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TORT LAW
Principles in Practice

Third Edition

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EDITORIAL ADVISORS

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James Underwood

Professor of Law
Baylor University

ASPEN PUBLISHING

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To

Carol—for her ongoing example of strength and selfless love

Travis—who has the heart of a champion for underdogs

Lindsey—whose love for Travis has given Carol and I both a daughter (in-law) and precious granddaughter, Lucy

Tyler—who carries light-hearted laughter wherever he goes &

Tanner—who shows me how to live joyfully, no matter the circumstances

SUMMARY OF CONTENTS

CONTENTS

PREFACE

Allow me to briefly summarize some features of this third edition that I believe make it unique:

- **What's in a name?** The title "Torts: Principles in Practices" captures my belief that the supposed divide between legal theory and legal practice is a false dichotomy. I have now taught for nearly as long as I practiced law. One cannot truly understand how to apply the law solely based upon memorizing numerous black-letter legal rules. Circumstances are too varied and rules of law too ambiguous and conflicting to permit such ease of application. It is deep understanding and appreciation for the principles that permits a practitioner to represent clients in tort cases effectively. This book approaches the subject of Torts with a view toward capturing the spirit of the law of Torts at the dual levels of both its lofty principles and its actual implementation on the ground. To stay consistent with this theme, the book is filled with textboxes labeled either "*Principles*" or "*In Practice*" to supplement the material in the cases. The trend at many law schools is to increasingly focus on preparing students for practice. This book is designed to assist in those efforts.
- **Vibrant mix of cases.** I love many of the old classic cases and a student of Tort law would be considered illiterate without some familiarity with these cases. This book retains many of the old standards. The book also adds many modern cases in contemporary factual circumstances so that students can appreciate how nimbly the law can be applied to new situations. For example, I have included a recent case arising out of the 2016 presidential election where a court analyzes whether a Trump supporter committed a battery against a critic by intentionally inducing a seizure via a flashing light in a Twitter message. Another example involves a 2021 ruling on the issue of whether Amazon was a product "seller" potentially liable for a personal injury caused by a consumer's use of a product they acquired through Amazon. I have also bid farewell to a few cases that I always dreaded covering, which were not valuable enough to justify their continued inclusion or were not the best case to illustrate a particular proposition. For example, the first two editions included a case discussing (but not applying) the Learned Hand formula to determine negligence. I substituted a much better case that actually uses the formula in an explicit manner to determine why a defendant was negligent. Where possible, this book tries to include both the old and the new where they represent the best examples of particular propositions or legal analysis.
- **Helpful textual guidance.** The law of Torts is sufficiently robust and challenging so that artificial barriers to its understanding are not necessary. This book introduces every major section and subsection with text designed to provide context and to alert students to themes that will be important in the cases they are about to read. The concise, restrained notes following the cases elaborate on these themes and observations. Further, most major sections include a recapitulation titled "*Upon Further Review*."

