

The Torts Process

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The Torts Process

Tenth Edition

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To Jim

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Preface

From the moment James A. Henderson, Jr., and Richard N. Pearson conceived of this book nearly 50 years ago, *The Torts Process* has been premised on the view that tort law is more than a collection of doctrines and policies, and that it cannot realistically be understood apart from the processes by which tort disputes are resolved. Over the years, the authors of *The Torts Process* have remained steadfast in the view that it is equally as important for students to grasp the roles of the lawyer, the trial judge, the jury, and the appellate court in resolving a tort claim as it is to understand the doctrinal and policy elements that are at play. We find that providing students with this process perspective greatly enhances their appreciation for the actual nature, functions, and limits of tort law. To aid this effort to study tort law in motion, the authors have included a series of problems that challenge students to apply their understanding of doctrine to concrete circumstances. We have found that students, even in their first weeks of law study, benefit significantly from this effort and find it interesting and rewarding. There is no need, however, to assign all, or indeed any, of the problems, for the book is also designed to function as a traditional casebook. The book seeks to enrich and broaden students' understanding by providing integrated discussions of tort theory and policy issues and by raising important ethical and professional responsibility considerations.

This latest update of *The Torts Process* is the first that will not benefit directly from the extraordinary mind, voice, and pen of Professor Henderson. In addition to being a giant in the scholarly fields of tort law and products liability, Jim also was a teacher *par excellence*. He devoted extraordinary levels of care and effort to the classroom, as legions of former students can attest. And he considered the writing and updating of a law school casebook to be an act of great craft and responsibility, one in which he took enormous pride. I hope that, even as it is updated for this and future editions, *The Torts Process* will always make Jim proud.

Douglas A. Kysar

July 2021

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Chapter 1

Introduction to the Torts Process: Liability for Harmful and Offensive Battery

This chapter serves two functions. First, it provides an overview of the process of resolving torts disputes in our legal system. And second, it introduces one branch of the substantive law of torts—liability for harmful and offensive battery.

A. Some General Observations

The Lawyer as Part of the Legal Profession

One of the most important aspects of your undertaking the study of law is that you are likely doing so in order to become a licensed lawyer, thereby joining a distinctive, time-honored profession.¹ We will be considering issues of professional responsibility throughout this course, with help from a series of continuing notes on the subject. But now is a good time for you to begin to understand what you are letting yourself in for. We begin by making three general points. First, the legal profession is largely self-governing in that the standards of professional responsibility are, for the most part, established by the legal community itself. Second, although one may speak generally of professional responsibility as embodying the requirement that a lawyer behave ethically, it is a significantly more nuanced topic over which bar associations and courts have long labored in order to formulate general rules.² Lastly, although bar associations have established an ethical floor below which the lawyer may not delve, many difficult decisions are left to the professional discretion of the lawyer.

Several reasons support the legal profession's self-governance. For one, because the average citizen finds the law a mysterious thing, the understanding necessary for external control of the profession is largely lacking. In addition, the formal agencies that might exercise control, such as legislatures and courts, are themselves controlled substantially, if not wholly, by lawyers. Finally, as noted in the preamble to the Model Rules of Professional Conduct, adopted by the American Bar Association (ABA) in 1983, "[s]elf-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for

1. As an enterprise separate from the church, the legal profession appeared in England in the thirteenth century. Once royal courts were established following the Norman Conquest, the clergy was not allowed to represent litigants in lay courts. Representation required not only expertise in legal technicalities but also a working fluency in Norman French, the language used in the oral proceedings in English courts after the Conquest, rendering professional advocacy indispensable. See generally J. H. Baker, *An Introduction to English Legal History* 178-79 (3d ed. 1990).

2. The element of professional regulation probably emerged late in the thirteenth century. *Id.*

abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.”

