a K-Mart store when she was suddenly attacked from behind by Mr. Giese who grabbed her by the head and hair and threw her to the ground. Mr. Giese was a mentally disabled patient accompanied by state employees who had brought him to K-Mart as part of his treatment program and remained there to supervise him. Mrs. Wagner and her husband filed claims against the State. The trial court granted a 12(b)(6) motion to dismiss based on the State’s argument that the attack constituted a battery, a tort for which the State has retained immunity from suit. The appellate court affirmed that ruling and the Wagners then petitioned the Utah Supreme Court for review. It too affirmed.]
WILKINS, ASSOCIATE CHIEF JUSTICE: *** The Wagners argue that Mr. Giese’s attack could not legally constitute a battery because that intentional tort requires the actor to intend harm or offense through his deliberate contact, an intent Mr. Giese was mentally incompetent to form. The State, on the other hand, argues that the only intent required *** is simply the intent to make a contact. The contact must be harmful or offensive by law, but the actor need not intend harm so long as he intended contact.

*** While there is some variation among the definitions of the tort of battery, Prosser and Keeton on the Law of Torts § 8, at 33–34 (W. Page Keeton et al. eds., 5th ed.1984) (hereinafter Prosser), Utah has adopted the Second Restatement of Torts to define the elements of this intentional tort, including the element of intent. ***

We conclude that the plain language of the Restatement, the comments to the Restatement, Prosser and Keeton’s exhaustive explanation of the meaning of intent as described in the Restatement, and the majority of case law on the subject in all jurisdictions including Utah, compels us to agree with the State that only intent to make contact is necessary.

In order for a contact to constitute a battery at civil law, two elements must be satisfied. First, the contact must have been deliberate. Second, the contact must have been harmful or offensive at law. We hold that the actor need not intend that his contact be harmful or offensive in order to commit a battery so long as he deliberately made the contact and so long as that contact satisfies our legal test for what is harmful or offensive.

Section 2 of the Restatement (Second) of Torts defines the term “act” as “an external manifestation of the actor’s will and does not include any of its results, even the most direct, immediate, and intended.” Id. § 2. To illustrate this point, the comments clarify that when an actor points a pistol at another person and pulls the trigger, the act is the pulling of the trigger. Id. at cmt. c. The consequence of that act is the “impingement of the bullet upon the other’s person.” Id. It would be improper to describe the act as “the shooting,” since the shooting is actually the conflation of the act with the consequence. For another example, the act that has taken place when one intentionally strikes another with his fist “is only the movement of the actor’s hand and not the contact with the others body immediately established.” Id. Thus, presuming that the movement was voluntary rather than spastic, whether an actor has committed an intentional or negligent contact with another, and thus a tort sounding in battery or negligence, depends not upon whether he intended to move his hand, but upon whether he intended to make contact thereby.

The example the Restatement sets forth to illustrate this point is that of an actor firing a gun into the Mojave Desert. Restatement (Second of Torts) § 8A cmt. a. In both accidental and intentional shootings, the actor intended to pull the trigger. Id. Battery liability, rather than liability sounding in negligence, will attach only when the actor pulled the trigger in order to shoot another person, or knowing that it was substantially likely that pulling the trigger would lead to that result. Id. § 8A cmts. a & b. An actor who intentionally fires a
bullet, but who does not realize that the bullet would make contact with another person, as when "the bullet hits a person who is present in the desert without the actor's knowledge," is not liable for an intentional tort. Id.

*** We agree with the Wagners that not all intentional contacts are actionable as batteries, and that the contact must be harmful or offensive in order to be actionable. We do not agree, however, that, under our civil law, the actor must appreciate that his act is harmful or offensive in order for his contact to constitute a battery. ***

Prosser echoed the Restatement when he clarified that "[t]he intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do harm. Rather, it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." Prosser, supra, § 8, at 36. *** [Prosser] lists as one type of intentional tort the act of "intentionally invading the rights of another under a mistaken belief of committing no wrong." Id. § 8, at 37.

*** For example, a man who decides to flatter a woman he spots in a crowd with an unprompted-for kiss, one of the examples of battery Prosser provides, Prosser, supra, § 9, at 41–42, would find no objection under the Wagners' proposed rule so long as his intentional contact was initiated with no intent to injure or offend. He would be held civilly liable for his conduct only if he intended to harm or offend her through his kiss. A woman in such circumstances would not enjoy the presumption of the law in favor of preserving her bodily integrity; instead, her right to be free from physical contact with strangers would depend upon whether she could prove that the stranger hoped to harm or offend her through his contact. So long as he could show that he meant only flattery and the communication of positive feelings towards her in stroking her, kissing her, or hugging her, she must be subjected to it and will find no protection for her bodily integrity in our civil law.

*** We recognize that, in this instance, the retained immunity doctrine bars the caretakers of a handicapped person from taking responsibility for the conduct of their charge. It is unfortunate, and perhaps it is improvident of the State to retain immunity in this area. But it is not our role as a judiciary to override the legislature in this matter; it is for us only to interpret and apply the law as it is. We will not limit the recoveries of all other plaintiffs similarly injured by defining the tort of battery in such a way as to make it far more burdensome for plaintiffs to satisfy its elements and recover, nor will we distort the plain language of the Restatement so as to elevate an actor's "right" to deliberately touch others at will over an individual's right to the preservation of her bodily integrity.

*** Applying the rule we have laid out today to the facts of this case, it is clear that Mr. Giese's attack constituted a battery upon Mrs. Wagner. There is no allegation that his action was the result of an involuntary muscular movement or spasm. Further, the Wagners concede that Mr. Giese affirmatively attacked her; they do not argue that he made muscular movements that inadvertently or accidentally brought him into contact with her.
*** So long as he intended to make that contact, and so long as that contact was one to which Mrs. Wagner had not given her consent, either expressly or by implication, he committed a battery. Because battery is a tort for which the State has retained immunity, we affirm the court of appeals' decision to dismiss the case for failure to state a claim.

[Concurring opinion omitted.]

NOTES AND QUESTIONS

1. *Distinguish:*
   A. The intent to do an act. The defendant throws a rock.
   B. The intent to bring about the consequences of the act. The rock hits someone. Liability for intentional torts is premised on the intent to bring about the consequences. For battery, the consequence is a touching. The touching must be harmful or offensive.
   C. The intent to bring about a specific harm (e.g., broken leg). This is sufficient to establish intent, but not necessary.
   D. An actor's knowledge that particular consequences (e.g., touching that is harmful or offensive) are substantially certain to follow is sufficient to establish intent.
   E. An actor's knowledge that she is merely risking particular consequences (e.g., touching that is harmful or offensive) is not sufficient to establish intent—although it may be negligence if the risk is an unreasonable one under the circumstances.
   F. The motive for the act. Defendant's motive is irrelevant. Hudgens v. Prosper, Inc., 2011 WL 8181959 (Utah Dist. Ct. 2011) (allegations of intent sufficient even if motive was to provide incentive to team members and increase profits rather than to injure plaintiff).

2. *Distinguish:*
   A. The defendant does not act. He is carried onto plaintiff's land against his will. Smith v. Stone, Style 65, 82 Eng.Rep. 538 (1647) (no liability).
   B. He acts intentionally, but under fear or threats. Twelve armed men compel him to enter plaintiff's land and steal a horse. Gilbert v. Stone, Style 72, 82 Eng.Rep. 539 (1648) (intent, but may have excuse if acted under duress).
   C. He acts intentionally, but without any desire to affect the plaintiff, or any certainty that he will do so. He rides a horse, which runs away with him and runs the plaintiff down. Gibbons v. Pepper, 1 Ld.Raym. 38, 91 Eng.Rep. 922 (1695) (no liability if someone else struck the horse; liability if defendant's spurring caused runaway).
   D. He acts with the desire to affect the plaintiff, but for an entirely permissible or laudable purpose. He shoots the plaintiff in self-defense or while a soldier defending his country. See Chapter 3, Privileges (satisfies intent requirement but may result in no liability if conduct is privileged).
   3. It may not seem important to distinguish between negligent and intentionally wrongful conduct: the defendant usually will be held liable to
the plaintiff in either situation. Nevertheless, the distinction may be legally significant. In addition to the principal case, consider the following:

A. Will defendant be liable for punitive damages? See Chapter 10, Section 3.

B. Will the defense of contributory negligence be available to defendant? See page 623, note 7.

C. Will defendant’s employer be liable under the doctrine of respondeat superior? See page 711, note 3.

D. How far will the law trace the consequences of defendant’s wrongful act? See Tate v. Canonica, 180 Cal.App.2d 898, 5 Cal.Rptr. 28 (1960) (more inclined to find defendant’s conduct was legal cause of harm if tort was intentional) and R.D. v. W.H., 875 P.2d 26 (Wyo.1994) (court imposes higher degree of responsibility on those who commit intentional act).