- **Useful notes and problems.** I have included short hypothetical problems after almost each subsection in the book. These problems can be utilized in class for group discussion and debate or in the private study by individual students. A pet peeve of mine regarding some casebooks is when a short case is followed by ten pages of notes where the author tries to look under every rock in the legal field. I understand a first-year Torts class will only be the beginning of a lifetime of study for many students. This edition continues the use of self-restraint to avoid cluttering the notes and problems. I have deleted some problems I believed were unclear or unhelpful and added some that I believe will be useful sources of discussion in the classroom.
- **Charts, diagrams, pictures, checklists, etc.** This book tries wherever possible to include textboxes with summaries, visual depictions, charts, and checklists for students to focus their attention on core points. Textboxes with useful or provocative quotations germane to the material are also included to capture the imagination of students and, at times, to offer a glimpse into the academic debates often accompanying various issues. Pictures are included to help students remember that these cases involved actual events that transformed the lives of real people.
- **Pattern jury instructions.** As another method of illustrating and restating core legal concepts, where possible the book includes form jury instructions from various jurisdictions, introduced with the heading "*Ladies and Gentlemen of the Jury*." In terms of the real-world application of most Tort concepts, the jury instructions embody the law as it is used in the courtrooms across the United States.
- **Practice essay questions.** Included at the end of many chapters in the book are longer-form practice essay questions entitled "*Pulling It All Together*." These are typically made up of two to four paragraphs of hypothetical facts with a prompt question at the end and an indication of how long a student might want to spend in attempting to write an answer to the question. Students are constantly seeking such hypothetical questions for their use in exam preparation. Teachers can use these essays in class as a summary of material or students on their own can utilize them.
- **Coverage.** My goal was to avoid a 1,500-page twenty-pound book that tried to include every conceivable Tort issue. But I wanted the book to be useful for just about any first-year Torts class. It begins with coverage of the classic intentional torts and defenses to them. The book then spends several chapters exploring negligence (including causation). The book also covers general defenses (e.g., comparative fault, immunities, statutes of limitation), damages, and apportionment. These subjects alone may be all that many Torts classes will have time to cover. But for the professor who has additional time, I have also included chapters on strict liability, products liability, defamation, and business torts. The exclusion of any mention of business torts has always struck me as a serious deficiency that results in the misimpression that all Tort claims involve physical or mental injury. While entire law school electives are devoted to inquiry into some of these later chapters of this book, many Torts professors enjoy introducing these areas of the law in the first-year curriculum. In any event, this book is structured to be flexible enough to be used in many different ways. Despite adding a handful of new cases, this third edition actually comes in a bit shorter in length than the prior two editions. Additional editing of existing cases and deletion of some cases (e.g., the doctrine of Necessity) has made this possible.

- **Mile markers.** This edition retains a feature added from the prior edition that my students love—an explicit checklist of learning objectives at the beginning of each new chapter. These help to ensure that students are aware of what major concepts they need to understand in each chapter.

This book is designed to be an effective tool, for both professor and student, in offering insight into the rich and multifaceted law of Torts. I hope that you find this book provides a catalyst for your further learning.

James Underwood

January 2022

ACKNOWLEDGMENTS

I had no idea when I first agreed with Aspen to write the first edition of this book how much I was biting off. That project took two years to complete—much of it written in a hospital at my ailing son's bedside. The last eight years has been swift and I am now given the chance to offer thanks for those who have helped me bring forth a third edition.

First, I am indebted to Aspen, both for having the faith in me to approach me about the initial project and in giving me a chance to produce a third edition so that I can continue to fix the errors I have found from the last edition. I also want to thank the editors who have shown meticulous attention to detail. Aspen has, from my perspective, the best editors in the business.

I am also thankful to teach at Baylor Law School which strives to produce the next generation of professionals dedicated to impacting others' lives. Dean Toben continues to keep our ship steered in the right direction and supports scholarly efforts like this. I have also had the chance to teach alongside both Prof. Jill Lens and Prof. Luke Meier. Our lively debates about tort law have helped to inform my views in ways that impact these materials.

Bear with me momentarily, as I acknowledge some of the people closest to me. I am always, first and foremost, grateful to my wife Carol who continues to show me grace and patience on a daily basis. As I reflect upon some of the most important things I have learned from her, the greatest lesson is in how to live a courageous life in the face of the worst challenges. Against all odds, she has displayed truly undaunted courage as we have leaned into the storms of life together. For that I will forever be grateful to her and in awe of her.

