SUSTAINABLE FORESTRY INITIATIVE Certified Sourcing
www.sfiprogram.org
SFI-00198

10062442-0003

ISBN 978-1-5438-2630-2
90000
9 781543 826302

TWERSKI
HENDERSON
WENDEL

TORTS
Cases and Materials

Fifth Edition

TWERSKI
HENDERSON
WENDEL

ASPEN CASEBOOK SERIES

TORTS
Cases and Materials

Fifth Edition

Wolters Kluwer

ASPEN CASEBOOK SERIES

Fifth Edition

Fifth Edition

Wolters Kluwer

Torts

ASPEN CASEBOOK SERIES

Torts
Cases and Materials

Fifth Edition

Aaron D. Twerski
Irwin and Jill Cohen Professor of Law
Brooklyn Law School

James A. Henderson, Jr.
Late Frank B. Ingersoll Professor of Law
Cornell Law School

W. Bradley Wendel
Edwin H. Woodruff Professor of Law
Cornell Law School

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-2630-2

Library of Congress Cataloging-in-Publication Data

Names: Twerski, Aaron D., author. | Henderson, James A., 1938- author. | Wendel, W. Bradley, 1969- author.
Title: Torts : cases and materials / Aaron D. Twerski, Irwin and Jill Cohen Professor of Law, Brooklyn Law School; James A. Henderson, Jr. Late Frank B. Ingersoll Professor of Law, Emeritus Cornell Law School; W. Bradley Wendel, Edwin H. Woodruff Professor of Law, Cornell Law School.
Description: Fifth edition. | New York : Wolters Kluwer, [2021] | Series: Aspen casebook series | Includes bibliographical references and index. | Summary: "Casebook on tort law for law school courses"–Provided by publisher.
Identifiers: LCCN 2020045530 (print) | LCCN 2020045531 (ebook) | ISBN 9781543826302 (hardcover) | ISBN 9781543826296 (ebook)
Subjects: LCSH: Torts–United States. | LCGFT: Casebooks (Law)
Classification: LCC KF1250 .T93 2021 (print) | LCC KF1250 (ebook) | DDC 346.7303–dc23
LC record available at https://lccn.loc.gov/2020045530
LC ebook record available at https://lccn.loc.gov/2020045531

About Wolters Kluwer Legal & Regulatory U.S.

Wolters Kluwer Legal & Regulatory U.S. delivers expert content and solutions in the areas of law, corporate compliance, health compliance, reimbursement, and legal education. Its practical solutions help customers successfully navigate the demands of a changing environment to drive their daily activities, enhance decision quality and inspire confident outcomes.

Serving customers worldwide, its legal and regulatory portfolio includes products under the Aspen Publishers, CCH Incorporated, Kluwer Law International, ftwilliam.com and MediRegs names. They are regarded as exceptional and trusted resources for general legal and practice-specific knowledge, compliance and risk management, dynamic workflow solutions, and expert commentary.

From Aaron
to
Kreindel

From Brad
to the memory of my father,
Harry W. Wendel,
and my mother,
Barbara J. Wendel

and from Aaron and Brad Wendel
in memory of Jim Henderson

Summary of Contents

Contents

chapter 10

chapter 11

Preface

We continue to hear from students that they find the book both accessible and rigorous. Features like the hypotheticals and authors' dialogues highlight areas of uncertainty or genuine disagreement among courts and scholars. At the same time, however, we have striven to avoid the "hide the ball" approach that afflicts far too many casebooks. Where a clear explanation is possible, we have given it, rather than trying to obscure the matter. If something remains murky, it may be due to an error on our parts, in which case we'd appreciate hearing about it. But it may simply be that the issue in question is genuinely difficult.

It is tempting to let a torts casebook rest on a foundation of great cases from the past, and not do too much updating. While the American Law Institute Third Restatement of Torts projects continue to generate a great deal of energy, tort doctrine overall has been relatively stable in recent years. The fourth edition of this book was intended to be a comprehensive revision, pruning out deadwood cases and adding in new ones as needed. The revisions for the fifth edition were less comprehensive, but the replacements reflect important developments in the law, including in areas as fundamental as duty, proximate cause, vicarious liability, and products liability.

This is the first edition of the book since the passing of our dear friend Jim Henderson. Jim was a great scholar, a great teacher, a great colleague, a great friend, and above all, a great human being. We miss him terribly, but hope to carry on his legacy with this book.

A.D.T. and W.B.W.

Acknowledgments

We thank Joanne Tapia, at Brooklyn Law School, who helped to prepare the manuscript. We could not have seen this through without her.

Research assistants provided invaluable help in assembling these materials. Taylor Arlack (Brooklyn '22), Briana Baker (Brooklyn '22), Madhura Banerjee (Cornell '22), Katherine Gutt (Brooklyn '22), Cohl Love (Brooklyn '22), Sandile Magagula (Cornell '22), Leah Rahmani (Brooklyn '22), Nick Steele-Oszlack (Cornell '22), Will Wilcox (Cornell '22), and Yisroel Wolf (Brooklyn '21). We are indebted to them for their contributions.

Deans Eduardo Peñalver at Cornell and Michael Cahill at Brooklyn also deserve thanks for their generous support.

We thank the authors and publishers of the following works for permitting us to include excerpts from these works:

Restatement of the Law Second Torts (1965), § 8A; § 19; § 21; § 35; § 46; § 63; § 65; § 222A; § 288A; § 291; § 310; § 311; § 339; § 402A; § 402B; § 442; § 520; § 821C; § 876; § 892. Copyright © 1965 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Second Torts (Tentative Draft No. 13), § 652B; § 652D. Copyright © 1967 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Second Torts (1976), § 652E. Copyright © 1976 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Third Agency (2006), § 7.07. Copyright © 2006 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Third Torts: Products Liability, § 1; § 2; § 3. Copyright © 1998 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Third Torts: Apportionment of Liability, § 8; § 15; § 23; § 27; § 29; § 314A; § 34; § 38; § 40; § 42; § 46; § 46(b). Copyright © 2000 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Third Torts: Liability for Physical Harm (2005), § 3; § 10; § 12; § 14; § 17; § 26; § 288. Copyright © 2005 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Third Torts: Liability for Physical and Emotional Harm (2010 & 2012), § 2; § 3; § 4; § 5; § 45. Copyright © 2010, 2012 by The American Law Institute. All rights reserved. Reproduced with permission.

Restatement of the Law Third Torts: Intentional Torts to Persons (Tentative Draft No. 1, April 8, 2015), § 101; § 102; § 103. Copyright © 2015 by The American Law Institute. All rights reserved. Reproduced with permission.

Uniform Commercial Code § 2-313. Copyright © 2002 by The American Law Institute and the National Conference of Commissioners on Uniform State Laws. Reproduced with permission. All rights reserved.

Uniform Comparative Fault Act § 6. Copyright © 1977 by The American Law Institute and the National Conference of Commissioners on Uniform State Laws. Reproduced with permission. All rights reserved.

Torts

Introduction

The observations and comments that follow address subjects that you should know something about as you set out on your study of tort law. Although these topics are not taken up separately in the course, they will be relevant throughout the materials. None of the comments should be taken as authoritative or exhaustive. Rather, they are aimed at giving you a bit of a head-start in your journey through the rich and provocative — and occasionally confounding — world of torts.

