



# **Lawyering Fundamentals**

## **Torts Cases**

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**CASES AND MATERIALS**

**PROSSER, WADE AND SCHWARTZ'S**

# **TORTS**

**TWELFTH EDITION**

*by*

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## CHAPTER II

# 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 Garratt’s fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be \$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, [c] 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 apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this section.”

A battery would be established if, in addition to plaintiff’s fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. [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 at both trials. 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).
4. Can a four-year-old child who strikes her babysitter in the throat, crushing her larynx, be held liable for an intentional tort? *Bailey v. C.S.*, 12 S.W.3d 159 (Tex. App. 2000) (rejecting argument that four-year-old was incapable of intent). What about a two-year-old child who bites an infant? See *Fromenthal v. Clark*, 442 So.2d 608 (La.App.1983), cert. denied, 444 So.2d 1242 (1984) (affirming trial court ruling that two-year-old was too young to form intent).
5. Some states have parental responsibility statutes that make parents liable for their child’s malicious torts. Can a young child commit a tort requiring 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).

### **Spivey v. Battaglia**

Supreme Court of Florida, 1972.  
258 So.2d 815.

DEKLE, JUSTICE. \* \* \* Petitioner (plaintiff in the trial court) and respondent (defendant) were employees of Battaglia Fruit Co. on January 21, 1965. During the lunch hour several employees of Battaglia Fruit Co., including petitioner and respondent, were seated on a work table in the plant of the company. Respondent, in an effort to tease petitioner, whom he knew to be shy, intentionally put his arm around petitioner and pulled her head toward him. Immediately after this “friendly unsolicited hug,” petitioner

suffered a sharp pain in the back of her neck and ear, and sharp pains into the base of her skull. As a result, petitioner was paralyzed on the left side of her face and mouth.

An action was commenced in the Circuit Court of Orange County, Florida, wherein the petitioners, Mr. and Mrs. Spivey, brought suit against respondent for, (1) negligence, and (2) assault and battery. Respondent, Mr. Battaglia, filed his answer raising as a defense the claim that his “friendly unsolicited hug” was an assault and battery as a matter of law and was barred by the running of the two-year statute of limitations on assault and battery. Respondent’s motion for summary judgment was granted by the trial court on this basis. The district court affirmed on the authority of *McDonald v. Ford*, [223 So.2d 553 (Fla.App.1969)].

The question presented for our determination is whether petitioner’s action could be maintained on the negligence count, or whether respondent’s conduct amounted to an assault and battery as a matter of law, which would bar the suit under the two-year statute (which had run).

In *McDonald* the incident complained of occurred in the early morning hours in a home owned by the defendant. While the plaintiff was looking through some records, the defendant came up behind her, laughingly embraced her and, though she resisted, kissed her hard. As the defendant was hurting the plaintiff physically by his embrace, the plaintiff continued to struggle violently and the defendant continued to laugh and pursue his love-making attempts. In the process, plaintiff struck her face hard upon an object that she was unable to identify specifically. With those facts before it, the district court held that what actually occurred was an assault and battery, and not negligence. The court quoted with approval from the Court of Appeals of Ohio in *Williams v. Pressman*, 113 N.E.2d 395, at 396 (Ohio App.1953):

“ \* \* \* an assault and battery is not negligence, for such action is intentional, while negligence connotes an unintentional act.”

The intent with which such a tort liability as assault is concerned is not necessarily a hostile intent, or a desire to do harm. Where a reasonable man would believe that a particular result was *substantially certain* to follow, he will be held in the eyes of the law as though he had intended it. It would thus be an assault (intentional). However, the knowledge and appreciation of a *risk*, short of substantial certainty, is not the equivalent of intent. Thus, the distinction between intent and negligence boils down to a matter of degree. “Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid (negligence), and becomes a substantial certainty.” In the latter case, the intent is legally implied and becomes an assault rather than unintentional negligence.

The distinction between the unsolicited kisses in *McDonald*, *supra*, and the unsolicited hug in the present case turns upon this question of intent. In *McDonald*, the court, finding an assault and battery, necessarily had to find initially that the results of the defendant’s acts were “intentional.”

This is a rational conclusion in view of the struggling involved there. In the instant case, the DCA must have found the same intent. But we cannot agree with that finding in these circumstances. It cannot be said that a reasonable man in this defendant's position would believe that the bizarre results herein were "substantially certain" to follow. This is an unreasonable conclusion and is a misapplication of the rule in *McDonald*. This does not mean that he does not become liable for such unanticipated results, however. The settled law is that a defendant becomes liable for reasonably foreseeable consequences, though the exact results and damages were not contemplated.

Acts that might be considered prudent in one case might be negligent in another. Negligence is a relative term and its existence must depend in each case upon the particular circumstances which surrounded the parties at the time and place of the events upon which the controversy is based.

The trial judge committed error when he granted summary final judgment in favor of the defendant. The cause should have been submitted to the jury with appropriate instructions regarding the elements of negligence. Accordingly, certiorari is granted; the decision of the district court is hereby quashed and the cause is remanded with directions to reverse the summary final judgment.

It is so ordered.

### 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 (e.g., for battery, a touching that is 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. The intent to do an act with actual knowledge on the part of the actor that the consequences (e.g., touching that is harmful or offensive) are substantially certain to follow. This is sufficient to establish intent.
- E. The intent to do an act with knowledge on the part of the actor that he is risking particular consequences. This is not sufficient to establish intent—although it may be negligence if the risk is an unreasonable one under the circumstances.

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. 533 (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) (liability).
- 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 (satisfies intent requirement but may result in no liability if conduct is privileged).

3. While standing in line to pay for her purchases, plaintiff was attacked from behind by a mentally handicapped man who grabbed her hair and head and threw her to the ground. In an attempt to fit her claim within negligence, she argued that he was mentally incapable of forming intent to cause harm and thus did not commit a battery. The court rejected her argument, noting that the intentional tort of battery required only acting with intent to cause contact that was harmful or offensive, not acting with intent to cause harm. *Wagner v. State*, 2005 UT 54, 122 P.3d 599 (2005).

4. 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. 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 613, note 7.

C. Will defendant's employer be liable under the doctrine of *respondeat superior*? See page 614, 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 bumped 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? See the principal case and *Baska 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 stepped between them to stop a fight).

G. Will an employer be subject to liability to an employee in spite of a general worker compensation immunity shield? Some state worker compensation statutes provide an exception to the immunity for intentional wrongdoing. Does an employer's intentional failure to train an employee to perform a dangerous task supply the requisite intent to injure under the worker compensation intentional injury exception? See *Reed Tool Co. v. Copelin*, 689 S.W.2d 404 (Tex.1985). What about an employer's deliberate exposure of employees to dangerous products? See *Millison v. E.I. du Pont de Nemours & Co.*, 101 N.J. 161, 501 A.2d 505 (1985) and *Bardere v. Zafir*, 102 A.D.2d 422, 477 N.Y.S.2d 131, *aff'd*, 63 N.Y.2d 850, 472 N.E.2d 37, 482

N.Y.S.2d 261 (1984) (plaintiff must show “specific acts [by the employer] directed at causing harm to particular employees”).

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 pages 683–684.

5. 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 not be liable for its employee’s 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).

6. For a discussion of the treatment of intent in English and American tort law, see Finnis, “Intention in Tort Law” in Owen, *Philosophical Foundations of Tort Law* 229 (Clarendon Press 1995).

### **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

shrubberies. 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). Generally, mistake as to the identity of the person or animal does not negate intent. Will the mistake protect the defendant against liability for the result he intended to cause? There is general agreement that it does not where the defendant by mistake appropriates property of the plaintiff. If he is not held liable for his mistake, he would be unjustly enriched. *Perry v. Jefferies*, 61 S.C. 292, 39 S.E. 515 (1901) (cutting and removing timber from plaintiff's land under a reasonable belief that defendant owned it); *Dexter v. Cole*, 6 Wis. 319, 70 Am.Dec. 465 (1857) (driving off plaintiff's sheep, believed to be defendant's).

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 105. Mistakes as to the existence of a privilege are dealt with in Chapter 3 in connection with the privilege itself.

### **McGuire v. Almy**

Supreme Judicial Court of Massachusetts, 1937.  
297 Mass. 323, 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 any one 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 suffers a heart attack, in *Cohen v. Petty*, page 10?

2. Note that the tort law standards differ from the criminal law standards for holding the mentally ill responsible for their actions. *Polmatier v. Russ*, 206 Conn. 229, 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) § 895J (1979). See also *White v. Muniz*, 999 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); *Chaddock v. Chaddock*, 130 Misc. 900, 226 N.Y.S. 152 (1927); *Beaubeauf v. Reed*, 4 La.App. 344 (1926).

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).

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 him 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? *Janelins 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.  
101 Mich. 370, 59 N.W. 656.

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. \* \* \*"[The jury rendered a verdict for the plaintiff.]

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 Cal.App.2d 314, 246 P.2d 111 (1952) (shooting); *Carnes v. Thompson*, 48 S.W.2d 903 (Mo.1932) (striking with pliers); *Baska v. Scherzer*, 283 Kan. 750, 156 P.3d 617 (2007) (while throwing punches at each other,

teenagers hit a woman who stepped between them to stop the fight); *Singer v. Marx*, 144 Cal.App.2d 637, 301 P.2d 440 (1956) (throwing a rock).

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.

3. Thus he 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); *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.

6 *Modern Rep.* 149, 90 *Eng.Rep.* 958.

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

1. In *United States v. Ortega*, 4 *Wash.C.C.* 531, 27 *Fed.Cas.* 359 (E.D.Pa. 1825), defendant approached the plaintiff in an offensive manner, took hold of the breast of his coat, and said that he demanded satisfaction. Is this a battery?
2. What about spitting in the plaintiff's face? *Alcorn v. Mitchell*, 63 *Ill.* 553 (1872). Or forcibly removing his hat? *Seigel v. Long*, 169 *Ala.* 79, 53 *So.* 753 (1910). Or an attempted search of his pockets? *Piggly-Wiggly Alabama Co. v. Rickles*, 212 *Ala.* 585, 103 *So.* 860 (1925). Or touching her private parts? *Skousen v. Nidy*, 90

Ariz. 215, 367 P.2d 248 (1961). Cf. *Gates v. State*, 110 Ga.App. 303, 138 S.E.2d 473 (1964) (stranger touching woman on the buttocks).

3. 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).

### **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.”<sup>2</sup> Indiana Pattern Jury Instructions (Civil) 31.03 (2d ed. Revised 2001).<sup>2</sup> 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 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).

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<sup>2</sup> 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 51(E). [C]

[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.

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RESTATEMENT (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 Don Sapatkin, "Surgeon Sued for Giving Anesthetized Patient Temporary Tattoo," The Philadelphia Inquirer, July 16, 2008, at B1, available at 2008 WLNR 13274435.

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 95.

7. Does the exposure to a virus, such as herpes, through sexual activity constitute a battery? Does consent to the sexual activity operate as a defense? See Doe v. Johnson, 817 F.Supp. 1382 (W.D.Mich.1993) (battery action alleged in transmission of HIV; consent to intercourse does not bar action). Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law, 70 Cornell L.Rev. 101 (1984).

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 (Del. 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. Loyacombo*, 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. Brashier*, 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. Thon*, 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 51.

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). 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).

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.  
25 Ala.App. 540, 150 So. 709.

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 regulated 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 8:13 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 whisky; 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). 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*, 23 N.C. (1 Ired.) 125, 35 Am.Dec. 735 (1840); *Grimes v. State*, 99 Miss. 232, 54 So. 839 (1911).

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. 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?

5. Is there an assault if defendant threatens the plaintiff with an unloaded gun? See *Allen v. Hannaford*, 138 Wash. 423, 244 P. 700 (1926). Suppose the gun remains lying in defendant’s lap? See *Castiglione v. Galpin*, 325 So.2d 725 (La.App. 1976).

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.

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. 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”).

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). Plaintiff 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*, 33 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 74, note 3.

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. Boozer*, 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 (1845) (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. 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. 2006) (applying New Mexico law) (neither brevity of seizure nor its characterization as a prank enabled officers to avoid liability).

5. 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.

6. 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).

7. If the only means of escape could cause physical danger to plaintiff, and he could remain “imprisoned” without any risk of harm, he may not recover for injuries he suffers in making his escape. See *Sindle v. New York City Transit Authority*, 33 N.Y.2d 293, 307 N.E.2d 245, 352 N.Y.S.2d 183 (1973) (plaintiff jumped from window of moving bus on way to police station).

8. 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.  
41 N.Y.2d 553, 362 N.E.2d 960, 394 N.Y.S.2d 161.

[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, [cc] *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, that 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 sentient 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 *Deuser v. Vecera*, 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 an ill and disoriented 16-year-old boy instructed a police officer to take her son to a particular hospital. 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); *Foshee 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, 1983.  
203 Mont. 263, 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.

Hardy took the lie detector test, which supported her statement that she had not taken the watch. The showroom manager apologized to Hardy the next morning and told her that she was still welcome to work at LaBelle's. The employee who reported seeing Hardy take the watch also apologized. The two employees then argued briefly, and Hardy left the store.

Hardy brought this action claiming that defendants had wrongfully detained her against her will when she was questioned about the watch.

On appeal Hardy raises basically two issues: (1) Whether the evidence is sufficient to support the verdict and judgment and (2) Whether the District Court erred in the issuance of its instructions.