E. Will the defendant be reimbursed through a liability insurance policy? See Allstate Ins. Co. v. Hiseley, 465 F.2d 1243 (10th Cir.1972) (applying Oklahoma law) (following an incident outside a bar, one car pursued another at speeds over 100 miles an hour and then bunched it, causing its driver to lose control and crash) and Automobile Ins. Co. of Hartford v. Cook, 7 N.Y.3d 131, 850 N.E.2d 1152, 818 N.Y.S.2d 176 (2006) (insured shot an acquaintance in self-defense inside insured’s home). Pryor, The Stories We Tell: Intentional Harm and the Quest for Insurance Funding, 75 Tex.L.Rev. 1721 (1997).

F. Has the state statute of limitations run? Buska v. Scherzer, 283 Kan. 750, 156 P.3d 617 (2007) (statute of limitations for intentional tort applies to cause of action brought against two teenagers who hit the mother of one of their friends when the mother stopped between them to stop a fight).


H. Will the plaintiff be able to bring a cause of action against the United States, which may be liable for the negligent acts of its employees, but not for their intentional acts? See note 615, page 696.

4. Do you think that a court’s characterization of a defendant’s conduct as “negligent” or “intentional” sometimes might be influenced by the legal effect of its finding? Since the court is not bound by either party’s characterization of the events, such influence could occur, but only in close cases. At the receiving dock of a meatpacking plant, plaintiff was unloading a truck when a government meat inspector leapt out at him, screamed
“boo,” pulled his wool stocking cap over his eyes, and jumped on his back. Plaintiff fell forward and struck his face on some meat hooks, severely injuring his mouth and teeth. Plaintiff’s complaint was for negligent conduct, apparently because the defendant’s employer, the United States, would be liable for its employee’s negligence, but not his battery. Cf. Lambertson v. United States, 528 F.2d 441 (2d Cir. 1976), cert. denied, 426 U.S. 921 (1976) (court did not permit plaintiff to recover by “dressing up the substance” of battery in the “garments” of negligence). See also Wright v. University of Utah, 876 P.2d 380, 386 (Utah App. 1994) (describing plaintiff’s attempt to circumvent the governmental immunity statute by recasting her claim as one sounding in negligence rather than battery as “fruitless, albeit creative”).


Ranson v. Kitner
Appellate Court of Illinois, 1889.
31 Ill.App. 241.

CONGER, J. This was an action brought by appellee against appellants to recover the value of a dog killed by appellants, and a judgment rendered for $50.

The defense was that appellants were hunting for wolves, that appellee’s dog had a striking resemblance to a wolf, that they in good faith believed it to be one, and killed it as such.

Many points are made, and a lengthy argument failed to show that error in the trial below was committed, but we are inclined to think that no material error occurred to the prejudice of appellants.

The jury held them liable for the value of the dog, and we do not see how they could have done otherwise under the evidence. Appellants are clearly liable for the damages caused by their mistake, notwithstanding they were acting in good faith.

We see no reason for interfering with the conclusion reached by the jury, and the judgment will be affirmed.

NOTES AND QUESTIONS

1. Did the defendant intend to kill the dog? The court calls it “mistake.” Why not accident?

2. Defendant fuel oil distributor had a contract to deliver oil to a residence. One day, during the delivery, the oil overflowed and damaged surrounding lawn and shrubbery. The tank overflowed because it already had been filled by another company, hired by the new owner. The previous owner apparently had not canceled his contract when he moved. Is the fuel oil distributor liable for trespass? Serota v. M. & M. Utilities, Inc., 55 Misc.2d 286, 285 N.Y.S.2d 121 (1967) (reasonable mistake no defense to trespass).
3. Defendant, seeking to confront the driver who frightened his horses the previous day, pushed back the hat of the wrong man. Does he intend to touch him? Seigel v. Long, 169 Ala. 79, 53 So. 753 (1910). What if a surgeon operates on the wrong patient? Gill v. Selling, 125 Or. 587, 267 P. 812 (1928). Defendant cuts and removes timber from plaintiff's land under a reasonable belief that it was on his own land. Did he intend to take plaintiff's timber? Perry v. Jeffries, 61 S.C. 292, 39 S.E. 515 (1901). After purchasing some sheep, defendant butcher was driving them down the road into town when some of plaintiff's sheep became intermingled with them. Defendant stopped and sorted most of plaintiff's sheep out of the herd, but plaintiff proved that four of his were taken into town and butchered with those defendant's. Were defendant's actions intentional? Dexter v. Cole, 6 Wis. 319, 70 Am. Dec. 465 (1857). Generally, mistake as to the identity of the person or animal does not negate intent and thus defendant is liable.

4. On the other hand, some of the defendant's privileges depend, not upon the existence of a fact, but upon the reasonable belief that the fact exists. Defendant, seeing the plaintiff reach for a handkerchief in his pocket, reasonably believes that he is reaching for a gun, and strikes plaintiff to defend himself. See page 110. Mistakes as to the existence of a privilege, like self-defense, are dealt with in Chapter 3 in connection with the privilege itself.

McGuire v. Almy

Supreme Judicial Court of Massachusetts, 1837.
297 Mass. 233, 8 N.E.2d 760.

Qua Justice. This is an action of tort for assault and battery. The only question of law reported is whether the judge should have directed a verdict for the defendant.

The following facts are established by the plaintiff's own evidence: In August, 1930, the plaintiff was employed to take care of the defendant. The plaintiff was a registered nurse and was a graduate of a training school for nurses. The defendant was an insane person. Before the plaintiff was hired she learned that the defendant was a "mental case and was in good physical condition," and that for some time two nurses had been taking care of her. The plaintiff was on "24 hour duty." The plaintiff slept in the room next to the defendant's room. Except when the plaintiff was with the defendant, the plaintiff kept the defendant locked in the defendant's room. **

On April 19, 1932, the defendant, while locked in her room, had a violent attack. The plaintiff heard a crashing of furniture and then knew that the defendant was ugly, violent and dangerous. The defendant told the plaintiff and a Miss Maroney, "the maid," who was with the plaintiff in the adjoining room, that if they came into the defendant's room, she would kill them. The plaintiff and Miss Maroney looked into the defendant's room, "saw what the defendant had done," and "thought it best to take the broken stuff away before she did any harm to herself with it." They sent for a Mr. Emerton, the defendant's brother-in-law. When he arrived the defendant was in the middle of her room about ten feet from the door, holding upraised the leg of a low-boy as if she were going to strike. The plaintiff stepped into the room and
walked toward the defendant, while Mr. Emerton and Miss Maroney remained in the doorway. As the plaintiff approached the defendant and tried to take hold of the defendant's hand which held the leg, the defendant struck the plaintiff's head with it, causing the injuries for which the action was brought.