A Bird’s-Eye View of the Law of Torts

We begin the study of tort law with the intentional tort of battery, both harmful and offensive. It will help you to understand this important subject if you understand how it fits generally into the broader landscape of tort. Tort law is part of the *common law*, a body of court-made substantive law that developed gradually over many centuries in England and that stands in sharp contrast to the statute-based civil law that developed during the same period in continental Europe. England transferred the common law to her colonies, including North America. The common law of torts may be arranged analytically under three major headings: (1) intentional torts (of which battery is a part), (2) negligence, and (3) strict liability. Historically, American tort law traces its lineage back to the writs of trespass in the King’s Courts in England in the centuries following the Norman Conquest. Formally, the writs from which the law of torts developed were orders, backed by the authority of the Crown, that defendants appear in court. They were limited in number and scope, and plaintiffs had to adhere strictly to their predetermined elements. At the outset, the writ of trespass was essentially criminal in nature and sought to punish volitional acts committed with force and arms that had harmed persons or property and thus threatened the King’s peace.³ Gradually, along with the development of private causes of action, courts extended the basic writs of trespass to include what today are known as the intentional torts of battery, assault, and false imprisonment. Even later, the writ of trespass on the case developed and eventually evolved into negligence. Under the law of negligence, intentional wrongdoing is no longer necessary; acting without taking reasonable precautions for the safety of others supports liability for unintended harm caused by such conduct. And finally, relatively recently, common law courts began to identify categories of harmful conduct upon which strict liability is imposed without a showing of either wrongful intent or negligence. Of course, to the extent that the original writs of trespass stood ready to impose liability without any proof of negligence, these recent examples of strict liability may be viewed as a return, full circle, to the starting place of tort.

In addition to learning about tort law in this course, you will also be learning about the processes and procedures by which tort claims are resolved in our system. Indeed, this book is dedicated to the proposition that the substantive law can be understood only in relation to the processes by which it is applied.⁴

3. See generally *id.* at 70-73.

4. This same interconnectedness between substance and procedure is found in the early history of the common law. In one author’s description of the early development of the common law, he offers these observations:

Much of our legal history will defy comprehension unless [the modern] separation of law from procedure is put out of mind. The learning about writs, forms of action and pleading was fundamental to the common law, not simply because lawyers were more punctilious about form than substantive law as now understood. The principles of the common law were not laid down in the abstract, but grew around the forms through which justice was centralized and administered by the king’s courts. There was a law of writs before there was a law of property, or of contract, or of tort.

Id. at 63. Along these lines, two leading scholars have argued that the rise of tort law in America can only be understood once one appreciates how a change in the rules of evidence allowing parties to provide testimony expanded dramatically the scope of tortious wrongs that could permissibly be presented to fact finders. See Kenneth S. Abraham & G. Edward White, *The Transformation of the Civil Trial and the Emergence of American Tort Law*, 59 *Ariz. L. Rev.* 431 (2017).

Formal adjudication, which takes place in both state and federal trial courts, is the subject of a separate first-year law course, civil procedure. But it is sufficiently important to your study of the torts process that we provide a preliminary overview of the processes by which our legal system resolves torts disputes. As you read, however, please bear in mind that the following discussion focuses largely on the adjudicative process as it has traditionally operated in American courts. Commentators argue, with good reason, that the traditional tort adjudication process culminating in a trial has been steadily eroded through a variety of changes such as the rise of private settlement mechanisms, heightened pleading standards, limitations on class action suits, enforcement of liability waivers and mandatory arbitration agreements, and legislative limitations on plaintiffs' substantive rights. See, e.g., Stephen Daniels & Joanne Martin, *Where Have All the Cases Gone? The Strange Success of Tort Reform Revisited*, 65 *Emory L.J.* 1445 (2016). For a powerful argument that these shifts represent a significant loss to American democracy and governance, see Alexandra D. Lahav, *In Praise of Litigation* (2017).

B. A Preliminary Look at the Adjudicative Process

Although the substance of this course involves the law of torts, that substance is created, defined, amended, and applied through many legal processes, including the process of adjudication. This section is designed to give you a preliminary look at adjudication in broad outline, so that later, when you study a particular problem or decision, you will know where the case has been and where it might be going.