The two key elements of false imprisonment are the restraint of an individual against his will and the unlawfulness of such restraint. [Cc] The individual may be restrained by acts or merely by words which he fears to disregard. [Cc]

Here, there is ample evidence to support the jury's finding that Hardy was not unlawfully restrained against her will. While Hardy stated that she felt compelled to remain in the showroom manager's office, she also admitted that she wanted to stay and clarify the situation. She did not ask to leave. She was not told she could not leave. No threat of force or otherwise was made to compel her to stay. Although she followed the assistant manager into the office under pretense of a tour, she testified at trial that she would have followed him voluntarily if she had known the true purpose of the meeting and that two policemen were in the room. Under these circumstances, the jury could easily find that Hardy was not detained against her will. [Cc] See also, *Meinecke v. Skaggs* (1949), 123 Mont. 308, 213 P.2d 237, and *Roberts v. Coleman* (1961), 228 Or. 286, 365 P.2d 79. \* \* \*

[The court also found that the District Court did not err in issuance of jury instructions on the law of false imprisonment, and affirmed the District Court's judgment in favor of defendants.]

### NOTES AND QUESTIONS

1. An employee is suspected of stealing property from her employer and is told a trip to her home is necessary to recover the property. If the employee feels mentally compelled for fear of losing her job to go in an automobile with her supervisor to her home, has she been confined involuntarily? See *Faniel v. Chesapeake & Potomac Tel. Co.*, 404 A.2d 147 (D.C.App.1979) (fear of losing one's job is a powerful incentive, but it does not render behavior involuntary).

2. Retention of plaintiff's property sometimes may provide the "restraint" necessary to constitute false imprisonment. See *Fischer v. Famous-Barr Co.*, 646 S.W.2d 819 (Mo.App.1982), where plaintiff set off the security alarm when exiting a store because the salesperson forgot to remove the sensor tag from an article of clothing she had purchased. Because an employee of the store took possession of the bag containing her purchases, plaintiff felt she had to follow the employee back to the fourth floor where she had made her purchase. Compare *Marcano v. Northwestern Chrysler-Plymouth Sales, Inc.*, 550 F.Supp. 595 (N.D.Ill.1982), where plaintiff went to a car dealership to discuss a dispute over payments on her loan and voluntarily gave her keys to the dealer so he could inspect the car. The dealer locked the car and kept the keys. Plaintiff stayed at the dealership for five hours. The court held that there was no false imprisonment because she could have left and because the intention of defendant was not to confine her personally, but only to keep the car.

3. False imprisonment has not been extended beyond such direct duress to person or to property. If the plaintiff submits merely to persuasion, and accompanies the defendant to clear himself of suspicion, without any implied threat of force, the action does not lie. *Hunter v. Laurent*, 158 La. 874, 104 So. 747 (1925); *James v. MacDougall & Southwick Co.*, 134 Wash. 314, 235 P. 812 (1925). Suppose the defendant says to the plaintiff, "You must remain in this room, or I will never speak to you again"? Compare *Fitscher v. Rollman & Sons Co.*, 31 Ohio App. 340, 167 N.E. 469 (1929), where defendant threatened to make a scene on the street unless plaintiff remained.

4. It is generally agreed that false imprisonment resembles assault, in that threats of future action are not enough. Thus the action does not lie where the defendant merely threatens to call the police and have the plaintiff arrested unless he remains. *Sweeney v. F.W. Woolworth Co.*, 247 Mass. 277, 142 N.E. 50 (1924); *Priddy v. Bunton*, 177 S.W.2d 805 (Tex.Civ.App.1943).

5. On the shopkeeper's privilege to detain a suspected thief, see *Bonkowski v. Arlan's Department Store*, page 116.

### **Enright v. Groves**

Colorado Court of Appeals, 1977.  
39 Colo.App. 39, 560 P.2d 851.

SMITH, JUDGE. Defendants Groves and City of Ft. Collins appeal from judgments entered against them upon jury verdicts awarding plaintiff \$500

actual damages and \$1,000 exemplary damages on her claim of false imprisonment \* \* \*.

The evidence at trial disclosed that on August 25, 1974, Officer Groves, while on duty as a uniformed police officer of the City of Fort Collins, observed a dog running loose in violation of the city's "dog leash" ordinance. He observed the animal approaching what was later identified as the residence of Mrs. Enright, the plaintiff. As Groves approached the house, he encountered Mrs. Enright's eleven-year-old son, and asked him if the dog belonged to him. The boy replied that it was his dog, and told Groves that his mother was sitting in the car parked at the curb by the house. Groves then ordered the boy to put the dog inside the house, and turned and started walking toward the Enright vehicle.

Groves testified that he was met by Mrs. Enright with whom he was not acquainted. She asked if she could help him. Groves responded by demanding her driver's license. She replied by giving him her name and address. He again demanded her driver's license, which she declined to produce. Groves thereupon advised her that she could either produce her driver's license or go to jail. Mrs. Enright responded by asking, "Isn't this ridiculous?" Groves thereupon grabbed one of her arms, stating, "Let's go!" \* \* \*

She was taken to the police station where a complaint was signed charging her with violation of the "dog leash" ordinance and bail was set. Mrs. Enright was released only after a friend posted bail. She was later convicted of the ordinance violation. \* \* \*

Appellants contend that Groves had probable cause to arrest Mrs. Enright, and that she was in fact arrested for and convicted of violation of the dog-at-large ordinance. They assert, therefore, that her claim for false imprisonment or false arrest cannot lie, and that Groves' use of force in arresting Mrs. Enright was permissible. We disagree.

False arrest arises when one is taken into custody by a person who claims but does not have proper legal authority. W. Prosser, Torts § 11 (4th ed.). Accordingly, a claim for false arrest will not lie if an officer has a valid warrant or probable cause to believe that an offense has been committed and that the person who was arrested committed it. Conviction of the crime for which one is specifically arrested is a complete defense to a subsequent claim of false arrest. [Cc]

Here, however, the evidence is clear that Groves arrested Mrs. Enright, not for violation of the dog leash ordinance, but rather for refusing to produce her driver's license. This basis for the arrest is exemplified by the fact that he specifically advised her that she would either produce the license or go to jail. We find no statute or case law in this jurisdiction which requires a citizen to show her driver's license upon demand, unless, for example, she is a driver of an automobile and such demand is made in that connection. \* \* \*

Here, there was no testimony that Groves ever even attempted to explain why he was demanding plaintiff's driver's license, and it is clear

that she had already volunteered her name and address. Groves admitted that he did not ask Mrs. Enright if she had any means of identification on her person, instead he simply demanded that she give him her driver's license.

We conclude that Groves' demand for Mrs. Enright's driver's license was not a lawful order and that refusal to comply therewith was not therefore an offense in and of itself. Groves was not therefore entitled to use force in arresting Mrs. Enright. Thus Groves' defense based upon an arrest for and conviction of a specific offense must, as a matter of law, fail.  
\* \* \*

Judgment affirmed.

### NOTES AND QUESTIONS

1. Is it necessary that the defendant be an officer? Suppose a filling station attendant asserts legal authority to detain the plaintiff, believing he had stolen cash from the station? *Daniel v. Phillips Petroleum Co.*, 229 Mo.App. 150, 73 S.W.2d 355 (1934). (upholding jury verdict for plaintiff). Plaintiff, alighting from defendant's train, fell and broke his leg. Defendant's conductor told plaintiff that the law required him to remain and fill out a statement about the accident. Plaintiff did so, and his cab was held for fifteen or twenty minutes, during which plaintiff was in considerable pain, while the statement was filled out and signed. This was held to be false imprisonment. *Whitman v. Atchison, T. & S.F.R. Co.*, 85 Kan. 150, 116 P. 234 (1911).

2. A private citizen who aids a police officer in making a false arrest can be held liable to plaintiff for false imprisonment. If, however, the police officer requests assistance, the private citizen will not be liable unless he knows the arrest is an unlawful one. See Restatement (Second) of Torts §§ 45A and 139.

3. Merely providing information to the police, even if it turns out to be incorrect information, is not enough to support a claim of false imprisonment. *Holcomb v. Walter's Dimmick Petroleum, Inc.*, 858 N.E.2d 103, 107 (Ind. 2006) ("Liability will not be imposed when the defendant does nothing more than detail his version of the facts to a policeman and ask for his assistance, leaving it to the officer to determine what is the appropriate response, at least where his representation of the facts does not prevent the intelligent exercise of the officer's discretion.") See also *Highfill v. Hale*, 186 S.W.3d 277 (Mo. 2006) (because deputy's decision to arrest neighbors for stalking was based at least partly on deputy's own investigation, complainant was not liable).

### Whittaker v. Sandford

Supreme Judicial Court of Maine, 1912.  
110 Me. 77, 85 A. 399.

[Plaintiff was a member and her husband was a minister of a religious sect, of which defendant was the leader. The sect had a colony in Maine and at Jaffa (now Tel Aviv), the latter of which plaintiff had joined. Plaintiff decided to abandon the sect and to return to America. While she and her four children were in Jaffa awaiting passage on a steamer, defendant offered her passage back to America on his yacht. When plaintiff

told defendant that she was afraid that he would not let her off the yacht until she was “won to the movement again,” defendant assured her repeatedly that under no circumstances would she be detained on board. Plaintiff accepted this assurance and sailed for America on the yacht. On arrival in port, defendant refused to furnish her with a boat so that she could leave the yacht, saying it was up to her husband whether she could leave. When plaintiff raised the issue with her husband, he said it was up to defendant, the leader of the sect and the owner of the yacht. She remained on board for nearly a month, during which time defendant and plaintiff’s husband attempted to persuade her to rejoin the sect. On several occasions, plaintiff, always in the company of her husband, was allowed to go ashore to the mainland and to various islands. She was not allowed to leave the yacht unaccompanied. She finally obtained her release and that of her four children with the assistance of the sheriff and a writ of habeas corpus. She then brought this action for false imprisonment. The jury returned a verdict in her favor for \$1100. Defendant excepted to the court’s instructions, and appealed from an order denying his motion for a new trial.]

SAVAGE, J. \* \* \* The court instructed the jury that the plaintiff to recover must show that the restraint was physical, and not merely a moral influence; that it must have been actual physical restraint, in the sense that one intentionally locked into a room would be physically restrained but not necessarily involving physical force upon the person; that it was not necessary that the defendant, or any person by his direction, should lay his hand upon the plaintiff; that if the plaintiff was restrained so that she could not leave the yacht Kingdom by the intentional refusal to furnish transportation as agreed, she not having it in her power to escape otherwise, it would be a physical restraint and unlawful imprisonment. We think the instructions were apt and sufficient. If one should, without right, turn the key in a door, and thereby prevent a person in the room from leaving, it would be the simplest form of unlawful imprisonment. The restraint is physical. The four walls and the locked door are physical impediments to escape. Now is it different when one who is in control of a vessel at anchor, within practical rowing distance from the shore, who has agreed that a guest on board shall be free to leave, there being no means to leave except by rowboats, wrongfully refuses the guest the use of a boat? The boat is the key. By refusing the boat he turns the key. The guest is as effectually locked up as if there were walls along the sides of the vessel. The restraint is physical. The impassable sea is the physical barrier. \* \* \*

A careful study of the evidence leads us to conclude that the jury were warranted in finding that the defendant was guilty of unlawful imprisonment. This, to be sure, is not an action based upon the defendant’s failure to keep his agreement to permit the plaintiff to leave the yacht as soon as it should reach shore. But his duty under the circumstances is an important consideration. It cannot be believed that either party to the agreement understood that it was his duty merely to bring her to an American harbor. The agreement implied that she was to go ashore. There was no practical way for her to go ashore except in the yacht’s boats. The agreement must be understood to mean that he would bring her to land, or to allow her to



get to land, by the only available means. The evidence is that he refused her a boat. His refusal was wrongful. The case leaves not the slightest doubt that he had the power to control the boats, if he chose to exercise it. It was not enough for him to leave it to the husband to say whether she might go ashore or not. She had a personal right to go on shore. If the defendant personally denied her the privilege, as the jury might find he did, it was a wrongful denial.

### NOTES AND QUESTIONS

1. A woman tells her boyfriend she does not want to see him anymore, but agrees to ride with him just to the store and back. When they return to her parents' house and she opens the car door, the boyfriend suddenly starts the car off, making it dangerous for her to exit the moving vehicle. False imprisonment? See *Noguchi v. Nakamura*, 2 Haw.App. 655, 638 P.2d 1383 (1982).

2. In *Talcott v. National Exhibition Co.*, 144 App.Div. 337, 128 N.Y.S. 1059 (1911), plaintiff was one of a crowd seeking admission to the baseball game between the Chicago Cubs and the New York Giants that played off the tie for the 1908 National League pennant. This was necessary because of a one-to-one tie in an earlier game between the same teams, produced when Fred Merkle of the Giants pulled his famous "bonehead play" in failing to touch second base. For two fascinating accounts of that game told by other players in it, see L. Ritter, *The Glory of Their Times* 98–100 and 124–218 (1966); the book has a picture of the after-game crowd in the Polo Grounds at page 126. The Giants, who would have won the pennant except for the Merkle error, lost the playoff game. Plaintiff succeeded in entering an enclosure where tickets were sold, but found that he could not get in to the stands. Defendant closed the entrance gates behind him to prevent injuries from the crush. There was another exit, but because defendant failed to inform plaintiff of its existence, he remained within the enclosure for more than an hour. In his action for false imprisonment, a verdict and judgment in his favor were affirmed. It was held that while the defendant might have been justified in closing the gates, it was then under a duty to inform plaintiff of the other exit.