My son Travis and daughter-in-law Lindsey were the first of my family to be exposed to these materials as my students. They are now young, successful practicing lawyers in Tyler, Texas. They are also the parents of my first granddaughter (Lucy) and soon to be second. I'd like to claim partial credit for the great futures they hold before them. In reality, they have had far more impact upon me and my teaching. Travis recently decided to abandon Big Law in Dallas and moved his practice to Tyler to work at a small firm where he gets the chance to vindicate the rights of individuals. My son Tyler was a budding theoretical mathematician in graduate school at the University of California Santa Barbara until he read one chapter of the prior edition of this book—he's now a graduate with honors from Harvard Law School and practicing tax law at the largest firm in Texas. My youngest son Tanner (now 23) was, of course, on my mind nearly every minute as I worked on the first edition of this book. He had just suffered a severe traumatic brain injury when he was the victim of a tort on an interstate highway in Waco. As he lay in a coma, I began sculpting this book by his bedside. You might surmise that the subject of Torts was on my mind a lot in those days. Miraculously, he awoke, and has since graduated from high school with stellar grades. He is still doing therapy most days of the week. Slowly (nearly 10 years later) he is regaining functions (e.g., walking) that most of us take for granted. While he is still going to therapy most days, he has recently accepted his first job working at a new coffee shop that loves to employ people facing personal challenges. Tanner somehow consistently

focuses upon life's blessings and displays a joy that most of us can only envy. As I frequently remind myself, if he does not complain, who am I to ever do so?

Years ago, I wrote here that we "live in the moment with hope fueled by our faith and gratitude for our blessings." I cannot add to or improve upon that sentiment—it might make a good epitaph on my tombstone someday. I pray daily that these words are not just sweet sentiments but reality. Some days are easier than others. Always striving to look ahead rather than behind, I am already contemplating a fourth edition to this casebook years from now and all the new blessings I will be able to report here.

Special thanks also go to my current research assistant, Hope Burkhalter, for her work in helping me to spot my own errors.

Finally, I also wish to express my sincere gratitude to the following copyright holders for granting permission to include certain excerpts in this book:

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TORT LAW

Principles in Practice

CHAPTER 1

Introduction to Torts

I TORTS DEFINED

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

From a tort victim's perspective, the above definition seems somewhat dry. A child suffers a serious injury while riding in the back seat of his parents' car when it is hit from behind on the highway. A patient receives dental implants that are not placed securely and have to be removed. A schoolyard bully runs up behind a boy walking home from school and hits him over the head with a tree branch. A stalker repeatedly makes phone calls to a young lady at her home late at night threatening to break into the house to cause her bodily harm. Vandals throw paint against someone's new automobile ruining its exterior finish. A homeowner fails to

CHAPTER GOALS

- Understand the definition of a tort claim and the general scope of scenarios that might involve such causes of action.
- Introduce core tort goals that will play a role in coverage of material later in the book.
- Appreciate that there may actually be two sides to the ongoing debate over whether a tort crisis exists and whether reform of the system is warranted.
- Understand basic procedural aspects of a typical tort case from pleadings through trial and appeal.
- Facilitate preparation for the first day of class through the introduction of the basics of preparing a case brief.

Tort:

The word is derived from the Latin "tortus" which meant twisted or crooked. In the common law, a tort is a "private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages."

Black's Law Dictionary

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

II GOALS AND CRITICISMS

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

As you work through these materials, you should consider for each tort theory or doctrine the principle behind the rule of law. One fascinating aspect of legal study is the realization that the rules are not arbitrary. You may not agree with a particular doctrine — and often courts among different states will disagree about particular tort doctrines — but you can be certain that every tort doctrine had a reason for its adoption initially. As times and circumstances change, and as values evolve in our society, there are frequent occasions when a tort doctrine needs to be revisited. You will see numerous examples in the cases of courts revisiting old tort doctrines to decide if they should continue to be recognized, abandoned, or modified in some fashion. These determinations are driven by perceptions of the principles.