The extent to which an insane person is liable for torts has not been fully defined in this Commonwealth. * * *

Turning to authorities elsewhere, we find that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent, nor do the courts discuss the effect of different kinds of insanity or of varying degrees of capacity as bearing upon the ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it, although it is sometimes said that an insane person is not liable for torts requiring malice of which he is incapable. Defamation and malicious prosecution are the torts more commonly mentioned in this connection. * * * These decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged. Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal mediaeval conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault. Notwithstanding these criticisms, we think, that as a practical matter, there is strong force in the reasons underlying these decisions. They are consistent with the general statements found in the cases dealing with the liability of infants for torts, [Cc] including a few cases in which the child was so young as to render his capacity for fault comparable to that of many insane persons, [Cc]. Fault is by no means at the present day a universal prerequisite to liability, and the theory that it should be such has been obliged very recently to yield at several points to what have been thought to be paramount considerations of public good. Finally, it would be difficult not to recognize the persuasive weight of so much authority so widely extended.
But the present occasion does not require us either to accept or to reject the prevailing doctrine in its entirety. For this case it is enough to say that where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it. ***

Coming now to the application of the rule to the facts of this case, it is apparent that the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent. See American Law Institute Restatement, Torts, §§ 13, 14. We think this was enough. ***

The rest of the opinion holds that whether the plaintiff consented to the attack or assumed the risk of it is an issue to be left to the jury. There was no evidence that the defendant had previously attacked anyone or made any serious threat to do so. The plaintiff had taken care of the defendant for fourteen months without being attacked. When the plaintiff entered the room the defendant was breaking up the furniture, and it could be found that the plaintiff reasonably feared that the defendant would do harm to herself. Under such circumstances it cannot be ruled as a matter of law that the plaintiff assumed the risk.

Judgment for the plaintiff on the verdict.

NOTES AND QUESTIONS

1. Can someone who is mentally ill have an intent to do harm to another? And if so, how can such an intent be "fault"? How does the insane person differ from the automobile driver who loses consciousness due to a heart attack or stroke or other illness, as in Cohen v. Petty, page 97?

2. Note that the tort law standards differ from the criminal law standards for holding the mentally ill responsible for their actions. Palmaire v. Russ, 206 Conn. 223, 537 A.2d 468 (1988) (defendant liable for battery of plaintiff's decedent even though he was found not guilty by reason of insanity in criminal case arising out of same incident); Delahanty v. Hinckley, 799 F. Supp. 184 (D.D.C. 1992) (rejecting defendant's argument that he should not be liable to plaintiff police officer who was injured when defendant shot at President Reagan because he was in a "deluded and psychotic state of mind" and found not guilty by reason of insanity in criminal case).

3. Despite criticism, the American decisions are unanimous in their agreement with the principal case. Mentally disabled persons may be held responsible for their intentional torts as long as plaintiff can prove that they formed the requisite intent. Restatement (Second) § 895d (1979). See also White v. Muritz, 988 P.2d 814 (Colo. 2000) (in battery claim against
defendant with Alzheimer’s, plaintiff must prove defendant desired to cause contact that was offensive or harmful).

4. Mental illness may prevent the specific kind of intent necessary for certain torts, such as deceit, that require the plaintiff to prove that the defendant knew that he was not speaking the truth. See Irvine v. Gibson, 117 Ky. 306, 77 S.W. 1106 (1904) (slander requires proof that defendant knew the statement was false) and Chaddock v. Chaddock, 130 Misc. 900, 226 N.Y.S. 152 (1927) (fraud requires proof that defendant knew the statement was false).

5. An action also may lie against persons responsible for caring for the mentally ill person, based on negligent supervision, but only if a caretaking responsibility has been assumed. Familial relationship only is not enough. Rausch v. McVeigh, 105 Misc.2d 163, 431 N.Y.S.2d 887 (1980) (cause of action for negligent supervision against parents of 22-year-old autistic son who attacked his therapist); Shirdon v. Houston, 2006 WL 2522394 (Ohio App.) (no duty to supervise adult son even though father knew his son could be aggressive and combative); and Kaminski v. Town of Fairfield, 216 Conn. 29, 578 A.2d 1048 (1990) (accord).

6. Several jurisdictions have carved out a narrow exception to this general rule, holding that an institutionalized mentally disabled patient who cannot control or appreciate the consequences of his conduct cannot be held liable for injuries caused to those employed to care for the patient. The jurisdictions that have addressed this issue have done so both in the context of intentional torts and negligence. Gould v. American Family Mutual Ins. Co., 198 Wis.2d 450, 543 N.W.2d 282 (1996) (negligence action brought against patient with Alzheimer’s); Creasy v. Rusk, 730 N.E.2d 659 (Ind. 2000) (same); Anicet v. Gant, 580 So.2d 273 (Fla.App.1991) (assault and battery against twenty-three-year-old man suffering from “irremediable mental difficulties” who was unable to control himself from acts of violence). California recently extended this exception to in-home care givers. Gregory v. Cott, 59 Cal.4th 996, 331 P.3d 179, 176 Cal.Rptr.3d 1 (2014) (in-home care giver hired through agency injured while caring for Alzheimer’s patient). There, the ruling was based on primary implied assumption of the risk, which will be discussed in Chapter 12.

7. Intoxication. What if the defendant is intoxicated? Does intoxication preclude a showing of intent? Bar patron passed out or fell asleep at bar and other patrons agreed to drive him home. Bar employee helped patron from bar and was putting him into the back seat of a car when he began shouting obscenities and kicked the employee in the face, seriously injuring him. Sufficient intent for battery? Janelsin v. Button, 102 Md.App. 30, 648 A.2d 1039 (1994) (voluntary intoxication does not vitiate intent).

Talmage v. Smith
Supreme Court of Michigan, 1894.

MONTGOMERY, J. The plaintiff recovered in an action of trespass. The case made by plaintiff’s proofs was substantially as follows: *** Defendant had on his premises certain sheds. He came up to the vicinity of the sheds, and saw six or eight boys on the roof of one of
them. He claims that he ordered the boys to get down, and they at once did so. He then passed around to where he had a view of the roof of another shed, and saw two boys on the roof. The defendant claims that he did not see the plaintiff, and the proof is not very clear that he did, although there was some testimony from which it might have been found that he was within his view. Defendant ordered the boys in sight to get down, and there was testimony tending to show that the two boys in defendant’s view started to get down at once. Before they succeeded in doing so, however, defendant took a stick, which is described as being two inches in width, and of about the same thickness, and about 16 inches long, and threw it in the direction of the boys; and there was testimony tending to show that it was thrown at one of the boys in view of the defendant. The stick missed him, and hit the plaintiff just above the eye with such force as to inflict an injury which resulted in the total loss of the sight of the eye. ** George Talmage, the plaintiff's father, testifies that defendant said to him that he threw the stick, intending it for Byron Smith,—one of the boys on the roof,—and this is fully supported by the circumstances of the case. **

The circuit judge charged the jury as follows: “If you conclude that Smith did not know the Talmage boy was on the shed, and that he did not intend to hit Smith, or the young man that was with him, but simply, by throwing the stick, intended to frighten Smith, or the other young man that was there, and the club hit Talmage, and injured him, as claimed, then the plaintiff could not recover. If you conclude that Smith threw the stick or club at Smith, or the young man that was with Smith,—intended to hit one or the other of them,—and you also conclude that the throwing of the stick or club was, under the circumstances, reasonable, and not excessive, force to use towards Smith and the other young man, then there would be no recovery by this plaintiff. But if you conclude from the evidence in this case that he threw the stick, intending to hit Smith, or the young man with him,—to hit one of them,—and that that force was unreasonable, force, under all the circumstances, then [the defendant] would be doing an unlawful act, if the force was unreasonable, because he had no right to use it. He would be liable then for the injury done to this boy with the stick.” **

“We think the charge is a very fair statement of the law of the case.

** The right of the plaintiff to recover was made to depend upon an intention on the part of the defendant to hit somebody; and to inflict an unwarranted injury upon some one. Under these circumstances, the fact that the injury resulted to another than was intended does not relieve the defendant from responsibility. **

The judgment will be affirmed, with costs.