3. Members of a religious cult are abducted by their relatives and subjected to deprogramming. Is this false imprisonment? *Eilers v. Coy*, 582 F.Supp. 1093 (D.Minn.1984).

4. Plaintiff boarded a plane in Washington, D.C., for a flight to New York where he was to attend a reception at the United Nations. After sitting on the tarmac for over an hour waiting for his flight to take off, plaintiff realized he would miss the reception and demanded to be returned to the terminal. Is the airline liable for failing to allow him to leave the airplane after it had pulled away from the gate? After it had sat on the tarmac for an hour? Somewhere above New Jersey? See *Abourezk v. New York Airlines*, 895 F.2d 1456 (D.C.Cir.1990) (no duty to release passenger until plane reached New York absent exigent circumstances not present in the case).

## 5. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

### **State Rubbish Collectors Ass'n v. Siliznoff**

Supreme Court of California, 1952.  
38 Cal.2d 330, 240 P.2d 282.

[The State Rubbish Collectors Association sued Siliznoff to collect on certain notes. Siliznoff sought cancellation of the notes because of duress

and want of consideration. In addition, he sought general and punitive damages because of alleged “assaults” made on him. The evidence was that Siliznoff had collected the trash from the Acme Brewing Company, which the Association regarded as within the territory of another member of the Association named Abramoff. The defendant was called before the Association and ordered to pay over the collected money to Abramoff, as a result of which he signed the notes in question. Further facts appear in the opinion.

The jury returned a verdict for Siliznoff on the original complaint and on the counterclaim. Siliznoff obtained a judgment against the Association for \$1,250 general and special damages and \$4,000 punitive damages. The Association appealed the judgment.]

TRAYNOR, J. \* \* \* Plaintiff’s primary contention is that the evidence is insufficient to support the judgment. Defendant testified that: \* \* \*

Andikian [an inspector of the Association] told defendant that “‘We will give you up till tonight to get down to the board meeting and make some kind of arrangements or agreements about the Acme Brewery, or otherwise we are going to beat you up.’ \* \* \* He says he either would hire somebody or do it himself. And I says, ‘Well, what would they do to me?’ He says, well, they would physically beat me up first, cut up the truck tires or burn the truck, or otherwise put me out of business completely. He said if I didn’t appear at that meeting and make some kind of an agreement that they would do that, but he says up to then they would let me alone, but if I walked out of that meeting that night they would beat me up for sure.” Defendant attended the meeting and protested that he owed nothing for the Acme account and in any event could not pay the amount demanded. He was again told by the president of the association that “‘that table right there [the board of directors] ran all the rubbish collecting in Los Angeles and if there was any routes to be gotten that they would get them and distribute them among their members \* \* \*.” After two hours of further discussion defendant agreed to join the association and pay for the Acme account. He promised to return the next day and sign the necessary papers. He testified that the only reason “‘they let me go home, is that I promised that I would sign the notes the very next morning.” The president “‘made me promise on my honor and everything else, and I was scared, and I knew I had to come back, so I believe he knew I was scared and that I would come back. That’s the only reason they let me go home.” Defendant also testified that because of the fright he suffered during his dispute with the association he became ill and vomited several times and had to remain away from work for a period of several days.

Plaintiff contends that the evidence does not establish an assault against defendant because the threats made all related to action that might take place in the future; that neither Andikian nor members of the board of directors threatened immediate physical harm to defendant. [C] We have concluded, however, that a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being,

whether or not the threats are made under such circumstances as to constitute a technical assault.

In the past it has been frequently stated that the interest in emotional and mental tranquillity is not one that the law will protect from invasion in its own right. [Cc] As late as 1934 the Restatement of Torts took the position that "The interest in mental and emotional tranquillity and, therefore, in freedom from mental and emotional disturbance is not, as a thing in itself, regarded as of sufficient importance to require others to refrain from conduct intended or recognizably likely to cause such a disturbance." Restatement, Torts, § 46, comment *c*. The Restatement explained the rule allowing recovery for the mere apprehension of bodily harm in traditional assault cases as an historical anomaly (§ 24, comment *c*), and the rule allowing recovery for insulting conduct by an employee of a common carrier as justified by the necessity of securing for the public comfortable as well as safe service (§ 48, comment *c*).

The Restatement recognized, however, that in many cases mental distress could be so intense that it could reasonably be foreseen that illness or other bodily harm might result. If the defendant intentionally subjected the plaintiff to such distress and bodily harm resulted, the defendant would be liable for negligently causing the plaintiff bodily harm. Restatement, Torts, §§ 306, 312. Under this theory the cause of action was not founded on a right to be free from intentional interference with mental tranquillity, but on the right to be free from negligent interference with physical well-being. A defendant who intentionally subjected another to mental distress without intending to cause bodily harm would nevertheless be liable for resulting bodily harm if he should have foreseen that the mental distress might cause such harm.

The California cases have been in accord with the Restatement in allowing recovery where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. [Cc]

The view has been forcefully advocated that the law should protect emotional and mental tranquillity as such against serious and intentional invasions, [cc] and there is a growing body of case law supporting this position. [Cc] In recognition of this development the American Law Institute amended section 46 of the Restatement of Torts in 1947 to provide:

"One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it."

In explanation it is stated that "The interest in freedom from severe emotional distress is regarded as of sufficient importance to require others to refrain from conduct intended to invade it. Such conduct is tortious. The injury suffered by the one whose interest is invaded is frequently far more serious to him than certain tortious invasions of the interest in bodily integrity and other legally protected interests. In the absence of a privilege, the actor's conduct has no social utility; indeed it is anti-social. No reason or policy requires such an actor to be protected from the liability which

usually attaches to the wilful wrongdoer whose efforts are successful.” (Restatement of the Law, 1948 Supplement, Torts, § 46, comment *d.*)

There are persuasive arguments and analogies that support the recognition of a right to be free from serious, intentional and unprivileged invasions of mental and emotional tranquillity. If a cause of action is otherwise established, it is settled that damages may be given for mental suffering naturally ensuing from the acts complained of [cc], and in the case of many torts, such as assault, battery, false imprisonment and defamation, mental suffering will frequently constitute the principal element of damages. [C] In cases where mental suffering constitutes a major element of damages it is anomalous to deny recovery because the defendant’s intentional misconduct fell short of producing some physical injury.

It may be contended that to allow recovery in the absence of physical injury will open the door to unfounded claims and a flood of litigation, and that the requirement that there be physical injury is necessary to insure that serious mental suffering actually occurred. The jury is ordinarily in a better position, however, to determine whether outrageous conduct results in mental distress than whether that distress in turn results in physical injury. From their own experience jurors are aware of the extent and character of the disagreeable emotions that may result from the defendant’s conduct, but a difficult medical question is presented when it must be determined if emotional distress resulted in physical injury. [C] Greater proof that mental suffering occurred is found in the defendant’s conduct designed to bring it about than in physical injury that may or may not have resulted therefrom. \* \* \*

In the present case plaintiff caused defendant to suffer extreme fright. By intentionally producing such fright it endeavored to compel him either to give up the Acme account or pay for it, and it had no right or privilege to adopt such coercive methods in competing for business. In these circumstances liability is clear. \* \* \*

The judgment is affirmed.

### NOTES AND QUESTIONS

1. Why not assault? Why not false imprisonment? Assuming neither tort occurred, how many attorneys in 1952 would have thought of bringing a cross-complaint in this case for “intentional infliction of emotional harm”? How many judges would have adopted it?

2. But what form of tort has been unleashed? Is it as definite in character as those that arose out of the writ of trespass? What would the result have been in the main case if the Association had only threatened to close down Siliznoff’s business, but had not made threats to his physical well-being? Do you agree that the jury can more easily determine whether conduct is outrageous than whether physical injury resulted from emotional harm? If so, does this fact suggest that a claim should be allowed?

3. The seminal case to allow recovery for the intentional infliction of mental distress as a distinct tort was *Wilkinson v. Downton*, [1897] 2 Q.B. 57, in which a practical joker amused himself by telling the plaintiff that her husband had been

smashed up in an accident, was lying at The Elms in Leytonstone with both legs broken, and that she was to go to him at once in a cab with two pillows to fetch him home. The shock to her nervous system caused serious physical illness with permanent consequences, and at one time threatened her reason. The cause of action through which defendant was held liable is unclear to the reader of the opinion and apparently to the court as well.

4. *Interference with Human Bodies.* Before the recognition of a separate tort for intentional infliction of emotional distress, a number of courts had allowed recovery for mental distress at the intentional mutilation or disinterment of a dead body or for interference with proper burial. See, for example, *Alderman v. Ford*, 146 Kan. 698, 72 P.2d 981 (1937); *Gostkowski v. Roman Catholic Church*, 262 N.Y. 320, 186 N.E. 798 (1933); *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970). In these and later cases, the courts have talked of a property right in the body, said to be in the next of kin or a group of close relatives, which serves as a foundation for the action for mental disturbance. See, for example, *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir.1995) (discussing Ohio and Michigan law) (unauthorized removal of corneas and eyeballs by coroner). In *Gadbury v. Bleitz*, 133 Wash. 134, 233 P. 299 (1925), where the body was held without burial with demand for payment of another debt, the court avoided difficulties surrounding right of ownership by recognizing that the tort was in reality the intentional infliction of mental distress upon the survivors by extreme outrage. In accord, *Gray Brown–Service Mortuary, Inc. v. Lloyd*, 729 So.2d 280, 285 (Ala. 1999) (“It has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering.”)

5. *Common Carriers and Innkeepers* have been held to a higher standard of conduct and sometimes held liable for using insulting language to their passengers and patrons. See, e.g., *Lipman v. Atlantic Coast Line R.R. Co.*, 108 S.C. 151, 93 S.E. 714 (1917) (carrier); *Emmke v. De Silva*, 293 F. 17 (8th Cir. 1923) (hotel). But cf. *Wallace v. Shoreham Hotel Corp.*, 49 A.2d 81 (D.C. Mun. App. 1946) (restaurant patron did not state cause of action based on waiter’s insult) and *Bethel v. N.Y.C. Transit Authority*, 92 N.Y.2d 348, 681 N.Y.S.2d 201, 703 N.E.2d 1214 (1998) (abolishing higher standard of care for common carriers).

6. As the principal case indicates, § 46 of the Restatement of Torts was changed in the 1948 Supplement to recognize the cause of action for the intentional infliction of severe emotional distress, called “outrage” in some jurisdictions. As with any newly recognized cause of action, the courts in each jurisdiction must struggle with what its contours will be. What sorts of conduct constitutes “extreme and outrageous” conduct? Are words alone enough? Should the plaintiff’s individual vulnerabilities be taken into account? How does the jury determine whether the emotional distress is “severe”? Is it necessary that the defendant intended to cause the mental disturbance, or that it be substantially certain to follow, within the rule stated in *Garratt v. Dailey*, page 17?

## **Slocum v. Food Fair Stores of Florida**

Supreme Court of Florida, 1958.  
100 So.2d 396.

DREW, JUSTICE. This appeal is from an order dismissing a complaint for failure to state a cause of action. Simply stated, the plaintiff sought money damages for mental suffering or emotional distress, and an ensuing heart

attack and aggravation of pre-existing heart disease, allegedly caused by insulting language of the defendant's employee directed toward her while she was a customer in its store. Specifically, in reply to her inquiry as to the price of an item he was marking, he replied: "If you want to know the price, you'll have to find out the best way you can \* \* \* you stink to me." She asserts, in the alternative, that the language was used in a malicious or grossly reckless manner, "or with intent to inflict great mental and emotional disturbance to said plaintiff."

No great difficulty is involved in the preliminary point raised as to the sufficiency of damages alleged, the only direct injury being mental or emotional with physical symptoms merely derivative therefrom. [C] While that decision would apparently allow recovery for mental suffering, even absent physical consequences, inflicted in the course of other intentional or malicious torts, it does not resolve the central problem in this case, i.e. whether the conduct here claimed to have caused the injury, the use of insulting language under the circumstances described, constituted an actionable invasion of a legally protected right. Query: does such an assertion of a deliberate disturbance of emotional equanimity state an independent cause of action in tort?

Appellant's fundamental argument is addressed to that proposition. The case is one of first impression in this jurisdiction, and she contends that this Court should recognize the existence of a new tort, an independent cause of action for intentional infliction of emotional distress.

A study of the numerous references on the subject indicates a strong current of opinion in support of such recognition, in lieu of the strained reasoning so often apparent when liability for such injury is predicated upon one or another of several traditional tort theories. \* \* \*

A most cogent statement of the doctrine covering tort liability for insult has been incorporated in the Restatement of the Law of Torts, 1948 supplement, sec. 46, entitled "Conduct intended to cause emotional distress only." It makes a blanket provision for liability on the part of "one, who, without a privilege to do so, intentionally causes severe emotional distress to another," indicating that the requisite intention exists "when the act is done for the purpose of causing the distress or with knowledge \* \* \* that severe emotional distress is substantially certain to be produced by [such] conduct." Comment (a), Sec. 46, *supra*. Abusive language is, of course, only one of the many means by which the tort could be committed.