WHAT THIS COURSE IS ABOUT

The term "torts" connotes civil (rather than criminal) wrongs for which the victims (the plaintiffs) have causes of action against the wrongdoers (the defendants) to recover money judgments. The term traces its origins to the Norman French word for "twisted," or "crooked." It shares the same root, in Modern English, with "tortuous" and "torture." Torts include punching someone in the face without just cause; driving an automobile negligently so as to cause harm to others; and commercially distributing a defective, harmful product. The three major areas of tort that this book explores, reflected in these examples, are intentional torts, negligence, and strict liability. Tort law is often characterized as private law. Tort actions are typically brought by private persons who either claim themselves to be victims of wrongdoing or who claim to represent such victims. Criminal law is the public-law counterpart to tort. Crimes are prosecuted by officers of the state to protect and vindicate essentially public interests. Many torts have parallels in criminal law, and the terminology is quite similar in both the private (tort) and public (criminal) contexts.

In addition to learning about tort law, you will also be learning about the processes by which tort claims get resolved in our system. Formal adjudication, which takes place in both state and federal trial courts, is the subject of a separate

first-year law course unto itself — civil procedure. In this torts course, you will also consider the appellate phase of adjudication, whereby one or the other side takes the case to a higher court. And you will be introduced to the settlement process whereby the parties agree outside of court to terms that resolve the claim once and for all. Most tort claims are resolved via settlement — it is too costly to take very many cases to full-blown trial. Settlement agreements are formal contracts that must conform to the requirements you will be studying in your course on contract law.

More than any other course in your first year of law school, torts has been the subject of public controversy in recent years. Massive class actions have sought to vindicate the rights of hundreds of thousands of injured victims. Tort liabilities that run in the hundreds of billions of dollars have forced entire industries into bankruptcy. Perhaps most directly relevant to those of you who may eventually go into trial practice on the civil side, lawyers and law firms for both tort plaintiffs and defendants have prospered financially from all of this legal activity. Some observers applaud these developments, believing that America is a better, safer place for all of it. Other observers are appalled at what they view to be excesses that threaten our national welfare. Obviously, it is premature for you to form firm opinions one way or the other, given that your study of tort law has only just begun. However, these issues will not go away any time soon; and before we are finished with this course, you should be in a better position to decide where you stand.

SOME PRELIMINARY THOUGHTS REGARDING THE SOCIAL OBJECTIVES OF TORT LAW

In order to understand tort law, it is useful, as a general matter, to appreciate what tort law is trying to accomplish. Of course, sometimes the rules of tort law are so clear and precise that the proper liability outcome in a given case is obvious regardless of what the underlying objectives of the system may be. Thus, the intentional tort of battery requires that the defendant's intentional act cause a harmful or offensive contact with the plaintiff's person. In the absence of such contact, the defendant has not committed a battery regardless of how deliberately wrongful the defendant's conduct has been. Even if tort law is assumed to be aimed at discouraging intentionally wrongful conduct, without a harmful or offensive contact with the plaintiff, the defendant has not committed a battery — and that is that. But inevitably (and more often than you might think) cases arise in which the contact requirement for battery is not so clear. For example, will kicking a park bench on which the plaintiff is sitting suffice? Is a sharp tap on a stranger's shoulder to get her attention an "offensive" (and therefore wrongful) contact within the rules governing battery? In these instances, reasonable minds may differ on whether the contact requirement is satisfied. In determining the appropriate outcomes in these cases, an appreciation of the underlying objectives of tort certainly helps.

Current thinking about the objectives of our tort system falls into two main camps. Many observers believe that tort law exists to correct wrongs—injustices—that have occurred in the course of human interactions. In determining whether a tort remedy is appropriate, courts look backward at past events and ask if a wrong has been committed. If it has, the court so declares and enters its declaration in the public record that the defendant has wronged the plaintiff. On the assumption that the payment of money damages by the defendant to the plaintiff will make the injured plaintiff whole again (or as nearly whole as possible), the court achieves corrective justice by ordering such payment. On this widely shared view, tort law's primary objective is to achieve fairness for its own sake. The other major view concerning the objectives of tort is instrumental—tort remedies are justified because they create incentives for actors to behave more carefully in the future. The emphasis from this second perspective is not to correct past wrongs but to deter future losses. Unlike the corrective justice perspective, in which tort judgments are ends in themselves, from the instrumental viewpoint tort judgments are means to the end that really matters: achieving a less dangerous (and thus more prosperous) society.

If the truth be told, these two contrasting views regarding the underlying objectives of tort will, in many, if not most, instances, explain and justify the same outcomes on the same facts. The question raised earlier concerning whether a sharp tap on a stranger's shoulder is, or is not, offensive to reasonable sensibilities should probably be decided in the same way from either a fairness/corrective-justice or an instrumental/safety perspective. But situations arise in which one's choice of worldview makes a difference in how actual cases get decided. For example, debate continues currently on the issue of whether a product manufacturer's duty to warn consumers of nonobvious risks is based solely on reducing future injuries or is also based on maintaining respect for the dignitary values that inhere in consumers being allowed to make fully informed choices regarding product use and consumption. Depending on the view one adopts, certain kinds of warnings will, or will not, be required from manufacturers, and the tort liabilities will vary accordingly.

As you work through the appellate decisions in this book, you should ask yourself whether a particular court's rationale seems to reflect corrective justice or instrumental perspectives, or perhaps a combination of the two. And where no view of underlying objectives is evident from the opinion, you should ask yourself how the case on appeal might have been argued for each side, using one or the other perspective. This is a course on tort *law*, not tort *policy*. But sometimes the two cannot easily be separated.

ETHICAL RESPONSIBILITIES OF LAWYERS

Cases do not make their way through the litigation system all by themselves. Most plaintiffs and defendants in tort lawsuits are represented by lawyers. In an adversarial system of adjudication, as we have in the United States (as in other countries

sharing the heritage of the English common law, such as the United Kingdom, Canada, Australia, and New Zealand), it is up to the parties themselves, with the assistance of their lawyers, to decide what claims and defenses to assert. The parties and their lawyers also investigate incidents to determine the facts; largely control the process of pretrial discovery, where plaintiffs and defendants learn information in the possession of the other party; and have significant latitude to decide what evidence to introduce at trial. The practice in adversarial systems is in contrast with so-called civil law systems, often based on the French or German civil code, in which judges exercise greater control over the processes of investigation, discovery, and presentation of evidence at trial. It is true, as you will see, that American judges do have the authority to manage trial and pretrial litigation to some extent, but the parties and their lawyers nevertheless play a central role in the justice system in the United States.