NOTES AND QUESTIONS

1. This doctrine of “transferred intent” was derived originally from the criminal law and dates back to the time when tort damages were awarded as a side issue in criminal prosecutions. It is familiar enough in the criminal law, and has been applied in many tort cases where the defendant has shot at A, struck at him, or thrown a punch or rock at him, and unintentionally hit B instead. See, for example, Lopez v. Surchia, 112
2. The doctrine is discussed in Prosser, Transferred Intent, 45 Tex.L.Rev. 650 (1967). The conclusion there is that it applies whenever both the tort intended and the resulting harm fall within the scope of the old action of trespass—that is, where both involve direct and immediate application of force to the person or to tangible property. There are five torts that fell within the trespass writ: battery, assault, false imprisonment, trespass to land, and trespass to chattels. When the defendant intends any one of the five, and accomplishes any one of the five, the doctrine applies and the defendant is liable, even if the plaintiff was not the intended target. Restatement (Third) of Torts § 33, comment c, (2010) suggests courts likely would apply transferred intent to Conversion actions as well.

3. Thus defendant is liable when he shoots to frighten A (assault) and the bullet unforeseeably hits a stranger (battery). Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961) (facts similar to principal case—defendant fired warning shot to scare intruders away from his watermelon patch and hit plaintiff whom he did not know was there) and Hall v. McBryde, 919 P.2d 910 (Colo.App.1996) (firing at passing car and hitting neighbor). Or when he shoots at a dog (trespass to chattels) and hits a boy scout (battery). Corn v. Sheppard, 179 Minn. 490, 229 N.W. 869 (1930). What if defendant, believing a house to be empty, intends arson (trespass to chattels) and accomplishes battery (sleeping man killed by smoke inhalation)? Cf. Lewis v. Allstate Ins. Co., 730 So.2d 65 (Miss. 1998).

4. On the other hand, when either the tort intended or the one accomplished does not fall within the trespass action, the doctrine does not apply. Clark v. Gay, 112 Ga. 777, 38 S.E. 81 (1901) (defendant committed murder in plaintiff’s house and plaintiff sought value of house because his family refused to live there after the murder); McGee v. Vanover, 148 Ky. 737, 147 S.W. 742 (1912) (defendant inflicted beating on A, causing mental distress to plaintiff bystander).

2. Battery

**Cole v. Turner**

Nisi Prius, 1704.


At Nisi Prius, upon evidence in trespass for assault and battery, Holt, C.J., declared:

1. That the least touching of another in anger is a battery.

2. If two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently it will be no battery.
3. If any of them use violence against the other, to force his way in a rude inordinate manner, it is a battery; or any struggle about the passage, to that degree as may do hurt, is a battery.

NOTES AND QUESTIONS


2. What about tapping plaintiff on the shoulder to attract his attention? “Pardon me, sir, could you direct me, etc.”? Coward v. Baddeley, 4 H. & N. 478, 157 Eng.Rep. 927 (1859). Tapping someone on the shoulder to get their attention is a common example of touching that is not offensive.

Wallace v. Rosen

Court of Appeals of Indiana, 2002.
765 N.E.2d 192.

KIRSCH, J. Mable Wallace appeals the jury verdict in favor of Indianapolis Public Schools (IPS) and Harriet Rosen, a teacher for IPS. On appeal, Wallace raises the following issues:

I. Whether the trial court erred in refusing to give her tendered jury instruction regarding battery. * * *

We affirm.

FACTS AND PROCEDURAL HISTORY

[Rosen was a teacher at Northwest High School in Indianapolis. On April 22, 1994, the high school had a fire drill while classes were in session. The drill was not previously announced to the teachers and occurred just one week after a fire was extinguished in a bathroom near Rosen's classroom. On the day the alarm sounded, Wallace, who was recovering from foot surgery, was at the high school delivering homework to her daughter Lalaya. Wallace saw Lalaya just as Wallace neared the top of a staircase and stopped to speak to her. Two of Lalaya's friends also stopped to talk. Just then, the alarm sounded and students began filing down the stairs while Wallace took a step or two up the stairs to the second floor landing. As Rosen escorted her class to the designated stairway she noticed three or four people talking together at the top of the stairway and blocking the students' exit. Rosen did not recognize any of the individuals but approached "telling everybody to move it." Wallace, with her back to Rosen, was unable to hear Rosen over the noise of the alarm and Rosen had to touch her on the back to get her attention. Rosen then told Wallace, "you've got to get moving because this is a fire drill." At trial, Wallace testified that Rosen...
pushed her and she slipped and fell down the stairs. Rosen denied pushing Wallace, but admitted touching her back. At the close of the trial, the trial court judge refused to give the jury an instruction concerning civil battery that was requested by plaintiff. The jury found in favor of IPS and Rosen on the negligence count, and Wallace appealed.

DISCUSSION AND DECISION

***

I. Battery Instruction

Wallace first argues that it was error for the trial court to refuse to give the jury the following tendered instruction pertaining to battery:

A battery is the knowing or intentional touching of one person by another in a rude, insolent, or angry manner.

Any touching, however slight, may constitute an assault and battery.

Also, a battery may be recklessly committed where one acts in reckless disregard of the consequences, and the fact the person does not intend that the act shall result in an injury is immaterial. ***

The Indiana Pattern Jury Instruction for the intentional tort of civil battery is as follows: "A battery is the knowing or intentional touching of a person against [his] [her] will in a rude, insolent, or angry manner." 2 Indiana Pattern Jury Instructions (Civil) 31.03 (2d ed. Revised 2001). Battery is an intentional tort. [C] In discussing intent, Professors Prosser and Keeton made the following comments:

In a loose and general sense, the meaning of "intent" is easy to grasp. As Holmes observed, even a dog knows the difference between being tripped over and being kicked. This is also the key distinction between two major divisions of legal liability—negligence and intentional torts.

It is correct to tell the jury that, relying on circumstantial evidence, they may infer that the actor's state of mind was the same as a reasonable person's state of mind would have been. Thus, . . . the defendant on a bicycle who rides down a person in full view on a sidewalk where there is ample room to pass may learn that the factfinder (judge or jury) is unwilling to credit the statement, "I didn't mean to do it."

On the other hand, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. In such cases the distinction between

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2 The Indiana Pattern Jury Instructions are prepared under the auspices of the Indiana Judges Association and the Indiana Judicial Conference Criminal and Civil Instruction Committees. Although not formally approved for use, they are tacitly recognized by Indiana Trial Rule 61(B). [C]
intent and negligence obviously is a matter of degree. The line has to be drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff’s own good. W. PAGE KEETON et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 8, at 33, 36–37 (5th ed. 1984) (footnotes omitted).

[Witnesses] testified that Rosen touched Wallace on the back causing her to fall down the stairs and injure herself. For battery to be an appropriate instruction, the evidence had to support an inference not only that Rosen intentionally touched Wallace, but that she did so in a rude, insolent, or angry manner, i.e., that she intended to invade Wallace’s interests in a way that the law forbids.

Professors Prosser and Keeton also made the following observations about the intentional tort of battery and the character of the defendant’s action: “In a crowded world, a certain amount of personal contact is inevitable and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage . . . .”

The time and place, and the circumstances under which the act is done, will necessarily affect its unpermitted character, and so will the relations between the parties. A stranger is not to be expected to tolerate liberties which would be allowed by an intimate friend. But unless the defendant has special reason to believe that more or less will be permitted by the individual plaintiff, the test is what would be offensive to an ordinary person not unduly sensitive as to personal dignity. KEETON et al., § 9, at 42 (emphasis added).

[The court quoted from the trial transcript concerning the nature of the touching.]

Viewed most favorably to the trial court’s decision refusing the tendered instruction, the foregoing evidence indicates that Rosen placed her fingertips on Wallace’s shoulder and turned her 90 degrees toward the exit in the midst of a fire drill. The conditions on the stairway of Northwest High School during the fire drill were an example of Professors Prosser and Keeton’s “crowded world.” Individuals standing in the middle of a stairway during the fire drill could expect that a certain amount of personal contact would be inevitable. Rosen had a responsibility to her students to keep them moving in an orderly fashion down the stairs and out the door. Under these circumstances, Rosen’s touching of Wallace’s shoulder or back with her fingertips to get her attention over the noise of the alarm cannot be said to be a rude,
insolent, or angry touching. Wallace has failed to show that the trial court abused its discretion in refusing the battery instruction.***

[Other issues raised by the appeal were then discussed.]