However, even if we assume, without deciding, the legal propriety of that doctrine, a study of its factual applications shows that a line of demarcation should be drawn between conduct likely to cause mere "emotional distress" and that causing "severe emotional distress," so as to exclude the situation at bar. [C] "So far as it is possible to generalize from the cases, the rule which seems to be emerging is that there is liability only for conduct exceeding all bounds which could be tolerated by society, of a nature especially calculated to cause mental damage of a very serious kind." [C] And the most practicable view is that the functions of court and jury are no different than in other tort actions where there is at the outset

a question as to whether the conduct alleged is so legally innocuous as to present no issue for a jury. [C]

This tendency to hinge the cause of action upon the degree of the insult has led some courts to reject the doctrine in toto. [C] Whether or not this is desirable, it is uniformly agreed that the determination of whether words or conduct are actionable in character is to be made on an objective rather than subjective standard, from common acceptance. The unwarranted intrusion must be calculated to cause "severe emotional distress" to a person of ordinary sensibilities, in the absence of special knowledge or notice. There is no inclination to include all instances of mere vulgarities, obviously intended as meaningless abusive expressions. While the manner in which language is used may no doubt determine its actionable character, appellant's assertion that the statement involved in this case was made to her with gross recklessness, etc., cannot take the place of allegations showing that the words were intended to have real meaning or serious effect.

A broader rule has been developed in a particular class of cases, usually treated as a distinct and separate area of liability originally applied to common carriers. Rest.Torts, per. ed., sec. 48. The courts have from an early date granted relief for offense reasonably suffered by a patron from insult by a servant or employee of a carrier, hotel, theater, and most recently, a telegraph office. The existence of a special relationship, arising either from contract or from the inherent nature of a non-competitive public utility, supports a right and correlative duty of courtesy beyond that legally required in general mercantile or personal relationships. [Cc]

In view of the concurrent development of the cause of action first above described, there is no impelling reason to extend the rule of the latter cases. Their rationale does not of necessity cover the area of business invitees generally, where the theory of respondeat superior underlying most liabilities of the employer would dictate some degree of conformity to standards of individual liability. This factor, together with the stringent standards of care imposed in a number of the carrier cases [c], may have influenced the treatment of the subject by editors of the Restatement, where the statement of the carrier doctrine is quite limited in scope and classified separately from the section covering the more general area of liability under consideration. But whether or not these rules are ultimately adopted in this jurisdiction, the facts of the present case cannot be brought within their reasonable intendment.

Affirmed.

### NOTES AND QUESTIONS

1. Why is the intentional infliction of mental disturbance by the insult not a tort in itself?
2. "Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be. \* \* \* Of course there is danger of getting into the realm of the trivial in this matter of insulting

language. No pressing social need requires that every abusive outburst be converted into a tort; upon the contrary, it would be unfortunate if the law closed all the safety valves through which irascible tempers might legally blow off steam.” Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 *Harv.L.Rev.* 1033, 1035, 1053 (1936).

3. A South Carolina gentleman, incensed at his inability to get a telephone number, so far forgets his chivalry as to call the operator a God damned woman, and to say that if he were there he would break her God damned neck. The unprecedented experience, according to her allegations, causes her extreme mental disturbance and leaves her a nervous wreck. Does this state a cause of action? *Brooker v. Silverthorne*, 111 S.C. 553, 99 S.E. 350, 352 (1919) (language attributed to defendant “merits severest condemnation and subjects user to the scorn and contempt of his fellow men. But it is not civilly actionable.”)

4. None of these was found actionable: *Halliday v. Cienkowski*, 333 Pa. 123, 3 A.2d 372 (1939) (“Scotch bitch,” “bastard,” and “bum”); *Atkinson v. Bibb Mfg. Co.*, 50 Ga.App. 434, 178 S.E. 537 (1935) (foreman cursing discharged woman, with open knife in his hand); *Kramer v. Ricksmeier*, 159 Iowa 48, 139 N.W. 1091 (1913) (profanity and abuse over the telephone, with threats of future violence); *Barry v. Baugh*, 111 Ga.App. 813, 143 S.E.2d 489 (1965) (“crazy”).

5. What if the slurs or insults focus on racial, ethnic, or sexual characteristics? Most courts have found them not so outrageous as to be intolerable in a civilized society. See, for example, *Harville v. Lowville Central School Dist.*, 245 A.D.2d 1106, 667 N.Y.S.2d 175 (App. Div. 1997) (student called “Polish Nazi” by teacher); *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239 (5th Cir. 1993) (applying Texas law) (worker called “wetback” by supervisor); *Taggart v. Drake Univ.*, 549 N.W.2d 796 (Iowa 1996) (in fit of temper, dean addresses faculty member as “young woman” and refers to her in a “sexist and condescending manner”). Such words may be considered along with other conduct, however, in making a claim. *Contreras v. Crown Zellerbach Corp.*, 88 Wash.2d 735, 736, 565 P.2d 1173, 1174 (1977) (“continuous humiliation and embarrassment by reason of racial jokes, slurs and comments made in his presence” by coworkers and supervisors held to state a claim).

6. Note the last sentence of the opinion in the principal case. The Supreme Court of Florida did not adopt intentional infliction of emotional distress until almost thirty years later. *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla. 1985).

### **Harris v. Jones**

Court of Appeals of Maryland, 1977.  
281 Md. 560, 380 A.2d 611.

MURPHY, CHIEF JUDGE. \* \* \* The plaintiff, William R. Harris, a 26-year-old, 8-year employee of General Motors Corporation (GM), sued GM and one of its supervisory employees, H. Robert Jones, in the Superior Court of Baltimore City. The declaration alleged that Jones, aware that Harris suffered from a speech impediment which caused him to stutter, and also aware of Harris’ sensitivity to his disability, and his insecurity because of it, nevertheless “maliciously and cruelly ridiculed \* \* \* [him] thus causing tremendous nervousness, increasing the physical defect itself and further injuring the mental attitude fostered by the Plaintiff toward his problem



and otherwise intentionally inflicting emotional distress.” It was also alleged in the declaration that Jones’ actions occurred within the course of his employment with GM and that GM ratified Jones’ conduct.

The evidence at trial showed that Harris stuttered throughout his entire life. While he had little trouble with one syllable words, he had great difficulty with longer words or sentences, causing him at times to shake his head up and down when attempting to speak.

During part of 1975, Harris worked under Jones’ supervision at a GM automobile assembly plant. Over a five-month period, between March and August of 1975, Jones approached Harris over 30 times at work and verbally and physically mimicked his stuttering disability. In addition, two or three times a week during this period, Jones approached Harris and told him, in a “smart manner,” not to get nervous. As a result of Jones’ conduct, Harris was “shaken up” and felt “like going into a hole and hide.”

On June 2, 1975, Harris asked Jones for a transfer to another department; Jones refused, called Harris a “troublemaker” and chastised him for repeatedly seeking the assistance of his committeeman, a representative who handles employee grievances. On this occasion, Jones, “shaking his head up and down” to imitate Harris, mimicked his pronunciation of the word “committeeman,” which Harris pronounced “mmitteeman.” \* \* \*

Harris had been under the care of a physician for a nervous condition for six years prior to the commencement of Jones’ harassment. He admitted that many things made him nervous, including “bosses.” Harris testified that Jones’ conduct heightened his nervousness and his speech impediment worsened. He saw his physician on one occasion during the five-month period that Jones was mistreating him; the physician prescribed pills for his nerves.

Harris admitted that other employees at work mimicked his stuttering. Approximately 3,000 persons were employed on each of two shifts, and Harris acknowledged the presence at the plant of a lot of “tough guys,” as well as profanity, name-calling and roughhousing among the employees. He said that a bad day at work caused him to become more nervous than usual. He admitted that he had problems with supervisors other than Jones, that he had been suspended or relieved from work 10 or 12 times, and that after one such dispute, he followed a supervisor home on his motorcycle, for which he was later disciplined.

On this evidence, \* \* \* the jury awarded Harris \$3,500 compensatory damages and \$15,000 punitive damages against both Jones and GM. [This was reversed by the Court of Special Appeals.]

In concluding that the intentional infliction of emotional distress, standing alone, may constitute a valid tort action, the Court of Special Appeals relied upon Restatement (Second) of Torts, ch. 2, Emotional Distress, § 46 (1965), which provides, in pertinent part:

“§ 46. Outrageous Conduct Causing Severe Emotional Distress

“(1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability

for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”

The court noted that the tort was recognized, and its boundaries defined, in *W. Prosser, Law of Torts* § 12, at 56 (4th ed. 1971), as follows:

“So far as it is possible to generalize from the cases, the rule which seems to have emerged is that there is liability for conduct exceeding all bounds usually tolerated by decent society, of a nature which is especially calculated to cause, and does cause, mental distress of a very serious kind.”

The trend in other jurisdictions toward recognition of a right to recover for severe emotional distress brought on by the intentional act of another is manifest. Indeed, 37 jurisdictions appear now to recognize the tort as a valid cause of action. \* \* \*

[F]our elements \* \* \* must coalesce to impose liability for intentional infliction of emotional distress:

- (1) The conduct must be intentional or reckless;
- (2) The conduct must be extreme and outrageous;
- (3) There must be a causal connection between the wrongful conduct and the emotional distress;
- (4) The emotional distress must be severe. \* \* \*

[The intermediate Court of Special Appeals had found that the first two elements were established but reversed on the ground that the last two elements were not.]

Whether the conduct of a defendant has been “extreme and outrageous,” so as to satisfy that element of the tort, has been a particularly troublesome question. Section 46 of the Restatement, comment *d*, states that “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” The comment goes on to state that liability does not extend, however: “to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. \* \* \*”

In determining whether conduct is extreme and outrageous, it should not be considered in a sterile setting, detached from the surroundings in which it occurred. [C] The personality of the individual to whom the misconduct is directed is also a factor. “There is a difference between violent and vile profanity addressed to a lady, and the same language to a Butte miner and a United States marine.” *Prosser, Intentional Infliction of Mental Suffering: A New Tort*, 37 *Mich.L.Rev.* 874, 887 (1939). \* \* \*

It is for the court to determine, in the first instance, whether the defendant’s conduct may reasonably be regarded as extreme and outra-

geous; where reasonable men may differ, it is for the jury to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability. \* \* \*

While it is crystal clear that Jones' conduct was intentional, we need not decide whether it was extreme or outrageous, or causally related to the emotional distress which Harris allegedly suffered.<sup>2</sup> The fourth element of the tort—that the emotional distress must be severe—was not established by legally sufficient evidence justifying submission of the case to the jury. That element of the tort requires the plaintiff to show that he suffered a *severely* disabling emotional response to the defendant's conduct. The severity of the emotional distress is not only relevant to the amount of recovery, but is a necessary element to any recovery. \* \* \*

Assuming that a causal relationship was shown between Jones' wrongful conduct and Harris' emotional distress, we find no evidence, legally sufficient for submission to the jury, that the distress was "severe" within the contemplation of the rule requiring establishment of that element of the tort. The evidence that Jones' reprehensible conduct humiliated Harris and caused him emotional distress, which was manifested by an aggravation of Harris' pre-existing nervous condition and a worsening of his speech impediment, was vague and weak at best. \* \* \* While Harris' nervous condition may have been exacerbated somewhat by Jones' conduct, his family problems antedated his encounter with Jones and were not shown to be attributable to Jones' actions. Just how, or to what degree, Harris' speech impediment worsened is not revealed by the evidence. Granting the cruel and insensitive nature of Jones' conduct toward Harris, and considering the position of authority which Jones held over Harris, we conclude that the humiliation suffered was not, as a matter of law, so intense as to constitute the "severe" emotional distress required to recover for the tort of intentional infliction of emotional distress.

*Judgment affirmed; costs to be paid by appellant.*

### NOTES AND QUESTIONS

1. *Conduct Exceeding All Bounds Usually Tolerated by Decent Society*. How culpable must defendant's conduct be before it reaches the level of being extreme enough to be deemed tortious? Some guidelines can be found in decided cases. For example, it is generally held that the mere solicitation of a woman to illicit intercourse is not only not an assault but does not give rise to any other cause of action. *Reed v. Maley*, 115 Ky. 816, 74 S.W. 1079 (1903). "The view being, apparently, that there is no harm in asking." Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 Harv.L.Rev. 1033, 1055 (1936). *Jones v. Clinton*, 990 F.Supp. 657, 677 (E.D.Ark.1998) (applying Arkansas law) ("While the Court will certainly agree that plaintiff's allegations describe offensive conduct, the Court, as previously noted, has found that the Governor's alleged conduct does not constitute sexual assault. Rather, the conduct as alleged by plaintiff describes a

2. The fact that Harris may have had some pre-existing susceptibility to emotional distress does not necessarily preclude liability if it can be shown that the conduct intensified the pre-existing condition of psychological stress. [Cc]

mere sexual proposition or encounter, albeit an odious one. . . . The Court is not aware of any authority holding that such a sexual encounter or proposition of the type alleged in this case, without more, gives rise to a claim of outrage.”)

In *Samms v. Eccles*, 11 Utah 2d 289, 358 P.2d 344 (1961), a married woman was hounded by continued telephone calls from May to December, some of them late at night; and on one occasion defendant came to her home and made an indecent exposure of his person. The court stated that under usual circumstances solicitation would not be actionable (“It seems to be a custom of long standing and one which in all likelihood will continue”), but found the “aggravated circumstances” in this case sufficient to make the defendant liable.

Plaintiff alleged that her rabbi had induced her to enter into a sexual relationship with him in the guise of therapy to assist her in finding a husband. *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15, 22, 892 N.E.2d 375, 862 N.Y.S.2d 311 (2008) (even if plaintiff could prove that her acquiescence was obtained through lies, manipulation, or other morally opprobrious conduct, the rabbi’s conduct was not so outrageous in character and extreme in degree so as to go beyond all possible bounds of decency and be utterly intolerable in a civilized community).