Lawyers are not merely cogs in the machinery of the justice system, but play a vital, creative role as representatives of clients. Lawyers make countless decisions in the course of a lawsuit, concerning matters such as which parties to sue, what claims or defenses to assert, what avenues of investigation and discovery to pursue, whether to recommend that their client settle a case or go to trial, and how to conduct the trial. In making these decisions, lawyers are guided and constrained by obligations they owe both to their client and to the justice system. American lawyers like to describe themselves as "zealous advocates within the bounds of the law," capturing both of these duties — to clients, to be dedicated, loyal, competent representatives, and to courts, to ensure that their own actions and those of their clients remain lawful. These general ethical ideals are fleshed out as more specific, legally enforceable obligations. For example, lawyers are prohibited from disclosing confidential information related to their representation of clients, and may not represent other parties whose interests conflict with those of a client. Lawyers also may not knowingly introduce false evidence or fail to correct the false testimony of a witness. Violations of these duties may subject a lawyer to professional discipline, meted out by the court of the jurisdiction in which the lawyer is admitted to practice law. Alternatively, a lawyer may be subject to a lawsuit by a client for malpractice or breach of fiduciary duty, or may be sanctioned or held in contempt by a tribunal before which the lawyer is appearing.

Legal ethics is an ambiguous term. It may refer to general ideals, such as being a loyal representative of clients or an "officer of the court." Lawyers may also be subject to criticism by others in ethical terms for doing things that appear to be improper by the standards of ordinary morality. The academic discipline of legal ethics is concerned, among other things, with working out the right way to understand the relationship between the professional obligations of lawyers and the values and principles that guide people in their everyday lives. As often as not, however, when lawyers talk about legal ethics they mean the rules of professional conduct under which they practice and other aspects of the law governing lawyers. Every state in the United States has adopted rules of conduct based on the Model Rules of Professional Conduct, prepared by the American Bar Association (ABA). The ABA does not have authority to regulate the profession — it is really only a trade association of lawyers — but its model professional standards have proved

to be very influential, and state courts have generally adopted conduct rules based closely on the ABA's models. In addition to these rules of professional conduct, the violation of which can subject the lawyer to sanctions including reprimand, suspension, or disbarment, lawyers must conform their conduct to applicable legal standards set out in tort, contract, agency, criminal, constitutional, and procedural law.

At various points in this book we will consider some of the ethical issues that arise for lawyers in tort litigation. Although some of these issues, such as conflicts of interest and confidentiality, are complex and technical, it is never too early to start spotting the issues, as lawyers like to say, and becoming aware of when you might need to think like a lawyer about your own duties and liabilities. It is also never too early to think more broadly, in ethical terms, about the role of the legal profession in society and whether lawyers are justified in doing things that sometimes seem ethically troubling. There is really no way to separate ethical issues from the contexts in which lawyers practice, so we hope to offer some food for thought along the way while you are learning torts.

MEASURES OF RECOVERY IN TORT: THE RULES GOVERNING DAMAGES

In all of the cases we will consider in these materials, and in almost all of the tort cases brought to court, plaintiffs seek to recover money damages from defendants. When a plaintiff is successful, the court enters a *judgment* against the defendant, in favor of the plaintiff. If a jury is involved, the jury will have returned a *verdict* for the plaintiff, upon which the court enters judgment. The judgment is an order by the court to the defendant to pay the plaintiff a specified amount of money, together with interest from the date of judgment, within a certain time. (When the judgment is for defendant, the court simply enters an order to that effect.) If the defendant does not satisfy the judgment by paying as ordered, the plaintiff may seek the court's assistance in employing governmental officers to force payment, sometimes by a court-supervised sale of the defendant's reachable assets.

For what elements of loss may successful tort plaintiffs recover? Measured by what standards? In some cases, successful plaintiffs are entitled to *nominal damages* — a token amount awarded simply to commemorate the plaintiff's vindication in court. At early common law in England, nominal damages often took the form of defendant's payment of a peppercorn. Today, for some intentional torts that do not involve physical harm or outrageous behavior, courts award nominal damages — one dollar, perhaps — to successful plaintiffs. Courts award *compensatory damages* to compensate the plaintiff for losses caused by the defendant's tortious conduct. In personal injury cases, compensatory damages include economic losses such as lost earnings and reduced future earning capacity. Economic losses for personal injury also include medical and rehabilitation expenses, both past and future. Plaintiffs may also recover for intangible, *noneconomic losses,* including pain and suffering and mental upset past, present, and future.

In connection with claims for property damage, the successful plaintiff recovers an amount representing the extent by which the market value of the plaintiff's property has been diminished because of the defendant's tortious conduct.

Special rules apply when the defendant's tortious conduct causes death. For one thing, the action is brought by surviving next of kin or by a legal representative on behalf of the decedent's estate. *Wrongful death statutes* authorize recovery for the death itself. *Survival statutes* authorize recovery for losses incurred by the victim between the time of injury and the subsequent death. Compensatory damages in wrongful death cases track those awarded in personal injury cases not involving death, and include funeral and burial costs. The major element of economic recovery in these cases is destruction of the decedent's earning capacity. Damages do not, of course, include the elements of future medical expenses and pain and suffering, allowed in non-death cases. Jurisdictions vary with respect to whether surviving family members are allowed to recover for their own grief and emotional upset brought on by the death. A majority of American jurisdictions allow such recovery.

In addition to nominal and compensatory damages, American courts award *punitive damages* when the defendant's tortious conduct is especially outrageous. Jurisdictions vary in their descriptions of the sort of tortious conduct that justifies punitive damages. In theory, the amount of the award should be great enough, in relation to both the defendant's conduct and the defendant's net economic worth, to teach the defendant a lesson. The United States Supreme Court has begun to monitor the size of punitive damage awards in state courts on the grounds that awards that are too great violate the rights of defendants to due process of law under the Fourteenth Amendment to the United States Constitution.

TIME LIMITATIONS ON THE BRINGING OF TORT ACTIONS

When someone discovers that she has been harmed by another's conduct, she (the plaintiff) has a fixed period of time within which to commence a legal action against the other (the defendant) by filing a complaint in court. Actions commenced after the time period has expired are dismissed as being time barred. Statutes of limitations establish these time periods in every jurisdiction, with different periods applicable to different causes of action. Claims for intentional torts have the shortest limitations periods — typically, one year from the time that the plaintiff discovers the injury. Unintentional, fault-based tort claims have somewhat longer limitations periods — typically two years from the discovery of injury. The rationale behind these statutes of limitations is that when claims are allowed into court years after the events giving rise to the plaintiff's claim, the relevant evidence is likely to be stale and untrustworthy, or unavailable. Placing reasonable time pressures on plaintiffs reduces these difficulties, while being fair to the injured victims of wrongful conduct.

Jurisdictions differ regarding exactly what events start the limitations period running. A majority of states start running their limitations periods from the time

the plaintiff discovers — or should reasonably discover — that the defendant has caused her to suffer injury. Some jurisdictions start the period at discovery of the injury even if its cause is unknown; and a few start the period at the time of injury whether or not discovered. The limitations period begins to run in almost all states even if the plaintiff does not yet realize that the defendant has acted tortiously. When the victim of tortious conduct is under a legal disability when the statutory limitations period would ordinarily start to run, the statute is *tolled* — does not start to run — until the disability has ended.

In addition to these statutes of limitations, some jurisdictions have *statutes of repose* that impose time periods — typically four to six years — that begin to run upon occurrence of an event other than discovery of injury to the plaintiff. For example, some states have enacted statutes that bar products liability actions from being brought more than six years after original sale or distribution of the defective product regardless of when the product causes injury. These repose statutes have been the object of attack under various state constitutional provisions.