The Investigation

Of all the potential tort claims that arise when one person harms another, only a few will be brought to a lawyer. See David M. Engel, *Perception and Decision at the Threshold of Tort Law: Explaining the Infrequency of Claims*, 62 *DePaul L. Rev.* 293 (2013). For someone to call upon a lawyer for help, he or she must be aware of possibly having a valid claim; must decide to pursue it; must be unwilling, or unable, to handle it alone; must know that a lawyer's help is available; and must be willing to incur the cost, both pecuniary and psychological, of invoking the torts process.

Once a claimant consults a lawyer, the next step in the process is for the lawyer to listen to the client's story to find out what happened from the client's viewpoint. Deciding to go to a lawyer is a major move, and a client typically will have already decided that he or she is right and that the other person is wrong. For this reason, it takes skill on the part of the lawyer to get a reasonably objective view of what happened without antagonizing the client. It may become readily apparent at this first interview that what the client thinks is a valid claim is clearly without legal merit and for that reason should be dropped. Letting the client down easily when the claim is without merit is a skill that is important both to the lawyer and to the legal profession.

Aside from assessing the potential merit of the claim, the lawyer will want to know when the claim arose. In every jurisdiction, *statutes of limitation* allow injured plaintiffs only a limited length of time to commence legal actions. These periods, which generally range from one to four years, typically begin to run when the plaintiff discovers or should have

discovered the injury. Tort actions are usually subject to shorter limitation periods than contract actions, and battery actions are frequently subject to shorter periods than negligence actions. Plaintiffs who do not bring their actions within the time allowed are barred from recovery, although the statutes of limitation for persons under legal disabilities, such as minors, are suspended, or *tolled*, during the periods of disability.

Even if it appears that the claim has legal merit and is not time-barred, it may not be worth pursuing further if the harm suffered by the client is insubstantial. The clearest case of liability may be dropped if the amount of money damages likely to be recovered is insignificant. Of course, this effect of the size of the potential recovery upon the decision to go forward works both ways. If the client is severely harmed, a case in which liability is questionable may still be worth pursuing. For an in-depth empirical analysis of how in practice plaintiffs' lawyers determine which cases to pursue, see Stephen Daniels & Joanne Martin, *Plaintiff's Lawyers: Dealing with the Possible But Not Certain*, 60 DePaul L. Rev. 337 (2011).

Three categories of money damages may be available to the plaintiff in a torts case: nominal, compensatory, and punitive. Nominal damages, as the name implies, are small in amount, often a dollar. They are available only in intentional tort cases, and they are awarded to establish as a matter of public record that the defendant has wronged the plaintiff even if no actual harm occurred. The hope is that the plaintiff will seek satisfaction in the courtroom rather than resort to violent retaliation. Compensatory damages reflect the harm actually suffered. They include out-of-pocket expenses, such as hospital and doctors' bills, which ordinarily are specific and easy to compute, as well as more generalized elements of harm such as pain and suffering and impairment of earning capacity. The latter category is often calculated using race- and gender-based statistical tables for wages, life expectancy, and work-life expectancy, which can result in lower awards for minority and female plaintiffs and thereby carry forward the effects of past discrimination reflected in the tables. See Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 Ohio St. L.J. 661 (2017). Under the *collateral source rule*, amounts received from other sources such as medical insurance are not deducted from the plaintiff's tort recovery. Punitive damages are designed to punish the defendant for wrongdoing, and may be substantial in amount. They are ordinarily available only if the defendant is found to have acted with malice, or with reckless indifference to the rights of the plaintiff.