2. Courts are reluctant to subject either internal family disputes or petty but strongly felt antagonisms to the sanctions of tort law. However, when conduct exceeds all reasonable bounds of behavior tolerated by society, courts are likely to find that a claim has been stated. Cf. *Miller v. Currie*, 50 F.3d 373 (6th Cir.1995) (applying Ohio law) (plaintiff’s brother and sister-in-law and the employees of a nursing home prevented her from seeing her ninety-eight-year old mother); *Halio v. Lurie*, 15 A.D.2d 62, 222 N.Y.S.2d 759 (1961) (man who had jilted a woman wrote her jeering verses and taunting letters); *Jackson v. Brown*, 904 P.2d 685 (Utah 1995) (last minute cancellation of wedding not enough for outrage, but courting woman, proposing, and making arrangements for wedding including applying for license while married to someone else may be); *Smith v. Malouf*, 722 So.2d 490 (Miss. 1998) (teenager and her parents hid her location from the father of her baby so that baby could be secretly placed with strangers for adoption); *Flamm v. Van Nierop*, 56 Misc.2d 1059, 291 N.Y.S.2d 189 (1968) (defendant constantly drove behind plaintiff at a “dangerously close distance,” phoned him unnecessarily at his home and business and either hung up or remained on the line in silence, and “dashed” at him in public places).

3. Is filing a frivolous lawsuit against someone conduct that is sufficiently outrageous to permit recovery for intentional infliction of emotional distress? After being injured in a fight in a parking lot that was poorly lit, crowded, and chaotic, plaintiff identified a man as her assailant even though she only had a vague impression of the physical characteristics of the person responsible for breaking her leg and someone else had apologized for causing her injury. After the man she identified was found not guilty on the criminal charges arising out of her identification, plaintiff filed a civil suit against the man. He counterclaimed for intentional infliction of emotional distress. *Davis v. Currier*, 704 A.2d 1207 (Maine 1997) (no cause of action for intentional infliction of emotional distress); *Swerdlick v. Koch*, 721 A.2d 849 (R.I. 1998) (no cause of action against neighbor who repeatedly photographed and maintained a log of activity in attempt to prove plaintiffs were illegally operating a mail-order business out of their home). What if a juror, found in contempt for failing to show up one day two weeks into the trial of someone accused of torturing and killing six people, was placed alone in a jail cell with the alleged murderer, was questioned and berated by the alleged murderer, and was

laughed at by the jailors who placed her there? *Johnson v. Wayne County*, 213 Mich.App. 143, 540 N.W.2d 66 (1995) (states a cause of action).

4. What if a hospital had a policy of placing patients infected with the HIV virus in the same rooms as patients who were not, without disclosing that fact? Patient accidentally used his roommate's razor to shave and was then informed by the roommate that roommate was infected with HIV. Patient alleges that the hospital's conduct is outrageous and that he suffered severe emotional distress as a result. Liability? What other information would you like to have before deciding this issue? *Bain v. Wells*, 936 S.W.2d 618 (Tenn.1997).

5. Is there any common theme or set of similar factors running through the following cases?

A. *State Rubbish Collectors Association v. Siliznoff*, page 51.

B. Defendant, a private detective representing that he was a police officer, threatened to charge the plaintiff, a resident alien, with espionage unless she turned over to him certain private letters in her possession. She suffered severe mental disturbance and was made seriously ill. The defendant was held liable. *Janvier v. Sweeney*, [1919] 2 K.B. 316.

C. Defendants, school authorities, called a high school girl to the school office and bullied and badgered her for a considerable length of time, threatening her with prison and with public disgrace for herself and her family, unless she confessed to immoral conduct with various men. They succeeded in extorting from her a confession of misconduct, of which she was innocent. She suffered severe mental disturbance and resulting illness. Defendants were held liable. *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926).

D. *Collecting Agencies*. While reasonable attempts to collect a debt lead to no liability, even though they may be expected to, and do, cause serious mental distress, more extreme conduct may produce a different result. Defendant, a creditor, had plaintiff called to the telephone of her neighbor, with the message that it was an emergency call. Defendant began the conversation by telling plaintiff that "this is going to be a shock; it is as much of a shock to me to have to tell you as it will be to you." When plaintiff said that she was prepared for the message, the defendant let her have it: "This is the Federal Outfitting Company—why don't you pay your bill?" Plaintiff suffered severe nervous shock and resulting serious illness. A complaint alleging these facts was held to state a cause of action. *Bowden v. Spiegel, Inc.*, 96 Cal.App.2d 793, 216 P.2d 571 (1950). A veterinarian and an animal hospital threaten to "do away with" plaintiffs' dog unless plaintiffs paid in cash a bill for treating the dog for injuries suffered when struck by an automobile. See *Lawrence v. Stanford and Ashland Terrace Animal Hospital*, 655 S.W.2d 927 (Tenn.1983). See also *Cadle Co. v. Hobbs*, 673 So.2d 1363 (La. App. 1996) (implying that because plaintiff was African-American, no one would take her word against debt collector's).

E. There are similar cases involving the outrageous tactics of insurance adjusters seeking to force a settlement. *Continental Cas. Co. v. Garrett*, 173 Miss. 676, 161 So. 753 (1935). See also, as to refusal of a liability insurer to settle a claim, *Fletcher v. Western Nat. Life Ins. Co.*, 10 Cal.App.3d 376, 89 Cal.Rptr. 78 (1970). When the insurance company is reasonable in its refusal to settle a claim, it will not be held liable simply because its client happened to be an excessive worrier about fiscal problems. See *Rossignol v. Noel*, 289 A.2d 691 (Me.1972).

F. Other cases have involved evicting landlords, *Kaufman v. Abramson*, 363 F.2d 865 (4th Cir.1966), and even high pressure salesmen. See *Turner v. ABC Jalousie Co.*, 251 S.C. 92, 160 S.E.2d 528 (1968).

6. Many cases, like the principal case, arise out of workplace behavior. *Anderson v. Oklahoma Temp. Svcs., Inc.*, 925 P.2d 574 (Okla. App. 1996) (supervisor's use of profanity, smoking around employee after being asked to stop, and vulgar behavior not enough to state a cause of action for extreme and outrageous conduct) and *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987) (employer liable for intentional infliction of emotional distress of plaintiff due to co-employee's actions in repeatedly subjecting plaintiff to physical assaults and vulgar remarks). In the employment context, some courts have held that a plaintiff's status as an employee should entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger while others do not. Compare *Alcorn v. Anbro Eng'g, Inc.*, 2 Cal.3d 493, 468 P.2d 216, 86 Cal.Rptr. 88 (1970) with *Texas Farm Bureau Mut. Ins. Cos. v. Sears*, 84 S.W.3d 604, 611 (Tex. 2002) (while an employer's conduct might in some instances be unpleasant, the employer must have some discretion to "supervise, review, criticize, demote, transfer, and discipline" its workers; thus, only very unusual employment disputes will give rise to cause of action for intentional infliction of emotional distress).

7. *Vulnerability of Plaintiff.* The plaintiff's sensitivities may be a factor in deeming defendant's conduct extreme and outrageous. Cf. *Korbin v. Berlin*, 177 So.2d 551 (Fla.App.1965), where defendant approached a six-year-old girl and said to her: "Do you know that your mother took a man away from his wife? Do you know that God is going to punish them? Do you know that a man is sleeping in your mother's room? God will punish them." It was alleged that the child suffered serious mental distress and resulting physical injury. Should a demurrer to a complaint pleading these facts be overruled? Cf. *Delta Fin. Co. v. Ganakas*, 93 Ga.App. 297, 91 S.E.2d 383 (1956) (eleven-year-old child home alone frightened by threats she would be taken to jail if she did not open door for defendant seeking to repossess television set). *Drejza v. Vaccaro*, 650 A.2d 1308 (D.C.App.1994) (outrageousness of police officer's conduct while interviewing rape victim must be evaluated in light of the fact that it occurred only an hour after the rape, when she would be expected to be more susceptible to emotional distress). *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001) (same). After fourteen years, Plaintiff's illness made her no longer able to care for her two beloved Appaloosa horses, so she made arrangements for them to be pastured on defendants' property. Although defendants assured her they would take good care of the horses and return them to her if they could no longer keep them, they in fact sold them to a buyer for slaughter within a week of when they arrived. When plaintiff came to visit them and discovered them gone, defendants lied about their whereabouts and covered up the sale until it was too late for plaintiff to save the horses from the slaughter house. *Burgess v. Taylor*, 44 S.W.3d 806 (Ky. App. 2001) (in upholding jury verdict for plaintiff, court notes it appropriate to take into account defendants' knowledge of plaintiff's vulnerability to emotional distress based on her attachment to the horses).

8. Should special protection be accorded to pregnant women? When a creditor came to the house of a woman seven months pregnant and screamed profanity, abuse, and accusations of dishonesty in the presence of others and she suffered severe emotional disturbance which resulted in a miscarriage, she was allowed to recover in *Kirby v. Jules Chain Stores Corp.*, 210 N.C. 808, 188 S.E. 625 (1936). See *Bartow v. Smith*, 149 Ohio St. 301, 78 N.E.2d 735 (1948), a holding that otherwise was overruled by *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983).

9. Should protection also be given to the hypersensitive or idiosyncratic plaintiff? In one early landmark case, protection was allowed. Plaintiff, an eccentric woman who had in the past been treated for mental illness, believed that her ancestors had concealed a pot of gold by burying it. After a fortune teller gave her a map that purportedly showed the land upon which the pot was buried, she spent months digging for it. Defendants filled a pot with rocks and dirt and buried it where plaintiff would find it, placing a note on it that directed the finder to gather all the heirs and wait three days before opening it. A large number of townspeople, including the practical jokers, the heirs, a judge, and other town officials, gathered at the local bank to observe plaintiff open the pot in circumstances of extreme public humiliation. She suffered acute mental distress, with resulting serious illness, which apparently further unsettled her reason and contributed to her early death. The “pot of gold” came in the form of a judgment to her heirs. *Nickerson v. Hodges*, 146 La. 735, 84 So. 37 (1920).

10. *Severe Emotional Distress*. All jurisdictions require that the plaintiff prove *severe* not just *mere* emotional distress. This is frequently characterized as distress so severe that no reasonable person could be expected to endure it. Note that unlike most torts, the severity of the damage affects not just how much the plaintiff will recover, but whether the plaintiff recovers at all.

11. *Proof of Severe Emotional Distress*. Testimony that the plaintiff was upset and cried will not be enough. *Hatch v. State Farm Fire and Cas. Co.*, 930 P.2d 382, 397 (Wyo. 1997) (“evidence of crying, being upset and uncomfortable is insufficient to demonstrate severe emotional distress that attains a level no reasonable person could be expected to endure”). Some jurisdictions require that the severe emotional distress be proved by expert witness testimony. *Vallinoto v. DiSandro*, 688 A.2d 830, 838 (R.I. 1997) (plaintiff must produce “competent medical evidence showing objective physical manifestation of her alleged psychic injuries”). Most, however, do not generally require expert proof to establish severe emotional distress caused by defendant’s conduct, preferring to rely on such factors as the flagrant and serious nature of the defendant’s conduct, subjective testimony from plaintiff and others, and physical symptoms, if present. *Miller v. Willbanks*, 8 S.W.3d 607 (Tenn. 1999) (collecting cases from other jurisdictions); *Kloepfel v. Bokor*, 149 Wash.2d 192, 66 P.3d 630 (2003) (rejecting argument that objective symptomatology is required to prove severe emotional distress); *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001) (noting connection between outrageousness of conduct and proof of severe emotional distress); *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995) (evidence of physical injury not necessary to determine whether plaintiff suffered severe emotional distress). Suppose a surgeon, angry at an operating-room nurse, throws a surgical drape into her face, covering her with the patient’s blood and tissue. Both the nurse and the patient underwent a series of tests for HIV, hepatitis, and other communicable diseases. All were negative. Is her testimony that she feared for her life and suffered severe emotional distress at the thought of the risk sufficient? *Grantham v. Vanderzyl*, 802 So.2d 1077 (Ala. 2001) (court finds as a matter of law that the mere fear of contracting a disease, without actual exposure to it, cannot be sufficient to cause the level of distress necessary for tort of outrage).

### **Taylor v. Vallelunga**

District Court of Appeal of California, 1959.  
171 Cal.App.2d 107, 339 P.2d 910.

O’DONNELL, JUSTICE pro tem. \* \* \* In the first count, plaintiff Clifford Gerlach alleges that on December 25, 1956, defendants struck and beat him

causing him bodily injury for which he seeks damages. In the second count, plaintiff and appellant Gail E. Taylor incorporates by reference the charging allegations of the first count and proceeds to allege that she is the daughter of plaintiff Clifford Gerlach, that she was present at and witnessed the beating inflicted upon her father by defendants, and that as a result thereof, she suffered severe fright and emotional distress. She seeks damages for the distress so suffered. It is not alleged that any physical disability or injury resulted from the mental distress. A general demurrer to the second count of the complaint was interposed by defendants. The demurrer was sustained and appellant was granted ten days leave to amend. Appellant failed to amend and judgment of dismissal of the second count was entered. The appeal is from the judgment of dismissal.