HOW TO READ AN APPELLATE DECISION

Your torts instructor may have his or her preferred way for you to summarize, or "brief," the appellate decisions in this book, and you are advised to follow those directions. But it will help you to get started if we share our own insights regarding how to read an appellate decision. The first thing you should understand is that every appeal involves a review by a higher court of a decision reached by a lower court, usually the court that tried the case in the first instance. Trial courts hear evidence, including testimony from witnesses who are sworn to tell the truth. Throughout the trial, the judge makes rulings on a number of issues raised on motions by the lawyers for both sides — whether to dismiss the complaint, whether to admit certain evidence, how to instruct the jury, whether to enter judgment on the jury's verdict, and the like. The trial judge's responses to all these requests take the form of legal rulings, the correctness of which is reviewable on appeal. Of the relatively few tort cases that actually reach trial, only a small proportion get appealed.

The appeal, brought by the party who lost at trial, asks the appellate court to review a limited number of the rulings of law by the trial court to determine whether error was committed. The findings of fact by the jury at trial, assuming the judge did not commit error in giving the case to the jury, are not reviewable on appeal. The appellate court may review only issues of law that were implicitly resolved for the winning side in the trial court's legal rulings. In performing this review, the appellate court does not admit evidence or hear testimony. Instead, the appellate court is limited to the written record from the trial, including pleadings, motions, transcripts of testimony, the trial court's legal rulings, and final judgment.

Because every torts trial begins with the plaintiff's written complaint and ends with the trial court's written judgment, every summary of the case on appeal could

begin with a description of the trial. For example, in connection with the first appellate decision in this book, *Garratt v. Dailey*, which starts on page 9, a summary of the trial below might begin by stating that the plaintiff brought an action against the defendant in battery. The summary could then describe the trial, perhaps by stating that "[i]t appears to have been undisputed that . . . ," with a description of the relevant testimony. Next, the summary might state that "at the close of testimony the trial court, sitting without a jury, found that . . . ," with a description of the judge's fact findings relevant to the issue of intent. Then, the summary might state that the trial court entered judgment on the findings for the defendant, Brian Dailey, and that the plaintiff appealed. There might follow a description of the issue on appeal (did the trial court err in entering judgment for defendant without making a finding on what Brian Dailey knew when he moved the chair), together with the Supreme Court's resolution of that issue and its disposition of the case: "The Supreme Court found error, reversed the entry of judgment for the defendant, and remanded the case to the trial court for clarification on the factual issue of. . . ."

Of course, these are only suggestions, offered as a beginning to guide your own thinking about appellate decisions. Your professor will no doubt guide you through the process of understanding and assimilating the materials in this course.

chapter 1

Intentional Torts: Interference with Persons and Property

A. INTENT

Intentional torts are the first of three major categories of tort liability we will consider in this course. One might think that the law of intentional torts would be easy to understand. It does not take an Einstein to conclude that, if Jones intentionally and with no provocation punches Smith and bloodies Smith's face, Jones will have to pay for the damages he causes. But, as we shall see, Jones's state of mind when he intentionally contacts another can range from the most evil intent to cause serious harm to an innocent intent to cause trivial contact with Smith's person. Where along the spectrum of intentional contacts tort liability should be imposed will require considerable thought. A word of caution is in order before we embark on the study of intentional torts. "Intent" is an everyday street term. In the cases that follow, it will be given rather precise definition. As you read the cases in this chapter, ask yourself whether the courts are imposing liability because they disapprove of the conduct of the defendant, because they disapprove of what the defendant was thinking while engaging in the conduct in question, or both.

GARRATT v. DAILEY

279 P.2d 1091 (Wash. 1955)

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 backyard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the backyard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi

Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

> III. . . . that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.
>
> IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any 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 eleven thousand dollars. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions . . . 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. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:

> An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if
>
> (a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and
>
> (b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and
>
> (c) the contact is not otherwise privileged.

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

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

We have here the conceded volitional act of Brian, i.e., the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. . . .

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

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

> It is not enough that the act itself is intentionally done and this, even though the actor realizes or should realize that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this Section.

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. . . . 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. . . . If Brian did not have such knowledge, there was no wrongful act by him, and the basic premise of liability on the theory of a battery was not established.

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

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

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

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

Remanded for clarification.

THE RESTATEMENTS, SECOND AND THIRD, OF TORTS

Throughout this book, both cases and text will refer to the Restatements, Second and Third, of Torts. In your other courses you will also find references to Restatement sections on various subject matters. It is important to understand what Restatements are and what weight is to be given to them. First, Restatements are not statutes. Stylistically they consist of black letter rules (that often sound like statutes) and more expansive comments to the black letter rules (that don't sound like statutes) but they are not legislative. Instead, they emanate from a private not-for-profit organization, the American Law Institute (ALI). The ALI consists of approximately 4,000 members drawn from the bench, the practicing bar, and academia. Its governing body is the Council, which consists of close to 70 members — all of them highly prestigious judges, lawyers, and law professors. Over seven decades the ALI has produced Restatements in a host of areas of the law. Reporters are chosen by the ALI to work on a discrete area of the law. They are charged with the task of synthesizing the work product of the state and federal courts and discerning what is the best governing rule. The reporters create tentative drafts that are reviewed and critiqued by several advisory groups, the Council, and finally by the entire membership. After numerous iterations and drafts, the ALI approves the final draft for publication.

Restatements are not primary authority. Courts are not bound to accept the Restatement view. But they are often highly persuasive and the frequency with which they are cited gives evidence to the fact that courts take them seriously.

The Restatement of Torts has gone through three iterations. The Restatement, First, of Torts was completed in 1939. The Restatement, Second, of Torts was completed in 1964. The reporter for the Second Restatement was the legendary William L. Prosser, one of the most influential figures in American tort law. The process of drafting the Restatement, Third, of Torts began in 1992. However, this time rather than attempting to draft an entire Restatement for all of tort law, the ALI decided to break torts down into several discrete subject matters. The first project was the Restatement of Products Liability for which two of the co-authors of this book (Twerski and Henderson) served as reporters. That project was completed in 1998. The second project was the Restatement, Third, of Torts: Apportionment of Liability (1999) (Reporters Professors William C. Powers, Jr., and Michael D. Green). The third project was the Restatement, Third, of Torts: Liability for Physical and Emotional Harm (2012) (Reporters Professors Michael D. Green and William C. Powers, Jr.). The last two projects in progress are the Restatement, Third, of Torts: Intentional Torts to Persons (Reporters Professors Kenneth W. Simons and W. Jonathan Cardi) and Restatement, Third, of Torts: The Law of Economic Harm (Reporter Professor Ward Farnsworth).

Since the Restatement, Third, of Torts addresses discrete subject matters and leaves many sections of the Second Restatement as authoritative, you will find references to both the Second and Third Restatements throughout this book. For example, the section on "Intent" has been reworked and now can be found in § 1 of Restatement, Third, of Torts, Vol. 1 (2010). Thus § 1 of the Third Restatement is in agreement with the First and Second Restatements that one acts with intent when one acts with the purpose to produce that consequence or when one knows with substantial certainty that the consequence will result. However, the sections dealing with the individual intentional torts, i.e., battery, assault, false imprisonment, trespass to land, and trespass to chattels, are to be found in the Second Restatement and in tentative drafts of the Third Restatement. On the other hand, the tort of intentional infliction of emotional distress is taken up in § 45 of the Restatement, Third, of Torts, Vol. 2 (2012). This back and forth between the Second and Third Restatements is simply a product of the ongoing revision process.