Affirmed. [The concurring opinions are omitted.]

NOTES AND QUESTIONS

1. Has the law of battery undergone any substantial changes since Cole v. Turner in 1704?

2. Do you agree that there was not enough evidence to let the jury decide whether the touching was offensive? The concurring opinion notes that there was testimony that the teacher had grabbed plaintiff's arm or shoulder to turn her around and that when plaintiff told her she was a parent, the teacher responded, "I don't care who you are, move it."

3. Note that the court refers to Indiana's pattern jury instruction on battery. Many jurisdictions have pattern or sample instructions that are available to the parties to use in requesting the instructions for their particular cases.

4. In the principal case, in a section omitted from this excerpt, the court noted that the third paragraph of the proposed instruction—that battery may be recklessly committed—was not an accurate statement of Indiana law and could have misled or confused the jury under the facts of the case. The court's discussion of the intent requirement makes it clear that it is an essential element. With the modern shift of emphasis to intent and negligence, as distinguished from trespass and case, "battery" has become exclusively an intentional tort. Thus there is no battery when defendant negligently, or even recklessly, drives his car into plaintiff and injures him, without intending to hit him. Cook v. Kinzua Pine Mills Co., 207 Or. 34, 293 P.2d 717 (1956). The same shift of emphasis accounts for the modern cases allowing recovery when the contact inflicted is not direct and immediate, but indirect.

RESTATMENT (SECOND) OF TORTS (1965)

"§ 13. Battery: Harmful Contact

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

"(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

"(b) a harmful contact with the person of the other directly or indirectly results."

"§ 18. Battery: Offensive Contact

"(1) An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
“(b) an offensive contact with the person of the other directly or indirectly results.

“(2) An act which is not done with the intention stated in Subsection (1. a) does not make the actor liable to the other for a mere offensive contact with the other’s person although the act involves an unreasonable risk of inflicting it and, therefore, would be negligent or reckless if the risk threatened bodily harm.”

NOTES AND QUESTIONS

1. When defendant intentionally causes plaintiff to undergo an offensive contact and the resulting injuries are more extensive than a reasonable person might have anticipated, the defendant will still be liable for those injuries. See Baldinger v. Banks, 26 Misc.2d 1086, 201 N.Y.S.2d 629 (1960) (six-year-old boy shoves four-year-old girl) (broken elbow); Harrigan v. Rosich, 173 So.2d 880 (La.App.1965) (defendant, wishing to get rid of the plaintiff, pushed him with his finger, and said, “Go home, old man.”) (detached retina).

2. In Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891), one schoolboy, during a class hour, playfully kicked another on the shin. He intended no harm, and the touch was so slight that the plaintiff did not actually feel it. It had, however, the effect of “lighting up” an infection in the leg from a previous injury, and as a result the plaintiff suffered damages found by the jury to be $2,500. The court found liability for battery even though the injury could not have been foreseen. The case is entertainingly and exhaustively discussed in Zile, Vosburg v. Putney: A Centennial Story. [1992] Wis.L.Rev. 877 (1992).

3. Does it make any difference if the defendant is trying to help the plaintiff? In Clayton v. New Dreamland Roller Skating Rink, Inc., 14 N.J.Super. 390, 82 A.2d 458 (1951), cert. denied, 13 N.J. 527, 100 A.2d 567 (1953), plaintiff fell at a skating rink and broke her arm. Over the protests of plaintiff and her husband, defendant’s employees, one of whom was a prize fight manager who had first aid experience, proceeded to manipulate the arm in an attempt to set it. Is this battery?

4. While her husband was helping her get dressed in her hospital room the day after her back surgery, patient found a washable tattoo of a rose on her lower abdomen. Surgeon says he had placed it there to improve her spirits and help her heal and that none of his other patients had complained. Patient is very upset. Does she have a cause of action for battery? If so, what would her damages be? See Todd McHale, “Doctor is Sued for Giving Woman Tattoo in Surgery,” Burlington County Times, July 17, 2008, at 1, available at 2008 WLNR 13781779.

5. Can the plaintiff make the defendant liable for contact that would not be offensive to a reasonable person, such as a tap on the shoulder to attract attention, by specifically forbidding that conduct? The Restatement (Second) of Torts § 19, leaves the question open. See Richmond v. Fiske, 160 Mass. 34, 35 N.E. 103 (1893), where defendant, against orders, entered plaintiff’s bedroom and woke him up to present a milk bill. This was held to be battery, but no doubt it would be offensive to a reasonable person.

6. Can there be liability for battery for a contact of which plaintiff is unaware at the time? Did Sleeping Beauty have a cause of action against
Prince Charming? What if an unauthorized surgical operation is performed while plaintiff is under an anaesthetic? Does it make any difference whether the operation is harmful or beneficial? See Mohr v. Williams, page 100.


8. Does a mortician who embalms a body unaware that it was infected with the AIDS virus have a cause of action for battery? Cf., Funeral Services by Gregory v. Bluefield Community Hospital, 186 W.Va. 424, 413 S.E.2d 79 (1991). What about the patients of a dentist who does not disclose he has AIDS? What if the dentist always wore gloves during treatment procedures? Would the reasonable person find such touching offensive? See Brzoska v. Olson, 668 A.2d 1355 (Dela. 1995).

Fisher v. Carrousel Motor Hotel, Inc.
Supreme Court of Texas, 1967.
424 S.W.2d 627.

[Action for assault and battery. Plaintiff, a mathematician employed by NASA, was attending a professional conference on telemetry equipment at defendant’s hotel. The meeting included a buffet luncheon. As plaintiff was standing in line with others, he was approached by one of defendant’s employees, who snatched the plate from his hand, and shouted that a “Negro could not be served in the club.” Plaintiff was not actually touched, and was in no apprehension of physical injury; but he was highly embarrassed and hurt by the conduct in the presence of his associates. The jury returned a verdict for $400 actual damages for his humiliation and indignity, and $500 exemplary (punitive) damages in addition. The trial court set aside the verdict and gave judgment for the defendants notwithstanding the verdict. This was affirmed by the Court of Civil Appeals. Plaintiff appealed to the Supreme Court.]

GREENHILL, JUSTICE *** 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. Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941).

Such holding is not unique to the jurisprudence of this State. In S.H. Kress & Co. v. Brashear, 50 S.W.2d 922 (Tex.Civ.App.1932, no writ), the defendant was held to have committed “an assault or 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 (Second) of Torts § 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 dispossession 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 (Second) of Torts § 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. [Cc]. 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 court then held that the defendant corporation was liable for the tort of its employee.]

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.

NOTES AND QUESTIONS

1. What if the plate had been snatched without a racial epithet? Or suppose the waiter had not touched plaintiff's plate, but said in a loud voice, "Get out, we don't serve Negroes here!"? What if the doorman at the hotel shouted a racial epithet and kicked plaintiff's car when he was about to leave. Battery? Cf. Van Eaton v. Thom, 764 S.W.2d 674 (Mo.App.1988) (defendant struck horse plaintiff was riding).

2. Does the utilization of the tort of battery confuse things? Why not characterize what happened as "intentional infliction of emotional harm"? Might the case be regarded as one of imaginative lawyering, assuming the state was not ready to recognize intentional infliction of emotional harm as a tort? What other remedies might have been available to plaintiff? Compare this with the State Rubbish Collectors case, page 53.