The California cases have for some time past allowed recovery of damages where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. [C] In the Siliznoff case [page 51] the Supreme Court extended the right of recovery to situations where no physical injury follows the suffering of mental distress, saying that “a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault.” [C] In arriving at this result the court relied in substantial part upon the development of the law in this field of torts as traced by the American Law Institute, and it quotes with approval [c] section 46, as amended, of the Restatement of Torts, (Restatement of the Law, 1948 Supplement, Torts, § 46) which reads: “One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it.” In explanation of the meaning of the term “intentionally” as it is employed in said section 46, the Reporter says in subdivision (a) of that section: “An intention to cause severe emotional distress exists when the act is done for the purpose of causing the distress or with knowledge on the part of the actor that severe emotional distress is substantially certain to be produced by his conduct. See Illustration 3.” Illustration 3 referred to reads as follows: “A is sitting on her front porch watching her husband B, who is standing on the sidewalk, C, who hates B and is friendly to A, *whose presence is known to him*, stabs B, killing him. C is liable to A for the mental anguish, grief and horror he causes.” [Emphasis added.]

The failure of the second count of the complaint in the case at bar to meet the requirements of section 46 of the Restatement of Torts is at once apparent. There is no allegation that defendants knew that appellant was present and witnessed the beating that was administered to her father; nor is there any allegation that the beating was administered for the purpose of causing her to suffer emotional distress, or, in the alternative, that defendants knew that severe emotional distress was substantially certain to be produced by their conduct. \* \* \*

Judgment affirmed.



### NOTES AND QUESTIONS

1. Plaintiff's proof of intent is relatively straight forward if the conduct is aimed at the plaintiff or if plaintiff can show that defendant knew that extreme emotional distress was substantially certain to follow from the conduct. *Blakeley v. Shortal's Estate*, 236 Iowa 787, 20 N.W.2d 28 (1945) (Shortal committed suicide by slitting his own throat in Blakely's kitchen). Generally, committing a murder or a suicide is not a tort against an eyewitness; however, it may be if the act is directed at the plaintiff or if defendant knew that extreme emotional distress was substantially certain to follow. *Lourcey v. Scarlett*, 146 S.W.3d 48 (Tenn. 2004) (plaintiff, while delivering mail, encountered Scarlett and his wife, who was nude from the waist up, in the middle of the road. Scarlett asked for help and then, while plaintiff was calling 911, Scarlett shot his wife, turned toward the plaintiff, and shot himself); *Mahnke v. Moore*, 197 Md. 61, 77 A.2d 923, 927 (1951) (overturning demurrer where child's father killed her mother with a shotgun in her presence, kept child in cottage with her mother's body for a week, then killed himself with shotgun, spattering child with his blood). Why not use "transferred intent"? See note 2, page 30.

2. As California did in the principal case, many jurisdictions continue to require that the conduct not only be intentional and outrageous, but also directed at the plaintiff or take place in the presence of the plaintiff, with the defendant's awareness. *Christensen v. Superior Court of Los Angeles Cty.*, 54 Cal.3d 868, 2 Cal.Rptr.2d 79, 820 P.2d 181 (1991) (claim of family members for intentional infliction of emotional distress arising out of mishandling of remains of family members did not state cause of action because it did not allege that conduct was directed at family members or done in their presence); *Koontz v. Keller*, 52 Ohio App. 265, 3 N.E.2d 694 (1936) (recovery denied where defendant murdered plaintiff's sister and plaintiff later discovered body); *Ellsworth v. Massacar*, 215 Mich. 511, 184 N.W. 408 (1921) (plaintiff later discovered attack on her husband). But see *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22 (Tenn. 2005) (conduct need not be directed at a specific person or occur in the presence of the plaintiff).

3. The Restatement (§ 46(2)) would allow recovery if defendant knows of bystander's presence *and* (1) the conduct was directed at a member of bystander's immediate family or (2) bystander suffers bodily harm as a result of her distress. *Hill v. Kimball*, 76 Tex. 210, 13 S.W. 59 (1890) (defendant inflicted a bloody battery upon two people in the presence of a pregnant woman who suffered a miscarriage as the result of her mental disturbance). What does it mean to be "present"? *Bevan v. Fix*, 42 P.3d 1013 (Wyo. 2002) (claim on behalf of young children who could hear their mother being attacked in adjacent hallway) ("sensory and contemporaneous observance of defendant's acts," does not necessarily require being able to see what is happening).

4. Some courts, however, have permitted recovery even though plaintiff was not present. *Knierim v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961) (defendant threatened a woman that he would murder her husband and then carried out the threat outside of her presence); *Schurk v. Christensen*, 80 Wash.2d 652, 497 P.2d 937 (1972) (mother of five-year-old permitted to recover against teenage babysitter who molested child). In *R.D. v. W.H.*, 875 P.2d 26 (Wyo. 1994), the husband and minor child of decedent sued her stepfather for events leading to her death by suicide. Plaintiffs alleged that the stepfather had sexually abused the decedent, provided her with a firearm with which she attempted suicide, and then provided her with prescription narcotics with which she killed herself. Although emphasizing that the generally better practice is to limit recovery to plaintiffs who were present

during the outrageous conduct, the court recognized a narrow exception for this case.

5. How far should these narrow exceptions go? Should there be a cause of action on behalf of those who witness the assassination of the president? For those who saw it live on television? For those who saw it replayed a few minutes later? The next day? On the first anniversary?

6. The classic articles on the infliction of mental distress are Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 *Harv.L.Rev.* 1033 (1936); Prosser, *Insult and Outrage*, 44 *Cal.L.Rev.* 40 (1956); Wade, *Tort Liability for Abusive and Insulting Language*, 4 *Vand.L.Rev.* 63 (1950); Partlett, *Tort Liability and the American Way: Reflections on Liability for Emotional Distress*, *Am.J. Comp.L.* 601 (1997); and Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 *Marq. L. Rev.* 789 (2007) (including an appendix with case law from all fifty-one jurisdictions).

## 6. TRESPASS TO LAND

### **Dougherty v. Stepp**

Supreme Court of North Carolina, 1835.  
18 N.C. 371.

This was an action of trespass *quare clausum fregit*, tried at Buncombe on the last Circuit, before his Honor Judge Martin. The only proof introduced by the plaintiff to establish an act of trespass, was, that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This, his Honor held not to be a trespass, and the jury under his instructions, found a verdict for the defendant, and the plaintiff appealed. \* \* \*

RUFFIN, CHIEF JUSTICE. In the opinion of the Court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle, that every unauthorized, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or herbage, or as here, the shrubbery.

Judgment reversed, and new trial ordered.

### NOTES AND QUESTIONS

1. We are here concerned only with intentional trespass to land. There may be negligent entry onto land, but it is governed by the ordinary rules applicable to negligence actions. One of these is that when the entry upon the land is merely negligent, proof of some actual damage is essential to the cause of action. Restatement (Second) of Torts § 165. Thus, the word “trespass” may be used to describe the kind of interest that defendant has invaded but usually is reserved for an intentional invasion of that interest—the right to exclusive possession of land.

2. The trespass is intentional even when the defendant enters the land in the honest and reasonable belief that it is his own. See *Glade v. Dietert*, 156 Tex. 382,

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## CHAPTER III

# PRIVILEGES

### 1. CONSENT

#### **O'Brien v. Cunard S.S. Co.**

Supreme Judicial Court of Massachusetts, 1891.  
154 Mass. 272, 28 N.E. 266.

Tort, for an assault, and for negligently vaccinating the plaintiff, who was a steerage passenger on the defendant's steamship. The trial court directed a verdict for the defendant, and the plaintiff brings exceptions. [Plaintiff alleged that she suffered ulceration at the site and blistering all over her body due either to contamination of the vaccine or of the vaccination site. There was conflicting medical expert testimony as to the cause of her injuries.]

KNOWLTON, J. \* \* \* To sustain the first count, which was for an alleged assault, the plaintiff relied on the fact that the surgeon who was employed by the defendant vaccinated her on ship-board, while she was on her passage from Queenstown to Boston. On this branch of the case the question is whether there was any evidence that the surgeon used force upon the plaintiff against her will. In determining whether the act was lawful or unlawful, the surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings. [Cc] It is undisputed that at Boston there are strict quarantine regulations in regard to the examination of emigrants, to see that they are protected from small-pox by vaccination, and that only those persons who hold a certificate from the medical officer of the steam-ship, stating that they are so protected, are permitted to land without detention in quarantine, or vaccination by the port physician. It appears that the defendant is accustomed to have its surgeons vaccinate all emigrants who desire it, and who are not protected by previous vaccination, and give them a certificate which is accepted at quarantine as evidence of their protection. Notices of the regulations at quarantine, and of the willingness of the ship's medical officer to vaccinate such as needed vaccination, were posted about the ship in various languages, and on the day when the operation was performed the surgeon had a right to presume that she and the other women who were vaccinated understood the importance and purpose of vaccination for those who bore no marks to show that they were protected. By the plaintiff's testimony, which, in this particular, is undisputed, it appears that about

200 women passengers were assembled below, and she understood from conversation with them that they were to be vaccinated; that she stood about 15 feet from the surgeon, and saw them form in a line, and pass in turn before him; that he “examined their arms, and, passing some of them by, proceeded to vaccinate those that had no mark;” that she did not hear him say anything to any of them; that upon being passed by they each received a card, and went on deck; that when her turn came she showed him her arm; he looked at it, and said there was no mark, and that she should be vaccinated; that she told him she had been vaccinated before, and it left no mark; “that he then said nothing; that he should vaccinate her again;” that she held up her arm to be vaccinated; that no one touched her; that she did not tell him she did not want to be vaccinated; and that she took the ticket which he gave her, certifying that he had vaccinated her, and used it at quarantine. She was one of a large number of women who were vaccinated on that occasion, without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that purpose. Viewing his conduct in the light of the surrounding circumstances, it was lawful; and there was no evidence tending to show that it was not. The ruling of the court on this part of the case was correct. \* \* \*

Exceptions overruled.

### NOTES AND QUESTIONS

1. With the principal case, contrast *Mulloy v. Hop Sang*, 1 W.W.R. 714 (Alberta C.A.) (1935) (appellate court does not accept that consent was given to medical procedure when patient with limited English did not reply or make objections to surgeon’s statement that he would do what was necessary after administering anesthesia).

2. Suppose that in the course of an argument defendant announces that he is going to punch plaintiff in the nose. Plaintiff stands his ground but says and does nothing, and defendant punches him. Is there consent?

3. On a park bench in the moonlight, a young man informs his fiancée that he is going to kiss her. She says and does nothing, and he kisses her. Is he liable for battery? What if it’s their first date? What if he is a stranger who has just sat down next to her when he makes his announcement?

### **Hackbart v. Cincinnati Bengals, Inc.**

United States Court of Appeals, Tenth Circuit, 1979.  
601 F.2d 516, cert. denied, 444 U.S. 931, 100 S.Ct. 275, 62 L.Ed.2d 188 (1979).

WILLIAM E. DOYLE, CIRCUIT JUDGE. The question in this case is whether in a regular season professional football game an injury which is inflicted by one professional football player on an opposing player can give rise to liability

in tort where the injury was inflicted by the intentional striking of a blow during the game.

The injury occurred in the course of a game between the Denver Broncos and the Cincinnati Bengals, which game was being played in Denver in 1973. The Broncos' defensive back, Dale Hackbart, was the recipient of the injury and the Bengals' offensive back, Charles "Booby" Clark, inflicted the blow which produced it. \* \* \*

The trial court's finding was that Charles Clark, "acting out of anger and frustration, but without a specific intent to injure \* \* \* stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck with sufficient force to cause both players to fall forward to the ground." Both players, without complaining to the officials or to one another, returned to their respective sidelines since the ball had changed hands and the offensive and defensive teams of each had been substituted. Clark testified at trial that his frustration was brought about by the fact that his team was losing the game. \* \* \*

Despite the fact that the defendant Charles Clark admitted that the blow which had been struck was not accidental, that it was intentionally administered, the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game. Notice was taken of the fact that many fouls are overlooked; that the game is played in an emotional and noisy environment; and that incidents such as that here complained of are not unusual. \* \* \*

Indeed, the evidence shows that there are rules of the game which prohibit the intentional striking of blows. Thus, Article 1, Item 1, Subsection C, provides that: "All players are prohibited from striking on the head, face or neck with the heel, back or side of the hand, wrist, forearm, elbow or clasped hands." Thus the very conduct which was present here is expressly prohibited by the rule which is quoted above.

The general customs of football do not approve the intentional punching or striking of others. That this is prohibited was supported by the testimony of all of the witnesses. They testified that the intentional striking of a player in the face or from the rear is prohibited by the playing rules as well as the general customs of the game. Punching or hitting with the arms is prohibited. Undoubtedly these restraints are intended to establish reasonable boundaries so that one football player cannot intentionally inflict a serious injury on another. Therefore, the notion is not correct that all reason has been abandoned, whereby the only possible remedy for the person who has been the victim of an unlawful blow is retaliation. \* \* \*

In sum, having concluded that the trial court did not limit the case to a trial of the evidence bearing on defendant's liability but rather determined that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn, we take the view that this was not a proper

issue for determination and that plaintiff was entitled to have the case tried on an assessment of his rights and whether they had been violated. \* \* \*

Reversed and remanded for a new trial.

### NOTES AND QUESTIONS

1. What about one player clipping another in a football game? In order to recover, plaintiff must show that the act was intentional, not just that it violated the game's safety rules. See *Gauvin v. Clark*, 404 Mass. 450, 537 N.E.2d 94 (1989) (jury found college hockey player did not act willfully in striking other player in abdomen). *Greer v. Davis*, 921 S.W.2d 325 (Tex.App.1996) (question for jury whether base runner acted intentionally or merely negligently in colliding with catcher rather than sliding or stepping out of baseline to avoid the tag).