FOOD FOR THOUGHT

Why did the appellate court in *Garratt* send the case back to the trial court? Consider the following possibilities: (1) The appellate court believed that to make out a battery it was sufficient if Brian knew that Ruth Garratt would sit where the chair had been and the court was not certain that the trial judge considered such knowledge sufficient to establish battery; (2) the appellate court believed that in order to make out a battery it was sufficient that Brian Dailey knew that he was going to bring about a contact that would be harmful or offensive and the court was concerned that the trial judge focused only on whether Brian acted with the desire or purpose of bringing about a harmful or offensive contact;

or (3) the appellate court believed that it was not necessary to determine whether Brian subjectively knew that he would cause either (1) or (2) but that it was sufficient if a reasonable child of Brian's age would know that his conduct would bring about a harmful or offensive contact.

On remand the trial judge, after reviewing the evidence, concluded that Brian knew with substantial certainty that the plaintiff would sit where the chair had been, since she was in the act of seating herself when Brian removed the chair. At least that is what the Washington Supreme Court, on a second appeal, believed had happened on remand. *See* Garratt v. Dailey, 304 P.2d 681 (Wash. 1956). Several scholars who have reviewed the trial judge's second decision are not sure that the Washington Supreme Court's characterization of what the trial judge held on remand was correct. In their view the trial judge found for the plaintiff because he held that constructive intent was sufficient to establish a battery. Apparently, the trial judge held that a battery could be established if a reasonable child of Brian's age would know that an offensive or harmful contact was certain to occur. *See* Walter Probert, *A Case Study in Interpretation in Torts:* Garratt v. Dailey, 19 Toledo L. Rev. 73 (1987); *and* David J. Jung & David I. Levine, *Whence Knowledge Intent? Whither Knowledge Intent?*, 20 U.C. Davis L. Rev. 551, 559-565 (1987).

In *Garratt,* plaintiff's lawyer clearly sought to establish through questioning of Brian that he knew that pulling a chair out from under someone would be an unpleasant experience. What if, however, Brian were to testify that he and his friends do it all the time to each other and that it's great fun? No one ever gets hurt and everyone enjoys the game. If Brian acted believing that Ruth would be neither injured nor offended, would his state of mind meet the requisites for battery as set forth in the Restatement?

In any event, even if a plaintiff must establish subjective intent, the trier of fact, be it judge or jury, is not required to believe a child's testimony that he did not know that his conduct would cause a harmful or offensive contact. It could conclude that the child was bright and mature and did actually know that his act would bring about undesired consequences. *See Prosser and Keeton on the Law of Torts* § 8 (5th ed. 1984).

INTENT AND DIMINISHED CAPACITY

Children of Brian Dailey's tender age are routinely held liable for their intentional torts. *See, e.g.,* Bailey v. C.S., 12 S.W.3d 159 (Tex. App. 2000) (four-year-old became angry at a babysitter and struck her in the throat); Jorgensen v. Nudelman, 195 N.E.2d 422 (Ill. App. Ct. 1963) (six-year-old held liable for throwing a stone, injuring playmate). Adults of diminished capacity have also been held liable based on intent. Thus, persons with intellectual and developmental disabilities and mental illnesses are held liable based on intent as long as they are capable of formulating in their mind the intent set forth in the Restatement. *See, e.g.,* Polmatier v. Russ, 537 A.2d 468 (Conn. 1988) (defendant adjudged not guilty of murder on grounds of insanity is civilly liable for intentionally causing the decedent's death).

INTENT TO OFFEND OR INTENT TO CONTACT?

In White v. Muniz, 999 P.2d 814, 815 (Colo. 2000), defendant, a patient suffering from Alzheimer's disease, struck the plaintiff caregiver on the jaw when the plaintiff attempted to change defendant's adult diaper. The trial judge instructed the jury as follows:

> The fact that a person may suffer from Dementia, Alzheimer type, does not prevent a finding that she acted intentionally. You may find that she acted intentionally, if she intended to do what she did even though her reasons and motives were entirely irrational. However, she must have appreciated the offensiveness of her conduct.

Based on this instruction, the jury found for the defendant and the plaintiff appealed. In affirming, the Colorado Supreme Court held that a battery cannot be established by simply proving that the defendant intended a contact with the plaintiff's body that turns out to be offensive. The plaintiff must prove that the defendant intended the contact be harmful or offensive to the other person. The court noted that other courts disagree and require only that the defendant intend contact with another and that the contact result in a touching that would be offensive to a reasonable person.

On similar facts the Utah Supreme Court in Wagner v. State of Utah, 122 P.3d 599 (Utah 2005), held that "mere intent to contact" was sufficient to trigger an action for battery if the contact was offensive to a reasonable person. Plaintiff was standing in a customer service area at a Kmart store when a mentally disabled patient who was under the supervision of the Utah State Development Center suddenly and inexplicably attacked her. Plaintiff sued the State of Utah for negligently failing to supervise the mental patient, who had a history of violent behavior. Under Utah law the state is immunized against negligence if the action arises out of an assault or battery. Plaintiff, seeking to avoid being barred by the immunity, argued that the action of the mental patient could not legally constitute a battery since she was mentally incompetent to intend to cause "harmful or offensive contact." The state argued that the "only intent required . . . is simply the intent to make contact." The Utah court agreed with the state and barred the action.

Citing to the Restatement sections set forth in *Garratt* the court said (*id.* at 605):

> If a physician who has performed a life-saving act of assistance upon an unconsenting patient with the hope of making that patient whole is liable for battery under the express terms of the Restatement, and a practical joker who makes a contact which he thinks will be taken as a joke or to which he thinks his victim has actually given consent is likewise liable, we cannot then say that other actors must intend harm in order to perfect a battery.

Accord White v. University of Idaho, 797 P.2d 108 (Idaho 1990) (piano teacher who approached student from behind and ran his fingers over her back to demonstrate the light touch that a pianist should have when running his hands over the

authors' dialogue 1

JIM: Aaron, I'm troubled by the text that you drafted following the *Garratt* case. It doesn't take a rocket scientist to realize that you believe that in order to be liable for a battery, the defendant must have intended to harm or offend the plaintiff. Now, I agree that the contact should be one that would be offensive to a reasonable, normal person. If I tap you gently on the elbow to get your attention and you suffer some gosh-awful, unexpected reaction, I shouldn't be liable. But why should it be necessary that the defendant intend that the contact be harmful or offensive? Why should Ruth Garratt have to prove that Brian Dailey intended to do something bad? Why isn't it enough that Brian knew that she would suffer a contact that normal people would find harmful or offensive?

AARON: Let's get this straight. Do you agree that in order to make out a case in battery you have to prove that the defendant subjectively desired to cause contact?

JIM: Of course not. It's enough to establish that the defendant knew that a contact was substantially certain to result. Ruth Garratt must show that the defendant himself knew she would fall.