3. Defendant, unreasonably suspecting the plaintiff of shoplifting, forcibly seized a package from under her arm and opened it. Morgan v.
Loyacomo, 190 Miss. 656, 1 So.2d 510 (1941) (battery). Defendant deliberately blew pipe smoke in plaintiff's face, knowing she was allergic to it. Richardson v. Hennly, 209 Ga.App. 868, 434 S.E.2d 772 (1993), rev'd on other grounds, 264 Ga. 355, 444 S.E.2d 317 (1994) (battery). Defendant, coming up behind coworker in break room, snatched a ten dollar bill from his hand. Reynolds v. MacFarlane, 322 P.3d 755, 759 (Utah App. 2014) (quoting Prosser and Keeton on the Law of Torts: "contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in plaintiff's hand" is enough for bodily contact).

4. A is standing with his arm around B's shoulder and leaning on him. C, passing by, violently jerks B's arm, as a result of which A falls down. To whom is C liable for battery? Reynolds v. Pierson, 29 Ind.App. 273, 64 N.E. 484 (1902).

3. ASSAULT

I de S et ux. v. W de S
At the Assizes, 1348.
Y.B.Lib.Ass. folio 99, placitum 60.

I de S and M, his wife, complain of W de S concerning this, that the said W, in the year, etc., with force and arms did make an assault upon the said M de S and beat her. And W pleaded not guilty. And it was found by the verdict of the inquest that the said W came at night to the house of the said I and sought to buy of his wine, but the door of the tavern was shut and he beat upon the door with a hatchet which he had in his hand, and the wife of the plaintiff put her head out of the window and commanded him to stop, and he saw and he struck with the hatchet but did not hit the woman. Whereupon the inquest said that it seemed to them that there was no trespass since no harm was done.

THORPE, C.J. There is harm done and a trespass for which he shall recover damages since he made an assault upon the woman, as has been found, although he did no other harm. Wherefore tax the damages, etc. And they taxed the damages at half a mark. Thorpe awarded that they should recover their damages, etc., and that the other should be taken. And so note that for an assault a man shall recover damages, etc.

NOTES AND QUESTIONS

1. This is the great-grandparent of all assault cases. Why allow the action if "no harm was done"?

Western Union Telegraph Co. v. Hill
Court of Appeals of Alabama, 1933.

Action for damages for assault by J.B. Hill against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.
SAMFORD, JUDGE. The action in this case is based upon an alleged assault on the person of plaintiff's wife by one Sapp, an agent of defendant in charge of its office in Huntsville, Ala. The assault complained of consisted of an attempt on the part of Sapp to put his hand on the person of plaintiff's wife coupled with a request that she come behind the counter in defendant's office, and that, if she would come and allow Sapp to love and pet her, he "would fix her clock."

The first question that addresses itself to us is, Was there such an assault as will justify an action for damages? ** **

While every battery includes an assault, an assault does not necessarily require a battery to complete it. What it does take to constitute an assault is an unlawful attempt to commit a battery, incomplete by reason of some intervening cause; or, to state it differently, to constitute an actionable assault there must be an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, if not prevented. ** **

What are the facts here? Sapp was the agent of defendant and the manager of its telegraph office in Huntsville. Defendant was under contract with plaintiff to keep in repair and regulate an electric clock in plaintiff's place of business. When the clock needed attention, that fact was to be reported to Sapp, and he in turn would report to a special man, whose duty it was to do the fixing. At 8:18 o'clock p.m. plaintiff's wife reported to Sapp over the phone that the clock needed attention, and, no one coming to attend the clock, plaintiff's wife went to the office of defendant about 8:30 p.m. There she found Sapp in charge and behind a desk or counter, separating the public from the part of the room in which defendant's operator worked. The counter is four feet and two inches high, and so wide that, Sapp standing on the floor, leaning against the counter and stretching his arm and hand to the full length, the end of his fingers reaches just to the outer edge of the counter. The photographs in evidence show that the counter was as high as Sapp's armpits. Sapp had had two or three drinks and was "still slightly feeling the effects of whiskey; I felt all right; I felt good and amiable." When plaintiff's wife came into the office, Sapp came from towards the rear of the room and asked what he could do for her. She replied: "I asked him if he understood over the phone that my clock was out of order and when he was going to fix it. He stood there and looked at me a few minutes and said: 'If you will come back here and let me love and pet you, I will fix your clock.' This he repeated and reached for me with his hand, he extended his hand toward me, he did not put it on me; I jumped back. I was in his reach as I stood there. He reached for me right along here (indicating her left shoulder and arm)." The foregoing is the evidence offered by plaintiff tending to prove assault. Per contra, aside from the positive denial by Sapp of any effort to touch Mrs. Hill, the physical surroundings as evidenced by the photographs of the locus tend to rebut any evidence going to prove that Sapp could have touched plaintiff's wife across that counter even if he had reached his hand in her direction unless she was leaning against the counter or Sapp should
have stood upon something so as to elevate him and allow him to reach beyond the counter. However, there is testimony tending to prove that, notwithstanding the width of the counter and the height of Sapp, Sapp could have reached from six to eighteen inches beyond the desk in an effort to place his hand on Mrs. Hill. The evidence as a whole presents a question for the jury. This was the view taken by the trial judge, and in the several rulings bearing on this question there is no error. * * *

[Reversed on the ground that Sapp had not acted within the scope of his employment.]

NOTES AND QUESTIONS

1. Defendant, standing three or four feet from plaintiff, made a “kissing sign” at her by puckering his lips and smacking them. He did not touch her and made no effort to kiss her or to use any force. Is this an assault? Fuller v. State, 44 Tex.Crim. 463, 72 S.W. 184 (1903) (leering alone is not enough). Defendant Ku Klux Klan members dressed in KKK robes and carrying guns rode around in a shrimp boat on Galveston Bay from dock to dock frightening Vietnamese fishermen and their families. What would the family members have to prove to recover for assault? See, Vietnamese Fishermen’s Ass’n v. Knights of the K.K.K., 518 F.Supp. 993 (S.D.Tex.1981) (applying Texas law).

2. Defendant, a hundred yards from plaintiff, starts running toward him, throwing rocks as he runs. At what point does this become an assault? Cf. State v. Davis, 20 N.C. (1 Ired.) 125, 35 Am.Dec. 735 (1840) (at the point where defendant is close enough so that plaintiff’s apprehension of imminent contact is reasonable).

3. What about mere preparation, such as bringing a gun along for an interview? Penny v. State, 114 Ga. 77, 39 S.E. 871 (1901).

4. What if the threat is not imminent? Brower v. Ackerley, 88 Wash.App. 87, 943 P.2d 1141, 1145 (1997) (threats of future action—“I’m going to find out where you live and kick your ass” and “you’re finished; cut you in your sleep”—not imminent enough to state cause of action for assault.) Does a complaint state a cause of action for assault if one paragraph of the complaint asserts that the defendants threatened to strike the plaintiffs with blackjacks and that the threats placed the plaintiffs in fear that a battery will be committed against them and a subsequent paragraph asserts that the defendants showed the plaintiffs that the defendants were carrying blackjacks? Cucinotti v. Ortmann, 399 Pa. 26, 159 A.2d 216 (1960) (“words in themselves, no matter how threatening, do not constitute an assault”).


6. In State v. Barry, 45 Mont. 598, 124 P. 775 (1912), it was held that there was no assault where the plaintiff did not learn that a gun was aimed at him with intent to shoot him until it was all over. The Restatement (Second) of Torts § 22, has agreed. See also Reynolds v. MacFarlane, 322 P.3d 755, 758 (Utah App. 2014) (no assault where ten dollar bill was snatched from plaintiff’s hand from behind because no
evidence that plaintiff was aware of defendant's impending action to grab the bill before defendant completed the act of taking the bill).

7. A major distinction between a criminal assault and an assault in tort is that for criminal assault, a victim need not have an apprehension of contact. A criminal assault occurs if the defendant intends to injure the victim and has the ability to do so. Commonwealth v. Slaney, 345 Mass. 135, 185 N.E.2d 919 (1962). For the tort of assault, the victim must have an apprehension of contact, and it is not necessary that the defendant have the actual ability to carry out the threatened contact. Depending upon the jurisdiction, a defendant could be subject to either criminal prosecution or civil damages, or both.