2. Plaintiff and defendant were opposing players in a family softball game. Defendant, sliding into second base, knocked the plaintiff down and broke two bones in his ankle. Is there liability? *Tavernier v. Maes*, 242 Cal.App.2d 532, 51 Cal.Rptr. 575 (1966). What other facts do you want to know about the game to decide if the plaintiff consented to the contact? Would it make a difference if the conduct occurred while players were warming up rather than during the game? Cf. *Savino v. Robertson*, 273 Ill.App.3d 811, 210 Ill.Dec. 264, 652 N.E.2d 1240 (1995) (no difference).

3. What about a course of rough-house practical joking between the parties in the past? *Wartman v. Swindell*, 54 N.J.L. 589, 25 A. 356 (1892).

4. Defendant taps plaintiff on the shoulder to attract his attention for a reasonable purpose. May consent be assumed? *Wiffin v. Kincard*, 2 Bos. & P.N.R. 471, 127 Eng.Rep. 713 (1807); *Coward v. Baddeley*, 4 Hurl. & N. 478, 157 Eng.Rep. 927 (1859); *Wallace v. Rosen*, 765 N.E.2d 192 (Ind. App. 2002), page 31. Is this a battery, to begin with?

5. Local custom permits the public to take fish from small lakes and ponds. Defendant passes over plaintiff's property to reach such a lake. Consent? See *Marsh v. Colby*, 39 Mich. 626 (1878).

### Mohr v. Williams

Supreme Court of Minnesota, 1905.  
95 Minn. 261, 104 N.W. 12.

[Plaintiff consulted defendant, an ear specialist, concerning trouble with her right ear. On examining her, he found a diseased condition of the right ear, and she consented to an operation upon it. When she was unconscious under the anaesthetic, defendant concluded that the condition of the right ear was not serious enough to require an operation; but he found a more serious condition of the left ear, which he decided required an operation. Without reviving the plaintiff to ask her permission, he operated on the left ear. The operation was skillfully performed, and was successful. Plaintiff nevertheless brought an action for battery. In the court below the jury returned a verdict in favor of the plaintiff for \$14,322.50. The trial judge denied defendant's motion for judgment notwithstanding the verdict, but granted a new trial on the ground that the damages were excessive. Both parties appeal.]

BROWN, J. \* \* \* The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. \* \* \*

The physician impliedly contracts that he possesses, and will exercise in the treatment of patients, skill and learning, and that he will exercise reasonable care and exert his best judgment to bring about favorable results. The methods of treatment are committed almost exclusively to his judgment, but we are aware of no rule or principle of law which would extend to him free license respecting surgical operations. Reasonable latitude must, however, be allowed the physician in a particular case; and we would not lay down any rule which would unreasonably interfere with the exercise of his discretion, or prevent him from taking such measures as his judgment dictated for the welfare of the patient in a case of emergency. If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them. But such is not the case at bar. The diseased condition of plaintiff's left ear was not discovered in the course of an operation on the right, which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, question of fact for the jury.

The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the

occasion of the operation, and at her request. But the purpose of his presence was not that he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anaesthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

The last contention of defendant is that the act complained of did not amount to an assault and battery. This is based upon the theory that, as plaintiff's left ear was in fact diseased, in a condition dangerous and threatening to her health, the operation was necessary, and having been skillfully performed at a time when plaintiff had requested a like operation on the other ear, the charge of assault and battery cannot be sustained; that, in view of these conditions, and the claim that there was no negligence on the part of defendant, and an entire absence of any evidence tending to show an evil intent, the court should say, as a matter of law, that no assault and battery was committed, even though she did not consent to the operation. In other words, that the absence of a showing that defendant was actuated by a wrongful intent, or guilty of negligence, relieves the act of defendant from the charge of an unlawful assault and battery. We are unable to reach that conclusion, though the contention is not without merit. It would seem to follow from what has been said on the other features of the case that the act of defendant amounted at least to a technical assault and battery. If the operation was performed without plaintiff's consent, and the circumstances were not such as to justify its performance without, it was wrongful; and, if it was wrongful, it was unlawful. As remarked in 1 Jaggard on Torts, 437, every person has a right to complete immunity of his person from physical interference of others, except in so far as contact may be necessary under the general doctrine of privilege; and any unlawful or unauthorized touching of the person of another, except it be in the spirit of pleasantry, constitutes an assault and battery. In the case at bar, as we have already seen, the question whether defendant's act in performing the operation upon plaintiff was authorized was a question for the jury to determine. If it was unauthorized, then it was, within what we have said, unlawful. It was a violent assault, not a mere pleasantry; and, even though no negligence is shown, it was wrongful and unlawful. The case is unlike a criminal prosecution for assault and battery, for there an unlawful intent must be shown. But that rule does not apply to a civil action, to maintain which it is sufficient to show that the assault complained of was wrongful and unlawful or the result of negligence. [C]

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.



Order affirmed.

[Reference to the records of the District Court of Ramsey County, Minnesota, discloses that on the second trial the plaintiff received a verdict and judgment for \$39. There was no appeal.]

### NOTES AND QUESTIONS

1. Why did plaintiff's attorney sue under a theory of battery instead of ordinary negligent medical malpractice? Should there be recovery if defendant used all reasonable care in the operation? Cf. *Rogers v. Board of Road Commissioners*, page 72.

2. Plaintiff, a boy 15 years of age, was run over by a train and his foot was crushed. When he arrived at the hospital he was unconscious and bleeding. Defendant, the house surgeon, concluded that immediate amputation of the foot was necessary to save the boy's life. Finding no relatives present, he performed the operation. Is he liable? Why? *Luka v. Lowrie*, 171 Mich. 122, 136 N.W. 1106 (1912).

3. What if the plaintiff had remained conscious, and had insisted on prohibiting the operation, saying that he would rather die than lose his foot? See *Mulloy v. Hop Sang*, 1 W.W.R. 714 (Alberta C.A.) (1935) (automobile accident victim arrived at hospital asking that his badly injured hand be treated but not amputated). Construction worker, believing that he saw "666, the sign of the devil" on his hand cut it off with a power saw. His co-workers rushed him and his severed hand, packed in ice, to the hospital. A hand surgeon was standing by ready to attempt to reattach it. Patient refused permission, saying it was against his religion. What should surgeon do? See "Man Who Lost Hand Loses Lawsuit," *The Richmond Times Dispatch*, Sept. 14, 1997 at C4.

4. Medical care providers may act in the absence of express consent if (1) the patient is unable to give consent (unconscious, intoxicated, mentally ill, incompetent); (2) there is a risk of serious bodily harm if treatment is delayed; (3) a reasonable person would consent to treatment under the circumstances; and (4) the physician has no reason to believe this patient would refuse treatment under the circumstances. See, e.g., *Kozup v. Georgetown U. Hosp.*, 851 F.2d 437 (D.C.Cir. 1988) (parents' consent to baby's transfusion was not implied simply because it was necessary to save baby's life where there was no showing that there was no time to seek consent); *Stewart-Graves v. Vaughn*, 162 Wash.2d 115, 170 P.3d 1151 (2007) (father's consent implied as a matter of law even though he was in nearby waiting room because there was no meaningful opportunity for a deliberate, informed decision concerning treatment where failure to treat would have meant certain and immediate death of newborn).

5. The principal case has been regarded for years as the leading case on unauthorized operations. It is still sound law. Most surgery is performed in hospitals, which have their own rules and standardized practices, including consent forms. In many cases, it has been found that the consent is sufficiently general in its terms to justify the physician in doing whatever the physician believes necessary in the course of the operation. See for example *Rothe v. Hull*, 352 Mo. 926, 180 S.W.2d 7 (1944); *Baxter v. Snow*, 78 Utah 217, 2 P.2d 257 (1931). Does that mean the consent should be as broadly worded as possible? What if an obstetrician who has privileges at a hospital fails to obtain consent for a blood transfusion? The obstetrician would be liable. Would the hospital? *Ward v. Lutheran Hospitals & Homes Soc. of Am., Inc.*, 963 P.2d 1031 (Alaska 1998) (noting that overwhelming

weight of authority holds that hospital does not owe duty to patient to obtain consent for treatment when patient is under care of independent physician).

6. What if the plaintiff specifically insists that the procedure shall go thus far, and no further? For example, she consents to an incision and an examination of her stomach under ether, but expressly forbids anything more. If the surgeon goes ahead and removes a tumor found there, is he liable? *Schloendorff v. Society of New York Hospital*, 211 N.Y. 125, 105 N.E. 92 (1914). What if patient limits her consent to female health care providers, explaining that her religious beliefs prohibit her from being seen unclothed by a member of the opposite sex? During surgery, a male nurse sees and touches her as part of proper medical treatment. Liability for battery? *Cohen v. Smith*, 269 Ill.App.3d 1087, 207 Ill.Dec. 873, 648 N.E.2d 329 (1995) (violation of plaintiff's right to bodily integrity by unconsented to touching is the essence of battery). What if the consent form states anesthesia will be administered by "a physician privileged to practice anesthesia" and an EMT in training is permitted to do her first intubation on the patient? *Mullins v. Parkview Hosp., Inc.*, 865 N.E.2d 608 (Ind. 2007) (battery claim stated against anesthesiologist but not student EMT who did not know that consent had not been obtained). What if patient, about to undergo an MRI, limits her consent to particular drugs—demerol and morphine—because she is concerned about an allergic reaction. The nurse gives her fentanyl. Battery? *Duncan v. Scottsdale Med. Imaging Ltd.*, 205 Ariz. 306, 70 P.3d 435 (2003) (rejecting argument that the patient consented to the administration of pain medication and therefore the nature of the procedure was the same no matter which drug was used). What if a patient withdraws her consent during the procedure? *Schreiber v. Physicians Ins. Co. of Wisconsin*, 223 Wis.2d 417, 588 N.W.2d 26 (1999) (withdrawal of consent means that physician must conduct new informed consent discussion, cannot continue to rely on previously given consent); *Coulter v. Thomas*, 33 S.W.3d 522 (Ky. 2000) (withdrawal of consent while medical procedure in progress must be unquestionable response from clear and rational mind and it must be medically feasible for doctor to stop).

7. May a competent, informed adult refuse medical treatment that is necessary to preserve life? *Thor v. Superior Court*, 5 Cal.4th 725, 855 P.2d 375, 21 Cal.Rptr.2d 357 (1993) (right to refuse treatment not limited to those who are suffering from terminal conditions).

8. Brother Joseph Fox, an 83-year-old member of the Marianists, a Roman Catholic order, had previously expressed a desire not to have his life artificially prolonged by extraordinary means of treatment if there was no reasonable hope for recovery. During surgery to repair a hernia, he suffered permanent brain damage due to cardiac arrest. Was his refusal of extraordinary means of treatment (a respirator) still effective after he became incompetent? *Matter of Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64, cert. denied, 454 U.S. 858 (1981). This issue is resolved in many jurisdictions by statutory provisions for "living wills" or "advance directives" that state the patient's consent and limitations on treatment.

9. When plaintiff refused to consent to a transfusion on religious grounds, the court in *Application of the President and Directors of Georgetown College*, 331 F.2d 1000 (D.C.Cir.1964), granted a declaratory judgment to proceed, with the judge who issued the emergency order finding that the patient felt that it would not be her responsibility if the judge ordered the transfusion. A similar request was denied in *In re Osborne*, 294 A.2d 372 (D.C.App.1972), where a bedside hearing disclosed that the patient would regard a transfusion under any circumstances as violative of his religious beliefs. See also *Stamford Hospital v. Vega*, 236 Conn. 646, 674 A.2d 821

(1996) (patient competent to make decisions entitled to refuse blood transfusion even if that decision is fatal).

10. What happens if health care personnel ignore a “do not resuscitate order”? If the patient (or his family) has a cause of action for battery, what is the measure of damages? *Campbell v. Delbridge*, 670 N.W.2d 108 (Iowa 2003) (plaintiff entitled to emotional distress damages for unauthorized transfusion); *Anderson v. St. Francis–St. George Hospital, Inc.*, 77 Ohio St.3d 82, 671 N.E.2d 225 (1996) (where the battery was physically harmless, plaintiff entitled only to nominal damages, not compensatory damages for wrongful living or wrongful prolongation of life.) See also, Milani, *Better Off Dead Than Disabled?: Should Courts Recognize a “Wrongful Living” Cause of Action When Doctors Fail to Honor Patients’ Advance Directives?*, 54 Wash. & Lee L. Rev. 149 (1997).

11. In the case of a minor child, consent of the parent is necessary for any medical procedure, except in an emergency. *Zoski v. Gaines*, 271 Mich. 1, 260 N.W. 99 (1935) (9½ years) (tonsillectomy); *Bonner v. Moran*, 126 F.2d 121 (D.C.Cir.1941) (15 years) (skin graft). A minor 17 or 18 years of age, however, has been held capable of legally consenting, at least to minor procedures, *Gulf & S.I.R. Co. v. Sullivan*, 155 Miss. 1, 119 So. 501 (1928) (smallpox vaccination), but not to major ones, *Lacey v. Laird*, 166 Ohio St. 12, 139 N.E.2d 25 (1956) (nose job). Is consent from a parent necessary to prescribe contraception? The right of mature teenage females to give or withhold consent to abortions is governed by statute in most jurisdictions and the statutes, in turn, must fall within constitutional parameters.

12. When a parent refuses on religious or other grounds to allow a hospital to provide medical treatment for a child, courts are likely to grant a hospital’s application to overrule the parent if the treatment is for a life threatening condition, but not if it only will improve the child’s comfort or appearance. Compare *In re Sampson*, 29 N.Y.2d 900, 328 N.Y.S.2d 686, 278 N.E.2d 918 (1972) (approving) with *In re Green*, 448 Pa. 338, 292 A.2d 387 (1972) (disallowing).