AARON: Fair enough. But once we take the trouble to delve into Brian Dailey's five-year-old mind to determine what he knew when he moved the chair, what if we

keyboard committed the tort of battery even though he had not intended to injure or offend the plaintiff); Kelley v. County of Monmouth, 883 A.2d 411, 552 (N.J. Super. Ct. App. Div. 2005) (defendant's claim that he intended "horseplay" does not absolve him for liability for battery). *But see* Walters v. Soriano, 706 N.W.2d 702 (Wis. Ct. App. 2005) (physician doing a medical evaluation to discover whether patient was malingering in order to receive worker's compensation benefits accused patient of not trying to bend over as far as she could and thus pulled her backward causing her injury; held not liable for battery since he did not act for the purpose of causing bodily harm nor of causing offensive contact but rather for the purpose of performing a medical evaluation).

The First and Second Restatement of Torts appear to require that to be liable for battery that the defendant acts intending to cause a harmful or offensive contact (dual intent). The Tentative Draft No. 1 of the Restatement, Third, of Torts: Intentional Torts to Persons, §§ 101 and 102 (2015) require only that the "actor intends to cause contact with another" and the "contact (i) causes bodily harm or (ii) is offensive" (to a reasonable sense of personal dignity). Whether it is sufficient that an actor intend physical contact with the person of the plaintiff (single intent) or the actor must also intend to offend or cause bodily harm (dual intent) is a matter of controversy both in the case law and between scholars. *See* Nancy Moore, *Intent and Consent in the Tort of Battery, Confusion and Controversy,* 61 Am. Univ. L. Rev. 1585, 1612-1617 (2013). For an exhaustive review of the case

discover that he did not intend to harm or offend? His mind on that aspect of the case is pure as driven snow. For that we are going to hold him liable like he was a mugger?

JIM: You're missing the point. If Brian subjectively knows Ruth will hit the ground that should be sufficient. He has presented Ruth Garratt with an unwanted contact.

AARON: As Perry Mason would say, "Your answer is non-responsive." The question is why are you holding him liable for his subjective knowledge when he did not subjectively desire to offend or harm? Brian may not know that it was unwanted. As I say in the notes, Brian may have thought it was good fun and that she would sit down on the ground and laugh, as did all his friends. He may not have known that older people are more fragile and react differently than his playmates.

JIM: It seems to me rather elementary, at least from Ruth Garratt's point of view. All of us, especially as we get on in years, should be able to go through life without being messed with intentionally by other people, even youngsters. Once the defendant decides to cause another person to fall on the ground, the show is over. Yes, the contact must be objectively offensive to a reasonable person. But the defendant need not intend more than to cause such a contact.

---

law supporting the single intent or dual intent rule, *see* Restatement (Third) of Torts: Intentional Torts to Persons, § 102 Reporters' Notes (Tentative Draft No. 1, 2015). For representative cases, *see, e.g.*, Sutton v. Tacoma School District. No. 10, 324 P.3d 763 (2014) ("requisite intent for battery is the intent to cause the contact not the intent to cause injury) (single intent). Carlsen v. Koivumaki, 227 Cal. App. 4th 879 (2014) (to make out battery requires proof that "the defendant touched the plaintiff or caused the plaintiff to be touched with the intent to harm or offend the plaintiff") (dual intent). Consider whether the ABC Construction Co., in building a 100-floor skyscraper with knowledge to substantial certainty that at least three workers will fall to their death over the five years it takes to construct the building, should be liable under the "single intent" rule. *See* Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. Rev. 1 (2012).

hypo 1

A, an immigrant from country *X*, is visiting America for the first time. In *X,* when taking leave from a friend or acquaintance, it is customary for the parties to kiss. *A* met *B*, a stranger in a bar, and chatted amicably for half an hour. When *B* got up to leave, *A* planted a kiss on *B*'s cheek. *B* was so taken aback that he fell backward and injured himself. Has *A* committed a battery?

hypo 2

Jennifer Cleary, age 50, was injured when her 8-year-old nephew jumped into her arms welcoming her to his birthday party ("I love you, Aunt Jennifer"), causing her to fall and break her wrist. She subsequently sued her nephew for $127,000 for medical bills and pain and suffering. She hoped that if her nephew were found liable the insurer would foot the bill. What result?

hypo 3

Adam, a long-distance truck driver, develops lung cancer after driving for ten years with a co-worker who was a chain smoker of *XYZ* cigarettes. Doctors are prepared to testify that his cancer was caused by exposure to second-hand smoke. Adam sues the *XYZ* Tobacco Co. for battery claiming that it knew with substantial certainty that people would be exposed to second-hand smoke and thus suffer injury. Is *XYZ* liable for battery?

WHO PAYS THE BILL?

However, one formulates the rule that subjects children to liability for their intentional torts, the question arises as to why an injured plaintiff would take the trouble to sue minors who have no assets. Some infants are born with silver spoons in their mouths. But not many — most children have no property of their own with which to satisfy a judgment. Parents and caretakers are generally not liable for the acts of minors or incompetents unless they themselves were negligent for failing to supervise or watch over their charges. *See, e.g.*, Dinsmore-Poff v. Alvord, 972 P.2d 978 (Alaska 1999) (thorough review of the case law establishing that, unless parent had reason to know with specificity of a present need to restrain a child to prevent imminently foreseeable harm, the general knowledge of child's past misconduct is not sufficient to impose liability on the parent for the acts of the child).

Many claims based on the intentional torts of a child are brought with the hope of recovering against the parents' homeowner's insurance policy. Although homeowner's policies provide very broad coverage, they generally exclude liability for intentional torts. Whether the exclusion bars recovery for the intentional torts of a child is a matter of some controversy. *See* Intent in Other Contexts, *infra*, p. 24.

More than a dozen states have enacted statutes imposing liability on non-negligent parents for the malicious or willful acts of their offspring. Most of these statutes limit liability. *See, e.g.*, Ala. Code § 6-5-380 ($1,000 and court costs); Ariz. Rev. Stat. Ann. § 12-661(B) ($10,000); Cal. Civ. Code § 1714.1 ($25,000); Cal. Civ. Code § 1714.3 (capping parental firearm liability at $25,000 per death or injury, not exceeding $60,000 per occurrence); Miss. Code Ann. § 93-13-2(1) ($5,000) (limited to property damage); W. Va. Code Ann. § 55-7A-2 ($5,000).

GARRATT *IN THE CLASSROOM*

The ghost of *Garratt* came back to haunt a law professor. On June 26, 2001, the *New York Post* ran a front-page story entitled "Class Action — Student Files $5M Suit Against Her Own Law Prof." The crux of the story was that a law professor teaching *Garratt v. Dailey* called the plaintiff, a 30-year-old female student, to the front of the class. He pointed out a chair and asked her to sit down. As she was sitting down, he pulled the chair out from under her. She fell and claimed she hurt her back. The lawyer representing her in a battery action against the professor said, "It was humiliating. There she was in front of all her peers with her dress up around her waist and injured." The lawyer suggested that the professor may have singled her out because she had sent him an e-mail saying that she was not prepared for class that day. The lawyer further claimed that his client had an "eggshell body" because she had undergone a back operation shortly before her fall and thus sustained serious injuries to her back. Assume that the professor never read the student's e-mail and had not singled her out, but merely wanted to demonstrate the *Garratt* story. Can he successfully defend a battery claim?