8. Although the court uses the term "fear" of an imminent battery, assault requires only apprehension or anticipation. Suppose Hill had a black belt in karate and was contemptuous of Sapp? Assault? Cf. Brady v. Schatzel, [1911] Q.St.R. 206, 208 (police officer testified he was not afraid when defendant pulled a gun on him because he did not believe he would fire it). Why might a lawyer plead and try to prove fear if it is not a necessary element of the tort?

9. What if these words are accompanied by a threatening gesture? Assault?

A. With his hand upon his sword, "If it were not assize-time, I would not take such language from you." Tuberville v. Savage, 1 Modern Rep. 3 (1699).

B. "Were you not an old man, I would knock you down." State v. Crow, 23 N.C. (1 Ired.) 375 (1841).

C. "If it were not for your gray hairs, I would tear your heart out." Commonwealth v. Eyre, 1 Serg. & Rawle 347 (Pa.1815).

D. "I have a great mind to hit you." State v. Hampton, 63 N.C. 13 (1868).

E. "If you do not pay me my money, I will have your life"? Keefe v. State, 19 Ark. 190 (1857).

10. Can words make an assault out of conduct that would otherwise not be sufficient for the tort? Suppose that while defendant and plaintiff are engaged in a violent quarrel, defendant reaches for his hip pocket. Does it make any difference whether he says, "I'll blow your brains out," or "Pardon me, I need a handkerchief"?

11. What about words that threaten harm from an independent source? "Look out! There is a rattlesnake behind you!"

4. FALSE IMPRISONMENT

Big Town Nursing Home, Inc. v. Newman
Court of Civil Appeals of Texas, 1970.
461 S.W.2d 195.

MCDONALD, CHIEF JUSTICE. This is an appeal by defendant Nursing Home from a judgment for plaintiff Newman for actual and exemplary damages in a false imprisonment case.
Plaintiff Newman sued defendant Nursing Home for actual and exemplary damages for falsely and wrongfully imprisoning him against his will from September 22, 1968 to November 11, 1968. **

Plaintiff is a retired printer 67 years of age, and lives on his social security and a retirement pension from his brother’s printing company. He has not worked since 1959, is single, has Parkinson’s disease, arthritis, heart trouble, a voice impediment, and a hiatal hernia. He has served in the army attaining the rank of Sergeant. He has never been in a mental hospital or treated by a psychiatrist. Plaintiff was taken to defendant nursing home on September 19, 1968, by his nephew who signed the admission papers and paid one month’s care in advance. Plaintiff had been arrested for drunkenness and drunken driving in times past (the last time in 1966) and had been treated twice for alcoholism. Plaintiff testified he was not intoxicated and had nothing to drink during the week prior to admission to the nursing home. The admission papers provided that patient “will not be forced to remain in the nursing home against his will for any length of time.” Plaintiff was not advised he would be kept at the nursing home against his will. On September 22, 1968, plaintiff decided he wanted to leave and tried to telephone for a taxi. Defendant’s employees advised plaintiff he could not use the phone, or have any visitors unless the manager knew them, and locked plaintiff’s grip and clothes up. Plaintiff walked out of the home, but was caught by employees of defendant and brought back forceably, and thereafter, placed in Wing 3 and locked up. Defendant's Administrator testified Wing 3 contained senile patients, drug addicts, alcoholics, mentally disturbed, incorrigibles and uncontrollables, and that “they were all in the same kettle of fish.” Plaintiff tried to escape from the nursing home five or six times but was caught and brought back each time against his will. He was carried back to Wing 3 and locked and taped in a “restraint chair”, for more than five hours. He was put back in the chair on subsequent occasions. He was not seen by the home doctor for some 10 days after he was admitted, and for 7 days after being placed in Wing 3. The doctor wrote the social security office to change payment of plaintiff’s social security checks without plaintiff’s authorization. Plaintiff made every effort to leave and repeatedly asked the manager and assistant manager to be permitted to leave. The home doctor is actually a resident studying pathology and has no patients other than those in two nursing homes. Finally, on November 11, 1968, plaintiff escaped and caught a ride into Dallas, where he called a taxi and was taken to the home of a friend. During plaintiff’s ordeal he lost 30 pounds. There was never any court proceeding to confine plaintiff. **

False imprisonment is the direct restraint of one person of the physical liberty of another without adequate legal justification. There is ample evidence to sustain [the jury’s finding that plaintiff was falsely imprisoned]. **

Defendant placed plaintiff in Wing 3 with insane persons, alcoholics and drug addicts knowing he was not in such category; punished plaintiff by locking and taping him in the restraint chair; prevented him from using the telephone for 51 days; locked up his clothes; told him he could not be released from Wing 3 until he began to
obey the rules of the home; and detained him for 51 days during which period he was demanding to be released and attempting to escape. * * *

Defendant may be compelled to respond in exemplary damages if the act causing actual damages is a wrongful act done intentionally in violation of the rights of plaintiff. [Cc]

Defendant acted in the utter disregard of plaintiff's legal rights, knowing there was no court order for commitment, and that the admission agreement provided he was not to be kept against his will. * * *

[The court of appeals found that the amount of damages was excessive and offered plaintiff a remittitur. Plaintiff subsequently agreed to the remittitur and the judgment below, so reformed, was affirmed.]

NOTES AND QUESTIONS

1. Plaintiff has a ticket to enter defendant's race track, but defendant refuses to admit him because the stewards have banned him from the track. False imprisonment? Marrone v. Washington Jockey Club, 35 App.D.C. 82 (1910) (mere refusal to admit not false imprisonment). Defendant attempts to enter a dance hall during a public dance, but is prevented by defendant who is under the mistaken belief that she is under eighteen. False imprisonment? Cullen v. Dickenson, 35 S.D. 27, 144 N.W. 656 (1913) (no). Suppose the exclusion is based on race or religion? There may be a civil rights action, but not false imprisonment. See 42 U.S.C. § 2000a, page 79, note 4.

2. Can there be false imprisonment in a moving automobile? Cieplinski v. Severn, 269 Mass. 261, 168 N.E. 722 (1929) (yes). In a city? Allen v. Fromme, 141 App.Div. 362, 126 N.Y.S. 520 (1910) (yes). In the state of Rhode Island? Texas? Cf. Albright v. Oliver, 975 F.2d 343 (7th Cir.1992) (in dicta, court notes that actionable confinement could be "as large as an entire state"). When plaintiff is not permitted to leave the country? Cf. Shen v. Leo A. Daly Co., 222 F.3d 472 (8th Cir. 2000) (applying Nebraska law) (although difficult to define exactly how close the restraint must be, the country of Taiwan is clearly too great an area within which to be falsely imprisoned).

3. If one exit of a room or a building is locked with plaintiff inside, but another reasonable means of exit is left open, there is no imprisonment. Davis & Allcott Co. v. Booser, 215 Ala. 116, 110 So. 28 (1926) (door through which plaintiff had entered was locked but other door was not); Furlong v. German-American Press Ass'n, 189 S.W. 385, 389 (Mo.1916) ("If a way of escape is left open which is available without peril of life or limb, no imprisonment"). See also the classic case of Bird v. Jones, 7 A. & E., N.S., 742, 115 Eng.Rep. 668 (1846) (the portion of Hammersmith Bridge across the Thames River ordinarily used as a footpath was obstructed by seats that defendant had erected for viewing a regatta on the river and defendant's agents refused to let plaintiff pass along the footpath; no false imprisonment because plaintiff could have returned the way he had come or crossed the bridge in the carriage way).

4. The Restatement (Second) of Torts § 36, comment a, treats the means of escape as unreasonable if it involves exposure of the person
(plaintiff in the water and defendant steals his clothes), material harm to the clothing, or danger of substantial harm to another. Plaintiff would not be required to make his escape by crawling through a sewer.