Likely you have heard in recent public forums debate on whether our tort system is broken and in need of serious reform. During the last few decades there have been tremendous efforts undertaken to modify common law tort doctrines either through the courts themselves or, more significantly, through legislative action. You will encounter various manifestations of judicial and legislative tort reform as you work through various portions of this book. When we get to Chapter 8 on Damages, we will encounter the tort reform movement directly. You are free to make your own assessment on the legitimacy of a torts crisis, but these materials will ask that you consider all of the evidence before reaching a conclusion. As a new lawyer (or law student) you will be asked your opinion by many laypersons about these matters. Further, if you practice tort law, you will encounter appeals to judges based upon notions that our system is broken and in need of repair. Being thoughtful in your approach to such matters will serve you well. One useful exercise for you will be to keep this issue — how well our current system is working — in the back of your mind as you read the hundreds of cases in this book. As you read each case, ask yourself, "Does it appear the current doctrines and procedural rules are already in place to avoid outrageous results?"

A. What Are the Purposes Behind Tort Law?

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

You might divide the world of tort scholars into two camps — roughly, those who believe the primary purpose of tort law is to regulate conduct by deterring

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

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

J. Clark Kelso, *Sixty Years of Torts: Lessons for the Future*, 29 Torts & Ins. L.J. 1 (1993).

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

"To me, a lawyer is basically the person that knows the rules of the country. We're all throwing the dice, playing the game, moving our pieces around the board, but if there is a problem, the lawyer is the only person who has read the inside of the top of the box."

Jerry Seinfeld

B. Has Tort Law Gotten Out of Control?

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

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

*18 Geo. J. Legal Ethics 809 (2005)**

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

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

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

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

A. The Myth

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

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

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

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

As engaging as the frivolous lawsuit narratives can be, they also follow a predictable pattern and tend to be somewhat misleading. The premise and conclusion of every storyline is that the onslaught of "frivolous lawsuits" threatens to destroy the American way of life. Very little hard data is ever presented to substantiate the claim; the basis for this rather frightening statement is almost entirely anecdotal. The public has almost always heard these stories, or stories like them, before. Of course, they are increasingly recognizable because cases like the ones described by the tort reformers receive disproportionate media attention. In the

modern media culture, the line between news and entertainment is not often clear; serious coverage of the court system struggles to be heard over the din of talk radio, cable punditry, stump speeches, and election coverage. The stories that do surface are "anecdotal glimpses of atypical cases." Cognitive biases only reinforce public misperception of the overall system — because vivid incidents are easier to recall, people tend to overestimate how frequently the most outrageous stories occur. And not even these cases are the straightforward abuses of the system they may seem.

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

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

B. The Reality

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

of litigation often cited by tort reformers and insurance companies for increasing abuse — declined by 14.2%.

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

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

> This year, the nation's oldest ladder manufacturer, family-owned John S. Tilley Ladders Co. of Watervilet, New York, near Albany, filed for bankruptcy protection and sold off most of its assets due to litigation costs. Founded in 1855, the Tilley firm could not handle the cost of liability insurance, which had risen from 6% of sales a decade ago to 29%, even though the company never lost an actual court judgment. "We could see the handwriting on the wall and just want to end this whole thing," said Robert Howland, a descendant of company founder John Tilley.

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

The economic argument takes the same narrative form as the excessive litigation claim — a personal anecdote about respected, small town folks whose hard work has been swept away by lawyers and lawsuits. But these concerns about the overall cost of litigation to the American economy are based on storytelling and dubious statistics, not hard data. One Brookings Institute expert estimates that tort liability could comprise at most 2% of the total costs of United States goods and services. At that rate, he estimates that it is "highly doubtful" legal expenditures could significantly affect the competitiveness of American products. Other experts place the total estimated business liability for all legal claims at about twenty-five cents for every one hundred dollars in revenue. The legal definition of "small business" may shift, and individual stories might invoke sympathy, but there appears to be no apparent economic facet to the litigation crisis either.

The reality is that the United States does not face a litigation crisis. Even if insurance premiums are excessively high, America's litigation rates are neither

excessive nor increasing. The most significant problems with the system involve, not too many cases or unreasonably high jury awards, but too little access to justice and unreasonably few legal services available to the general public. The "Frivolous Lawsuit Reduction Act" might dovetail nicely with a cultural bias or score well with a given political base, but it does not address any actual immediate emergency.