RANSON v. KITNER

31 Ill. App. 241 (1888)

CONGER, Justice.

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.

TALMAGE v. SMITH

59 N.W. 656 (Mich. 1894)

MONTGOMERY, Justice.

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 plaintiff 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.

Counsel for the defendant contends that the undisputed testimony shows that defendant threw the stick without intending to hit anybody, and that under the circumstances, if it in fact hit the plaintiff, — defendant not knowing that he was on the shed, — he was not liable. We cannot understand why these statements should find a place in the brief of defendant's counsel. 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. It is hardly conceivable that this testimony escaped the attention of defendant's counsel.

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 and 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 the 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 Smith, . . . (the defendant), would be doing an unlawful act, if the force was unreasonable, because he had no right to use it; then he would be doing an unlawful act. He would be liable, then, for the injury done to this boy with the stick, if he threw it intending to hit the young man Smith, or the young man that was with Smith on the roof, and the force that he was using, by the throwing of the club, was excessive and unreasonable, under all the circumstances of the case. . . .

We think the charge a very fair statement of the law of the case. The doctrine of contributory negligence could have no place in the case. The plaintiff, in climbing upon the shed, could not have anticipated the throwing of the missile, and the fact that he was a trespasser did not place him beyond the pale of the law. 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 someone.

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.

TRANSFERRED INTENT

In *Talmage*, the court "transferred the intent" to batter one person to establish a battery against another whom the defendant did not intend to hit. This illustrates the "unintended victim" category of transferred intent cases. *See, e.g.*, Baska v. Scherzer, 156 P.3d 617 (Kan. 2007) (plaintiff recovered for battery when she intervened in a fist fight and was punched); Hall v. McBryde, 919 P.2d 910 (Colo. Ct. App. 1996) (defendant liable for battery to neighbor injured during defendant's gunfire with drive-by shooters). *See also* Restatement (Third) of Torts: Intentional Torts to Persons § 110 cmt. *b* (Tentative Draft No. 1, 2015). The second category arises where a defendant has the intent to commit assault, battery, false imprisonment, trespass to land, or trespass to chattels and harm results to another's person or property. *Id.* Intent to commit any one of the five torts will suffice to make out the intent for any of the others. *See* Manning v. Grimsley, 643 F.2d 20 (1st Cir. 1981) (Baltimore Oriole pitcher liable for battery to plaintiff hit by 80-mile-per-hour ball meant to scare hecklers); People v. Washington, 222 N.E.2d 378 (N.Y. 1966) (stating in dictum that defendant who threw a trash can at plaintiff that hit plaintiff's car was liable for trespass to chattel). In the third category, the defendant mistakenly believes the plaintiff is another person that he intended to harm. *See* Am. Family Mut. Ins. Co. v. Johnson, 816 P.2d 952 (Colo. 1991) (defendant liable for battery to woman he mistook for his wife and kicked). *See also* Restatement (Third) of Torts: Intentional Torts to Persons § 110 cmt. *b*. The classic article on the subject is William L. Prosser, *Transferred Intent*, 45 Tex. L. Rev. 650 (1967). Three law review articles question the necessity for, and the wisdom of, the transferred intent doctrine. *See* Osborne N. Reynolds, *Transferred Intent: Should Its "Curious Survival" Continue?*, 50 Okla. L. Rev. 529 (1997); Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 Marq. L. Rev. 903 (2004); Peter B. Kutner, *The Prosser Myth of Transferred Intent*, 91 Ind. L.J. 1105 (2016) (arguing that transferred intent between the five categories of intentional torts unnecessarily broadens the scope of liability).

hypo 4

A mugs *B* to steal his Rolex watch. Unbeknownst to *A*, *C* watches the mugging in horror. *C* remains hidden behind some trees, fearful that if he comes out *A* will mug him as well. The tort of false imprisonment requires that the defendant intentionally restrict the plaintiff's freedom of movement. Has *A* falsely imprisoned *C*?

hypo 5

A shot a gun over the head of *B* intending to frighten him. The bullet ricocheted off a telephone pole and killed a bird flying by. The bird fell onto the hood of a passing car. Two miles later the bird slipped onto the windshield and obstructed the driver's vision, causing him to collide with *C*. Is *A* liable to *C* under transferred intent?

THE LAWYER WHISPERED SWEET NOTHINGS IN MY EAR

It would certainly be convenient if a lawyer's client were able to recall helpful factual details that fit nicely into a narrative supporting the client's position. In *Ranson*, the defendant sought to avoid liability by stating the crucial fact that the plaintiff's dog looked just like a wolf. As in the author's dialogue, it might have been useful to Brian's defense if he had testified that he and his friends thought it was a riot to pull chairs out from under each other. Given the importance of facts to the outcome of cases (something lawyers quickly come to appreciate in practice), you might be wondering whether there are limits on what lawyers can do to prepare clients and other witnesses to testify. Professional disciplinary rules forbid lawyers to "falsify evidence, [or] counsel or assist a witness to testify falsely." Model Rules of Professional Conduct, Rule 3.4(b). But what if the lawyer reasonably believes it is true that Brian and his friends played the chair game, or the defendant in *Ranson* mistook the plaintiff's dog for a wolf? Imagine the conversation between the defendant in *Ranson* and his lawyer:

Lawyer: Tell me what happened.
Defendant: Well, we were out hunting wolves. They're a real menace, you know? Always taking our sheep.
Lawyer: What do you do when you hunt wolves?
Defendant: That's a pretty dumb question. We shoot them.
Lawyer: What I mean is, wolves are dangerous animals. I imagine you don't get too close to them. How far away are you when you shoot?
Defendant: I would never get closer than 50 yards, but mostly I'm about 100 yards away—I'm a good shot.
Lawyer: From that far away, how can you be sure what you're shooting is a wolf and not something else?
Defendant: I've been hunting wolves for 25 years. I know a wolf when I see it.
Lawyer: So you would never shoot without first making absolutely sure it was a wolf?
Defendant: That's right.
Lawyer: When you shot the dog owned by the plaintiff, what did you see?
Defendant: That dog looked just like a wolf.
Lawyer: You wouldn't have shot if it were a dog, right?
Defendant: No way—I don't shoot dogs.

There is no express prohibition in the disciplinary rules on this kind of suggestive interview, using leading questions to steer the client into telling a story that would be helpful from the point of view of the client's case. Many lawyers believe they are justified in working out the details of their clients' stories, because people tend to get confused and forget important details, and therefore may not be as effective as witnesses at trial. At some point, however, witness "preparation" can turn into a charade, with the lawyer effectively planting facts in the mind of the witness. A law firm representing plaintiffs in product liability lawsuits against asbestos manufacturers was criticized for doing just that when an internal memo was discovered entitled "Preparing for Your Deposition." The memo included advice such as:

> Remember to say you saw the NAMES [of the asbestos-containing products] on the BAGS. . . . The more often you were around the product, the better for your case. . . . It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it. . . . It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.

See Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 Pepp. L. Rev. 175, 185-188 (2003).