From the point of view of the plaintiff's lawyer, the amount of the potential recovery is of personal relevance. Ordinarily, the plaintiff's lawyer in torts cases works on a contingent fee basis—that is, the lawyer's compensation is a certain percentage of the plaintiff's recovery. (The defendant's lawyer is usually paid on an hourly basis regardless of the outcome in the case.) The lower the recovery, the less the compensation to the plaintiff's lawyer. The normal contingent fee for the plaintiff's lawyer if the case goes to trial is between 30 and 40 percent of the recovery and may be even higher if the case is appealed.

Even if the lawyer determines that the claim has legal merit and that the potential damages will be substantial, as a practical matter the defendant may be unable to pay. In torts cases, liability insurance is the source from which many claims are satisfied. However, the defendant may have no insurance, or the insurance may not cover intentional torts such as battery. In the absence of insurance, a claim must be satisfied, if at all, out of whatever personal assets the defendant may have. The difficulty of satisfying a claim under such circumstances often discourages litigation against uninsured defendants.

If the claim appears to be worth pursuing, the real work for the lawyer begins. The story told by the client is apt to be incomplete and one-sided, so that further investigation will be necessary. Witnesses to the events giving rise to the claim will have to be located and interviewed. Other sources of information include police reports and newspaper stories.

The lawyer may also have to consult technical experts such as physicians, automobile mechanics, and engineers to develop a full understanding of the facts. In simpler cases, the law governing the claim may be clear, but with more complex cases, the lawyer is also likely to have to spend considerable time in the law library.

Once the lawyer feels that the facts and the law have been sufficiently mastered, an attempt will usually be made to settle the case. Most torts disputes are resolved by out-of-court settlement. Settlement may occur any time during litigation, but negotiations are almost always initiated well in advance of trying the case. The plaintiff's lawyer will make a tentative evaluation of the damages and of the probability of recovering any amount, and will determine a range within which the case should be settled. The evaluation will be discussed with the client, and the lawyer will then contact the defendant, or more likely the defendant's lawyer, to begin the bargaining process, although sometimes the initiative for settlement will come from the defendant's side. The fact that both sides can save the costs of going to trial pressures them to settle. If the assessments of likely recovery by both sides are in the same range, then the case is likely to be settled, especially if the plaintiff's harm is not serious.

The Pleadings

Formal court proceedings are instituted by the plaintiff with the filing of a *complaint*. The complaint is a document containing the plaintiff's claim for relief and a short statement of the facts upon which the claim is based. For example, in *Vosburg v. Putney*, the first case we shall examine, the plaintiff's complaint alleged that on February 20, 1889, the defendant "violently assaulted [the plaintiff] . . . kicked him and otherwise ill-treated him and that [he] was thereby made ill and lame and confined to his bed for a long time and suffered great physical pain and mental anguish and was permanently crippled." A complaint typically ends with a demand for damages; in *Vosburg*, for example, the plaintiff demanded what was then a considerable sum of \$5,000.

The complaint both initiates the lawsuit and informs the defendant of the basis of the plaintiff's claim. In the early days of common law pleading, the writ (as the forerunner of the complaint was known) had to comply with many technical rules; a plaintiff who deviated from these rules might lose the cause of action entirely. Modern procedural rules, however, are more forgiving, typically requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief."

After being served with the complaint, the defendant has a short period of time, typically 20 days, in which to file an answer in court. The *answer* must either admit or deny the allegations of fact contained in the complaint, or state that the defendant lacks sufficient knowledge of the facts to admit or deny them. In addition to challenging the plaintiff's version of the facts, the defendant may attack the legal theory upon which the complaint rests. This attack can either be included in the answer or be stated separately by a *motion to dismiss the complaint* asserting that the complaint fails to state a claim upon which relief can be granted. The test for whether such a motion should be granted is whether the plaintiff would be entitled to any recovery even if all the factual allegations in the complaint were proven true. A negative answer to this question requires the judge to grant the motion in favor of the defendant. As you will discuss in your civil procedure class, the United States Supreme Court has tinkered with this traditional pleading standard for purposes of federal civil litigation, arguably making it more difficult for plaintiffs to survive dismissal motions. See Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What Happened to the Federal Rules of Civil Procedure?*, 43 Tex. Tech L. Rev. 587 (2011).