III CASE PROCEDURE AND DEFINITIONS

The Typical Life of a Civil Tort Suit

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

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

A. Pleadings and Attacks on Pleadings

A tort victim who files a suit is called the "plaintiff." The alleged tortfeasor is the "defendant." The plaintiff initiates a civil tort case by filing a so-called short and plain statement of the claim. This is essentially a formal pleading that identifies the parties, states the court's power or "jurisdiction" over the type of claims filed and over the parties, and then articulates the factual and legal basis for the claims asserted. In short, the complaint tells the legal story of what the defendant did that was wrong and how this hurt the plaintiff. The complaint ends with a "prayer" for relief that identifies the legal remedies (e.g., the damages) plaintiff seeks against the defendant at the conclusion of the case. The defendant is permitted to file an initial attack on the adequacy of this pleading, denominated a "motion to dismiss." Typically, in ruling upon these

"It won't do to have truth and justice on his side, he must have law and lawyers."

Charles Dickens

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

B. Formal Discovery

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

C. Motions for Summary Judgment

Often the last formal barrier to getting its jury trial that a plaintiff faces is a defendant's motion for summary judgment arguing that no trial is needed because plaintiff lacks sufficient evidentiary support for its tort cause of action. (Less frequently, a plaintiff can file a motion for summary judgment arguing that its claims are undisputed and that it is entitled to judgment without need for trial, in whole or part.) The parties will argue about the application of the law to

the facts in a motion for summary judgment. In essence, the trial court is asking itself when ruling on such a motion, whether there is any need to convene a jury of citizens to rule upon disputed questions of fact. If not, summary judgment might well be granted and final judgment entered in an expedited fashion. Many of the cases in this book are appellate opinions reviewing the propriety of trial courts' granting of summary judgment motions.

D. Trial

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

E. Entry of Judgment

If the jury cannot reach a verdict (in federal court a unanimous verdict is required) the trial judge declares a "mistrial" and resets the case for a new trial in the future. If the jury does render a verdict, the court will entertain motions by the prevailing party to enter judgment in conformity with that verdict, and motions by the losing party to disregard the verdict as against the great weight

of the evidence. Once the trial court enters a final judgment, it loses jurisdiction over the case and the case becomes an appellate matter.

F. Appeal

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

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

IV CASE BRIEFING

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

A. Reasons for Briefing a Case

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

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

B. Preparation of a Case Brief

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

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

1. Facts

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

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

2. Procedural History

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

3. Issue

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

4. Rule

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

5. Analysis

The analysis is arguably the most important aspect of the brief. It really answers the implicit question, "*why* did the court reach its holding in this case?" All law professors will spend considerable time during class addressing the court's analysis in a case, trying to understand the rationale for the court's opinion and for any rule of law or doctrine adopted or applied by the court. This is the most interesting aspect of case briefing and will provide the most help to you in understanding any given area of the law. The analysis will be critical to the

course outline you prepare on a later date. Focusing upon the courts' analyses in the cases as you read through this book will also prepare you for your final exam, because a traditional torts essay exam demands that you be able to analyze in hypothetical factual contexts how a court would reach particular conclusions. You will do this by demonstrating familiarity with the rules of law and dexterity at using the facts to reach particular reasoned conclusions. Thus, at the intersection of the rules and the facts you find legal analysis.