5. A means of escape is not a reasonable one if the plaintiff does not know of its existence, and it is not apparent. Talcott v. National Exhibition Co., 144 App.Div. 337, 128 N.Y.S. 1059 (1911).

6. What if it's just a joke? Employees of airline that prides itself on being a "fun-loving, spirited company" arranged for local police officers to perform a mock arrest of a new employee, complete with handcuffs and a suggestion that she find someone to post bail, as a prank to celebrate the end of her probation. Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197 (10th Cir. 2009) (applying New Mexico law) (neither brevity of seizure nor its characterization as a prank enabled officers to avoid liability).

7. Along with battery and assault, false imprisonment has now become exclusively an intentional tort. The Restatement (Second) of Torts § 35, comment h, points out, however, that for negligence resulting in the confinement of another a negligence action will lie, but only if some actual damage results. Cf. Mouse v. Central Sav. & Trust Co., 120 Ohio St. 599, 7 Ohio L.Abs. 334, 167 N.E. 868 (1929). What would be the result if defendant double-parks his automobile and thus prevents plaintiff from driving to an important business meeting? False imprisonment is also like battery and assault in that no actual damages need be proved. Nominal damages may be awarded. Banks v. Fritsch, 39 S.W.3d 474 (Ky. App. 2001) (teacher who chained student to tree because of repeated absenteeism liable for nominal damages if student could not prove actual damages).

Parvi v. City of Kingston
Court of Appeals of New York, 1977.

[Police, responding to a complaint, found two brothers engaged in a noisy quarrel in an alley behind a commercial building. Plaintiff was with them, apparently trying to calm them. According to police testimony, all three were showing "the effects of alcohol." Plaintiff told the police he had no place to go, so rather than arrest him, they took him outside the city limits to an abandoned golf course to "dry out." There was conflicting testimony as to whether he went willingly. Within an hour, plaintiff had wandered 350 feet and onto the New York State Thruway, where he was struck by a car and severely injured. On cross-examination, he admitted he had no recollection of what happened that night.

Action for false imprisonment. The trial court dismissed the case and the Appellate Division affirmed.]

FUCHSBERG, JUSTICE. **The element of consciousness of confinement is a more subtle and more interesting subissue in this case. On that subject, we note that, while respected authorities have divided on whether awareness of confinement by one who has been falsely imprisoned should be a sine qua non for making out a case, [c] Broughton [v. State of New York], 37 N.Y.2d p. 456, 373 N.Y.S.2d p. 92, 335 N.E.2d p. 313 has laid that question to rest in this State. Its
holding gives recognition to the fact that false imprisonment, as a
dignitary tort, is not suffered unless its victim knows of the dignitary
invasion. Interestingly, the Restatement (Second) of Torts § 42 too has
taken the position that there is no liability for intentionally confining
another unless the person physically restrained knows of the
confinement or is harmed by it.

However, though correctly proceeding on that premise, the
Appellate Division, in affirming the dismissal of the cause of action for
false imprisonment, erroneously relied on the fact that Parvi, after
having provided additional testimony in his own behalf on direct
examination, had agreed on cross that he no longer had any recollection
of his confinement. In so doing, the court failed to distinguish between
a later recollection of consciousness and the existence of that
consciousness at the time when the imprisonment itself took place. The
latter, of course, is capable of being proved though one who suffers the
consciousness can no longer personally describe it, whether by reason of
lapse of memory, incompetency, death or other cause. Specifically, in
this case, while it may well be that the alcohol Parvi had imbibed or the
injuries he sustained, or both, had had the effect of wiping out his
recollection of being in the police car against his will, that is a far cry
from saying that he was not conscious of his confinement at the time
when it was actually taking place. And, even if plaintiff’s sentiment state
at the time of his imprisonment was something less than total sobriety,
that does not mean that he had no conscious sense of what was then
happening to him. To the contrary, there is much in the record to
support a finding that the plaintiff indeed was aware of his arrest at the
time it took place. By way of illustration, the officers described Parvi’s
responsiveness to their command that he get into the car, his colloquy
while being driven to Coleman Hill and his request to be let off
elsewhere. At the very least, then, it was for the jury, in the first
instance, to weigh credibility, evaluate inconsistencies and determine
whether the burden of proof had been met. **

Reversed.

BREITEL, CHIEF JUDGE (dissenting). ** [P]laintiff has failed even to
make out a prima facie case that he was conscious of his purported
confinement, and that he failed to consent to it. His memory of the
entire incident had disappeared; at trial, Parvi admitted that he no
longer had any independent recollection of what happened on the day
of his accident, and that as to the circumstances surrounding his entrance
into the police car, he only knew what had been suggested to him by
subsequent conversations. In light of this testimony, Parvi’s conclusory
statement that he was ordered into the car against his will is
insufficient, as a matter of law, to establish a prima facie case. **

NOTES AND QUESTIONS

1. In addition to the false imprisonment claim, could plaintiff have
filed a negligence claim based on the police officers’ conduct? For a more
recent case with eerily similar facts, see Deusser v. Vecere, 139 F.3d 1190
(8th Cir. 1998) (plaintiff’s decedent, who had been briefly detained by park
rangers for public drunkenness, but not arrested, was released in a parking
lot, and wandered onto interstate where he was killed by motorist).
2. The mother of a feverish and disoriented 16-year-old boy instructed a police officer to take her son to a particular hospital where her family physician was meeting them. Is there false imprisonment if the officer intentionally takes the boy to a different hospital? Cf. Haisenleder v. Reeder, 114 Mich.App. 258, 318 N.W.2d 634 (1982). Or what if the plaintiff, a sufferer from diabetes who is unconscious from insulin shock, is wrongfully arrested and confined in jail overnight in the belief that he is drunk, but is released before he regains consciousness. Is there a tort? See Prosser, False Imprisonment: Consciousness of Confinement, 55 Colum.L.Rev. 847 (1955); Restatement (Second) of Torts § 42.

3. Called upon to make an emergency evaluation, a doctor diagnoses a person as mentally ill and has her detained in a mental institution. Is this false imprisonment? See Williams v. Smith, 179 Ga.App. 712, 348 S.E.2d 50 (1986) (no false imprisonment if statutory commitment procedures were followed even if doctor was negligent in diagnosis); Eoshee v. Health Mgt. Assocs., 675 So.2d 957 (Fla.App.1996) (false imprisonment if statutory commitment procedures were not followed by nurse who physically prevented patient from leaving a psychiatric facility and coerced her into signing voluntary admission papers). What if a hospital detains a woman for two hours while its staff initiates involuntary commitment proceedings because she is agitated and threatened suicide? Riffe v. Armstrong, 197 W.Va. 626, 477 S.E.2d 535 (1996) (hospital's action justified in light of plaintiff's condition upon arrival).

**Hardy v. LaBelle's Distributing Co.**

Supreme Court of Montana, 1985.
203 Mont. 293, 661 P.2d 35.

GULBRANDSON, JUSTICE. **Defendant, LaBelle’s Distributing Company (LaBelle’s) hired Hardy as a temporary employee on December 1, 1978. She was assigned duty as a sales clerk in the jewelry department.**

On December 9, 1978, another employee for LaBelle’s, Jackie Renner, thought she saw Hardy steal one of the watches that LaBelle’s had in stock. Jackie Renner reported her belief to LaBelle’s showroom manager that evening.

On the morning of December 10, Hardy was approached by the assistant manager of LaBelle’s jewelry department and told that all new employees were given a tour of the store. He showed her into the showroom manager’s office and then left, closing the door behind him.

There is conflicting testimony concerning who was present in the showroom manager’s office when Hardy arrived. Hardy testified that David Kotke, the showroom manager, Steve Newsom, the store’s loss prevention manager, and a uniformed policeman were present. Newsom and one of the policemen in the room testified that another policeman, instead of Kotke, was present.

Hardy was told that she had been accused of stealing a watch. Hardy denied taking the watch and agreed to take a lie detector test. According to conflicting testimony, the meeting lasted approximately from twenty to forty-five minutes.