13. Can parents “consent” on behalf of their child to be a donor in a transplant operation for the benefit of a sibling? See *Hart v. Brown*, 29 Conn.Supp. 368, 289 A.2d 386 (1972). Can a guardian consent to an incompetent’s donation of an organ? See *Strunk v. Strunk*, 445 S.W.2d 145 (Ky.1969). Can a parent consent to a child’s participation in nontherapeutic research in which there is a risk of injury or damage to the health of the child? *Grimes v. Kennedy Krieger Institute, Inc.*, 366 Md. 29, 782 A.2d 807 (2001). Does the mother’s consent to an abortion prevent the child who was injured by the failed abortion from bringing a personal injury action against the physician? *Vandervelden v. Victoria*, 177 Wis.2d 243, 502 N.W.2d 276 (App.1993).

### **De May v. Roberts**

Supreme Court of Michigan, 1881.  
46 Mich. 160, 9 N.W. 146.

MARTSON, C.J. The declaration in this case in the first count sets forth that the plaintiff was at a time and place named a poor married woman, and being confined in child-bed and a stranger, employed in a professional capacity defendant De May who was a physician; that defendant visited the plaintiff as such, and against her desire and intending to deceive her wrongfully, etc., introduced and caused to be present at the house and lying-in room of the plaintiff and while she was in the pains of parturition

the defendant Scattergood, who intruded upon the privacy of the plaintiff, indecently, wrongfully and unlawfully laid hands upon her and assaulted her, the said Scattergood, which was well known to defendant De May, being a young unmarried man, a stranger to the plaintiff and utterly ignorant of the practice of medicine, while the plaintiff believed that he was an assistant physician, a competent and proper person to be present and to aid her in her extremity. \* \* \*

The evidence on the part of the plaintiff tended to prove the allegations of the declaration. On the part of the defendants evidence was given tending to prove that Scattergood very reluctantly accompanied Dr. De May at the urgent request of the latter; that the night was a dark and stormy one, the roads over which they had to travel in getting to the house of the plaintiff were so bad that a horse could not be rode or driven over them; that the doctor was sick and very much fatigued from overwork, and therefore asked the defendant Scattergood to accompany and assist him in carrying a lantern, umbrella and certain articles deemed necessary upon such occasions; that upon arriving at the house of the plaintiff the doctor knocked, and when the door was opened by the husband of the plaintiff, De May said to him "that I had fetched a friend along to help carry my things;" he, plaintiff's husband, said all right, and seemed to be perfectly satisfied. They were bid to enter, treated kindly and no objection whatever made to the presence of defendant Scattergood. That while there Scattergood, at Dr. De May's request, took hold of plaintiff's hand and held her during a paroxysm of pain, and that both of the defendants in all respects throughout acted in a proper and becoming manner actuated by a sense of duty and kindness. \* \* \*

Dr. De May therefore took an unprofessional young unmarried man with him, introduced and permitted him to remain in the house of the plaintiff, when it was apparent that he could hear at least, if not see all that was said and done, and as the jury must have found, under the instructions given, without either the plaintiff or her husband having any knowledge or reason to believe the true character of such third party. It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity which it is not pretended existed in this case. The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation. The fact that at the time, she consented to the presence of Scattergood supposing him to be a physician, does not preclude her from maintaining an action and recovering substantial damages upon afterwards ascertaining his true character. In obtaining admission at such a time and under such circumstances without fully disclosing his true character, both parties were guilty of deceit, and the wrong thus done entitles the injured party to recover the damages afterwards sustained, from shame and mortification upon discovering the true character of the defendants. \* \* \*

Judgment for plaintiff affirmed.

### NOTES AND QUESTIONS

1. The court says that the plaintiff consented to Scattergood's presence "supposing him to be a physician" and that the defendants introduced him without "fully disclosing his true character." In order for a consent to be valid, how much does defendant have to disclose? What if the plaintiff asks no questions? Under what circumstances can consent be assumed? Breast cancer patient, on a routine visit to her oncologist's office, is shown into a private examining room. Her doctor arrives, accompanied by another man, who is introduced as someone who is following his work. She says nothing. Following her doctor's instructions, she disrobes and he examines her breasts and lower abdomen in the other man's presence. As she leaves the office, she asks the receptionist who the other man is and is told he is a "drug salesman." Consent? Cf. *Sanchez-Scott v. Alza Pharmaceuticals*, 86 Cal.App.4th 365, 103 Cal.Rptr.2d 410 (2001) (because true status of drug company representative was not disclosed to patient, no consent was implied by failure to object).

2. Defendant calls on plaintiff, a woman with an artificial leg, in her house. Representing himself to be a doctor referred by the company that made her leg, he induces her to remove her dress, expose her person, and to permit him to touch her. He is in fact a doctor, but of theology. Battery? Cf. *Commonwealth v. Gregory*, 132 Pa.Super. 507, 1 A.2d 501 (1938). Defendant gives plaintiff some chocolate candy, which contains an irritant poison. In ignorance of this fact, plaintiff eats the candy, and is made ill. Is there liability for a battery? Cf. *Commonwealth v. Stratton*, 114 Mass. 303, 19 Am.Rep. 350 (1873). Defendant represents himself to be a licensed physician, but he is not. Cf. *Taylor v. Johnston*, 985 P.2d 460 (Alaska 1999) (battery claim may lie if person falsely claiming to be physician touches patient, even for purpose of providing medical treatment). On the effect, in general, of fraud and mistake on consent, see Restatement (Second) of Torts § 892B.

3. Suppose that A consents to sexual intercourse with B, in ignorance of the fact that B has a sexually transmitted disease. A contracts the disease. Has she an action against B? *Kathleen K. v. Robert B.*, 150 Cal.App.3d 992, 198 Cal.Rptr. 273 (1984). *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920); cf. *De Vall v. Strunk*, 96 S.W.2d 245 (Tex.Civ.App.1936). A woman consents to sexual intercourse with a man only after he assured her that "I can't possibly get anyone pregnant," knowing that the statement was false. She then suffers an ectopic pregnancy and must undergo surgery, which saves her life but makes her sterile. Liability? *Barbara A. v. John G.*, 145 Cal.App.3d 369, 193 Cal.Rptr. 422 (1983). Does it make a difference if he also does not know? See *McPherson v. McPherson*, 712 A.2d 1043 (Me.1998) (no liability because husband who infected wife with venereal disease neither knew nor had reason to know that he was infected). A wife consents to sexual intercourse with her husband, in ignorance of the fact that he is having an affair. After learning of the affair, she sues him for battery, claiming that her consent was obtained by fraud. Liability? *Neal v. Neal*, 125 Idaho 617, 873 P.2d 871 (1994).

4. Law Professor agrees to appear in the dunking booth at a law school fair. She was told that the proceeds would be donated to a fund to provide debt reduction for students who embark on public interest careers but later learned that the students spent the money on a fancy graduation reception for their parents. Consent valid? Consent induced by fraud or misrepresentation as to a collateral matter, rather than fraud as to the essential character of the act itself, will not invalidate consent. See Restatement (Second) of Torts §§ 55, 57 (1965).

5. Plaintiff consents to an operation under a general anesthetic only on condition that her own physician is present during the operation. He was not present. Is the consent vitiated? *Pugsley v. Privette*, 220 Va. 892, 263 S.E.2d 69 (1980). What is the effect of allowing a resident physician to perform the operation under the supervision of the designated surgeon? Suppose the designated surgeon is not present at all.

6. “*Informed Consent.*” The doctrine of “informed consent” requires a physician or surgeon to disclose to the patient the risks of proposed medical or surgical treatment. If she does not do so, she may be liable when injury results from the treatment. In early cases, this liability was placed on the ground of battery, by analogy to *De May v. Roberts*, and the cases in the preceding notes. Among the cases so holding have been *Bang v. Charles T. Miller Hospital*, 251 Minn. 427, 88 N.W.2d 186 (1958); *Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966). Around 1960, the failure to disclose the risk began to be treated as a breach of the doctor’s professional duty, and hence as a matter of negligence. The cases now generally proceed on that basis. The matter is therefore treated in Chapter 4, Negligence. When the physician exceeds the boundaries of consent, the matter is still treated as battery as set forth in *Mohr v. Williams*.

7. Note that most of the “consent induced by fraud” cases involve battery. What if the underlying tort is trespass? Compare these two cases against ABC, which broadcasts PrimeTime Live. Plaintiff, an ophthalmic surgeon who owned several clinics, was approached by a producer of PrimeTime Live and told the show was doing a segment on cataract operations. The producer told plaintiff that the segment would not involve ambush interviews or undercover surveillance and would be fair and balanced. Plaintiff cooperated by permitting film crews and interviews of doctors, patients, and technicians at his clinic in Chicago. Unbeknownst to plaintiff, the producer also had dispatched seven undercover test “patients” equipped with concealed cameras to other clinic locations owned by plaintiff. The resulting show was very critical of the clinics. Plaintiff sued for trespass, claiming the consent given to the seven test patients with concealed cameras was induced by fraud. Liability? *Desnick v. American Broadcasting Co., Inc.*, 44 F.3d 1345 (7th Cir.1995) (applying Illinois law) (no trespass because not an interference with the ownership or possession of land). Plaintiff, the Food Lion grocery store chain, was the target of a PrimeTime Live exposé on meat handling. Employees of ABC created false identities and applied for work at several Food Lion stores. While working for Food Lion, they filmed various activities with hidden cameras. Food Lion sued for trespass, claiming its consent to the ABC employees’ presence in its deli and meatpacking departments was obtained by fraud. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999) (applying North and South Carolina law) (jury verdict of trespass affirmed). See also *Copeland v. Hubbard Broadcasting, Inc.*, 526 N.W.2d 402 (Minn.App.1995) (reporter posing as student interested in observing veterinarian liable in trespass to pet owners who allowed her in their home to observe). For a discussion of the invasion of privacy claims in these cases, see Chapter 18, Privacy.

8. Plaintiff is in a bar, so intoxicated that he does not know what he is doing when he agrees to “Indian wrestle” with defendant. Valid consent? Cf. *Hollerud v. Malamis*, 20 Mich.App. 748, 174 N.W.2d 626 (1969) (consent ineffective if plaintiff incapable of expressing rational will).

9. Plaintiff consented to participate in a prize fight, an illegal activity in that state. He died as a result of a blow received in the fight and his estate filed a battery claim against the other fighter who demurred on the basis of consent. Is consent to

an illegal act a valid consent? *Hart v. Geysel*, 159 Wash. 632, 294 P. 570 (1930) (recognizing split of authority among jurisdictions as to whether consent to an illegal act is valid consent); *Janelins v. Button*, 102 Md.App. 30, 648 A.2d 1039 (1994) (same). The question of when plaintiff's consent should be invalidated because defendant violated a criminal statute may depend on several considerations: (a) the policy of denying compensation to an intentional wrongdoer who himself may have committed a crime and been injured as a result of it; (b) the effect of deterring him, and others like him, by denying him recovery if he gets hurt; (c) the effect of potential liability in deterring defendant and others like him; (d) the fact that plaintiff has after all been intentionally battered by defendant; (e) the policy expressed by the maxim, *In pari delicto potior est conditio defendentis* [In equal guilt, the position of the defendant is the stronger]. Even states that generally recognize the validity of consent to an illegal act will not deny recovery to those whom the statute making the conduct illegal was designed to protect. For example, plaintiff, a 15-year-old girl, consents to intercourse with a 50-year-old man in a state with criminal penalties for men who have sexual relations with children that age. Most courts have held plaintiff's consent to be ineffective. See *Gaither v. Meacham*, 214 Ala. 343, 108 So. 2 (1926). A competent adult woman, however, cannot maintain an action for her own seduction, even if intercourse between unmarried adults is illegal in the state. See *Rouse v. Creech*, 203 N.C. 378, 166 S.E. 174 (1932). Defendant provides plaintiff's decedent with sleeping pills, knowing he intends to use them to commit suicide. The state's criminal law prohibits both aiding and abetting suicide and attempted suicide. Schwartz, *Civil Liability for Causing Suicide: A Synthesis of Law and Psychiatry*, 24 Vand.L.Rev. 217, 220-222 (1971), evaluating the factors set forth above, suggests that a claim should be allowed. Would family members of those who commit suicide using the Kevorkian suicide machine have a cause of action against Dr. Kevorkian?

## 2. SELF-DEFENSE

The privilege of self-defense is covered in Criminal Law, and detailed discussion must be left to that course. Cases involving tort liability are infrequent. When they arise, the criminal law rules are carried over and applied without much variation. The following brief summary will indicate how self-defense fits into the tort picture:

1. *Existence of Privilege.* Anyone is privileged to use reasonable force to defend himself against a threatened battery on the part of another. The recognition of this privilege came as late as about 1400, and it always has been an affirmative defense to be pleaded and proved by the defendant. In some jurisdictions, the burden of proof is reversed if the defendant is a police officer. Then, plaintiff would have to show as his prima facie battery case that the use of force was unreasonable (and thus not privileged). See, for example, *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 74 Cal.Rptr.2d 614 (1998) (collecting cases from other jurisdictions). The trial court judge will make the initial determination whether a self-defense instruction is warranted by the facts. See, for example, *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997) in which the Supreme Court of Ohio approved the trial court judge's refusal to give a jury instruction on self-defense where defendant shot from his kitchen window at two men who had broken in to his pole barn. Defendant and his family were inside the house with all the doors locked, the police had been called, the pole barn