6. Holding

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

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

Upon Further Review

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

While understanding core concepts and their application should strike you as worthy goals, your primary concern as you embark on this journey

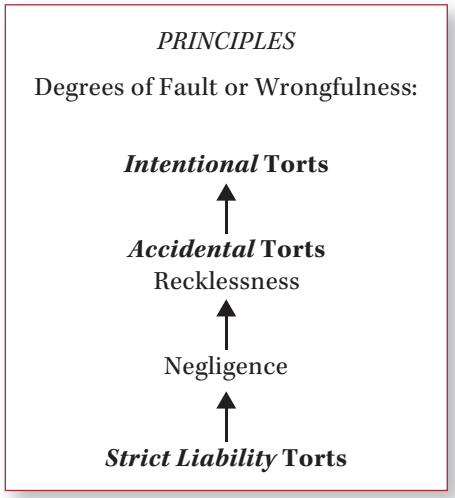
may be more practical. How do I read these cases? How do I prepare my case briefs? How do I avoid getting embarrassed on the first day of class when I hear my professor call my name? Although the above materials attempt to help answer some of these questions with detailed information, the *best advice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

CHAPTER 2

Intentional Torts

I OVERVIEW

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



CHAPTER GOALS

- Become introduced to some of the oldest tort causes of action that involve a defendant who has intentionally engaged in certain behavior or intended a certain type of harm to the plaintiff's interests.
- Learn how to analyze the elements of a cause of action in varying factual circumstances to determine whether liability attaches.
- Appreciate the two-fold definition of intent that is employed in some manner in every intentional tort claim covered in this chapter.
- Understand for each intentional tort claim the different underlying interest at stake and why this is deemed worthy of the law's protection.

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

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

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

II BATTERY

A. Introduction

Battery is a classic intentional tort. You have probably heard the phrase "assault and battery." Assault is technically a different, though related, tort from battery. You will need to learn how they are related but separate. Battery is designed to protect our bodily integrity; that is, our right to be free from certain unwanted physical contacts. We are daily faced with physical contacts from others, most of which are desired, unnoticed, or harmless. But certain other contacts might be physically harmful to us or unpleasant and disagreeable. The tort of battery

recognizes that we are entitled to some level of autonomy over our own bodies. It provides redress where that autonomy is violated in certain ways. Pay close attention to the elements of this cause of action as you read the next set of cases. Also remember that the same notion of autonomy that gives rise to a tort claim for battery when we are subjected to unwanted contacts, also necessarily gives rise to the consent defense where we have permitted contacts to occur, even where they later turn out to be harmful. The separate defense of consent is covered along with other defenses to intentional torts in the next chapter.

B. Intent

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

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

GARRATT v. DAILEY

270 P.2d 1091 (Wash. 1955)

HILL, J.

The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an

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

> III. . . . that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.
>
> IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any 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 (*See* Bohlen, *"Liability in Tort of Infants and Insane Persons,"* 23 Mich. L. Rev. 9), state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be. *Paul v. Hummel* (1868), 43 Mo. 119, 97 Am. Dec. 381; *Huchting v. Engel* (1863), 17 Wis. 237, 84 Am. Dec. 741; *Briese v. Maechtle* (1911), 146 Wis. 89, 130 N. W. 893; 1 Cooley on Torts (4th ed.) 194, §66; Prosser on Torts 1085, §108; 2 Kent's Commentaries 241; 27 Am. Jur. 812, Infants, §90.

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.

It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, §13, as:

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

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

> *Character of actor's intention.* In order that an act may be done with the intention of bringing about a harmful or offensive to a particular 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. *Vosburg v. Putney* (1891), 80 Wis. 523, 50 N. W. 403; *Briese v. Maechtle, supra.*

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

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

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

A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. *Mercer v. Corbin* (1889), 117 Ind. 450, 20 N.E. 132, 3 L. R.A. 221. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair, and, there being no wrongful act, there would be no liability.

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

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

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

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

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

Remanded for clarification.

In Practice

Courts routinely hold that children can be liable for torts that they commit. More often than not, however, a child does not possess his own funds to pay a tort judgment. A homeowner's insurance policy can sometimes be required to pay, at least for accidental torts. Beyond this, parents under some circumstances, and in some states, can also be held accountable for the torts of their children. Often this is not automatic but might be triggered by the child acting in a willful or wanton manner. In any event, for now do not assume that parents are automatically liable for all tortious misbehavior by their children.