Is this taking things a bit too far? Even though there is no rule directly on point, one might argue that the purpose of adversarial litigation is to enable both parties to tell their stories. Lawyers are permitted to assist their clients in telling a coherent, persuasive story, but fundamentally they are not playwrights — their job is to work with the raw materials of a narrative as they actually exist. Of course, figuring out where the line is between assisting a client in telling her story and scripting the client's testimony requires judgment, and the fact that witness preparation usually takes place in a confidential setting might tempt lawyers to take a more active role than they would if their activities were exposed to scrutiny. Do you think the plaintiffs' lawyers in the asbestos case would have written the memo if they had known it would be disclosed publicly?

There is one very clear limitation on the way lawyers use witnesses and evidence at trial. Under no circumstances may a lawyer introduce false evidence or permit a witness to testify falsely. Model Rule 3.3(a) prohibits the knowing introduction of false evidence and, if a lawyer subsequently comes to learn that a witness she called has given material false evidence, the lawyer has an obligation to rectify the perjury including, if necessary, disclosing it to the court. Model Rule 3.3(a)(3). For a fascinating civil case in which lawyers came to suspect that one of their party's witnesses had introduced false evidence, but did not take sufficient vigorous remedial measures, *see* United States v. Shaffer Equipment Co., 11 F.3d 450 (4th Cir. 1993). The duty to take corrective action applies only when the lawyer knows the evidence is false, but *Shaffer Equipment,* along with many other cases involving civil litigation, takes a dim view of lawyers who claim that there was some uncertainty about the truth.

INTENT IN OTHER CONTEXTS

Heretofore, we have focused on the kind of intent necessary to establish the tort of battery (*Garratt* and *Talmage*) or torts involved in damaging the property of another (*Ranson*). However, the concept of intent rears its ugly head in a host of other tort-related areas. For example, many liability insurance policies exclude coverage for intentional torts. We have already established that Brian Dailey was liable for battery based on his knowledge to substantial certainty that he would cause an offensive contact. Would a liability insurance policy that excludes coverage for harms caused intentionally necessarily exclude coverage for the conduct of a five-year-old who did not act for the purpose of causing harm? *See, e.g.*, Baldinger v. Consolidated Mut. Ins. Co., 222 N.Y.S.2d 736, *aff'd,* 183 N.E.2d 908 (1962) (insurance policy covered injury caused by a six-year-old boy who pushed a little girl to get her to move; although the boy's act may have been tortious under the knowledge rule in *Garratt*, the boy did not act for the purpose of injuring the girl). *See also* Cynthia A. Muse, *Homeowners Insurance: A Way to Pay for Children's Intentional—and Often Violent—Acts?,* 33 Ind. L. Rev. 665 (2000); Erik S. Knutsen *Fortuity Victims and the Compensation Gap: Re-Envisioning Liability Insurance Coverage for Intentional and Criminal Conduct*, 21 Conn. Ins. L.J. 209, 219-222 (2014-15). Does a liability insurance policy that excludes coverage for liability arising from an assault or battery exclude coverage of a defendant who claims that he committed the battery in self-defense? *See* Mouton v. Thomas, 924 So. 2d 394 (La. Ct. App. 2006) (though self-defense justifies a battery, the insured intended to harm the plaintiff and therefore the exclusion applies).

All states have statutorily mandated workers' compensation systems that provide benefits to employees injured on the job without regard to whether the employer was at fault. These compensation systems generally provide for recovery of a percentage of lost earnings (typically one-half to two-thirds), and medical expenses, but do not allow recovery for pain and suffering. An employee covered under workers' compensation forfeits her right to a common law negligence action against the employer. Thus, the workers' compensation remedy is exclusive of fault-based tort remedies. However, when an employer acts intentionally to injure an employee, the question of whether the employer still enjoys immunity from tort liability is more complex. Courts are in agreement that an employer who in a fit of anger strikes an employee is not entitled to the immunity of workers' compensation. However, how far one can push the "intentional tort" exception to workers' compensation is a matter of some controversy. An employer may be aware that its conduct would be substantially certain to bring about employee injury yet not have acted with the purpose of doing so. Removing safety guards or ordering an employee to repeatedly engage in highly risky activity may lead an employer to believe that an employee will, in the future, be substantially certain to suffer injury; yet an employer would certainly disavow that it acted with the purpose of causing injury. Some courts utilize the Restatement dual definition of intent but others allow a tort action only if the employer acts with the purpose of causing harm. *See, e.g.,* Laidlow v. Hariton Machin. Co., 790 A.2d 884 (N.J. 2002) (applying the substantial certainty test in a case where an employer removed a safety guard in

a rolling mill and employee's left hand was mangled); *but see* Grillo v. National Bank of Washington, 540 A.2d 743 (D.C. 1988) (specific intent to injure necessary to remove case from workers' compensation immunity).

In Helf v. Chevron U.S.A. Inc., 203 P.3d 962 (Utah 2009), the court forged a middle ground between the purpose and the knowledge approaches to intent. The plaintiff in that case alleged her injuries were caused by a chemical reaction that occurred when her supervisors directed her to neutralize toxic sludge through a chemical reaction in an open-air pit. She claimed that several hours before she was directed to initiate the reaction, several workers got ill from an identical reaction in the same open-air pit. Consequently, she argued that her injuries fell within the intentional injury exception to the Workers' Compensation Act because her supervisors directed her to initiate a chemical process that they knew, with substantial certainty, would result in the same dangerous conditions that occurred earlier that day and would injure whoever initiated the chemical reaction.

The court held that "a plaintiff may not demonstrate intent by showing merely that some injury was substantially certain to occur at some time. For a workplace injury to qualify as an intentional injury under the Act, the employer or supervisor must know or expect that the assigned task will injure the particular employee that undertakes it. In other words, the employer must know or expect that a specific employee will be injured doing a specific task." Only such knowledge, the court held, "robs an injury of its accidental character."

Strange as it may seem, on occasion a plaintiff may allege negligence and defendant will be tempted to argue, "No, I was not negligent, I intended the harm." What might explain this odd reaction? Well, intentional torts generally have shorter statutes of limitations than do actions grounded in negligence. When the short statute of limitations has run, the defendant may be tempted to insist that he acted intentionally rather than negligently. Of course, if liability insurance applies, coverage may be jeopardized by such an argument. (*See* above.) In that case, it will likely be the insurance company who will argue that the defendant intended to cause harm. This argument has been received with mixed success in several cases. In Spivey v. Battaglia, 258 So. 2d 815 (Fla. 1972), defendant tried to tease the plaintiff whom he knew to be shy and gave her a "friendly, unsolicited hug." The joke turned ugly when, as a result, plaintiff suffered paralysis on the left side of her face and mouth. The court held that there was no battery since defendant could not have known with substantial certainty that such devastating harm would take place. It allowed the plaintiff to go forward under the longer negligent statute of limitations even though the action would have been barred by the shorter statute of limitations that governed assault and battery. In Baska v. Scherzer, 156 P.3d 617 (Kan. 2007), plaintiff had a party at her home for her daughter's friends. During the party, a fight broke out between two boys. "Plaintiff placed herself between the boys and was punched in the face, losing several teeth and receiving injuries to her neck and jaw." Plaintiff filed suit just short of two years after the incident, alleging that she was injured by the defendants' negligence. The defendants moved for summary judgment based on the one-year statute of limitations for assault and battery. The trial court granted the motion holding that the doctrine of transferred intent applied. The intermediate appellate