Even if the complaint states a cause of action, if the parties do not dispute the material facts of a case, the case may not need to go to trial. The method of testing in advance of trial whether a dispute as to material facts exists is the *motion for summary judgment*. This motion is available to both the plaintiff and the defendant, and the party making the motion has the burden of convincing the judge that no real and genuine dispute exists as to any material fact. When all the pleadings and any supporting affidavits have been filed, the judge determines whether any genuine factual disputes remain pertaining to the parties' claims and defenses, and grants or denies the motion accordingly. If a dispute remains as to some but not all the relevant facts, the scope of trial may be limited to the disputed facts. Summary judgment is infrequently used for avoiding trial in torts cases, because the resolution of torts claims so often depends upon an evaluation of the conduct of one or more of the parties.

The filing of the initial pleadings and motions does not end the lawyer's pretrial activities. Further investigation into both the law and the facts may be necessary, and in almost all cases negotiations for settlement will continue. If a significant delay is likely before the case is reached for trial, the plaintiff may feel considerable pressure to settle, particularly if the injuries are serious and the plaintiff needs money to pay medical expenses and to replace income lost because of the injuries.

The time period between the filing of the initial pleadings and the trial will depend on a number of factors, and in particular on the degree of congestion in the trial docket. Generally, a case to be tried with a jury will take longer to reach than one without a jury, which is one important reason why many cases that go to trial are tried without a jury. But a plaintiff with serious injuries is more likely to want a jury trial, so it is the serious injury cases that are most affected by crowded dockets. Attorneys for either side may also seek to postpone trial for a variety of tactical reasons.

The Trial

If the case is not settled, the next phase in the process is the trial. The Seventh Amendment to the United States Constitution provides for the right to trial by jury in federal courts in all "suits at common law." Thus, either party may, in a timely fashion, enter a request for a jury trial in a case that would have been heard "at law" at the time of the framing of the Constitution. The Seventh Amendment does not provide for a jury trial if the case would have been heard "at equity." Although the Supreme Court of the United States has never held that the Seventh Amendment applies to state proceedings, the constitutions of all states provide, with variations, for either party to elect a jury trial in civil cases. If the case is to be tried to a jury, the first important step in the trial process is the selection of jurors. In most states, jurors are selected from a larger panel chosen from citizens of the county in which the court is located. Attorneys for both parties, as well as the presiding judge, participate actively in the jury selection process. What each lawyer hopes for in a jury is not an unbiased cross section of the community, but a jury as many of whom as possible have biases that favor his or her client. Many lawyers believe that characteristics such as race, national origin, occupation, and education will influence the way a juror looks at the evidence and the people involved in the case, although the empirical validity of these intuitions is often open to doubt.

After the jury is selected, the trial itself begins with the plaintiff's lawyer's *opening statement*. The opening statement is an outline of the plaintiff's case and the evidence the lawyer expects to present. It is designed to predispose the jury to accept the plaintiff's view

of the case and to enable the jury to relate the evidence as it comes in to the overall case. Following this statement, the plaintiff's lawyer presents the evidence. Typically, this will consist of oral testimony of the witnesses, documentary evidence such as medical reports, and occasionally physical evidence. When the plaintiff's lawyer is finished with the direct examination of a witness, the defendant's lawyer has the opportunity to cross-examine. In the course of allowing evidence into the record, the judge rules on objections raised by both sides.

After all the plaintiff's evidence has been presented, the defendant may make a motion that the judge direct the jury to return a verdict in favor of the defendant. This *motion for a directed verdict* (referred to since 1991 as a *motion for judgment as a matter of law* in federal court) will be granted if the judge concludes that the plaintiff has failed to prove one or more of the elements of the case—that is, that a reasonable jury could not find other than for the defendant even if they were to believe all of the testimony favorable to the plaintiff, disbelieve all unfavorable testimony, and draw every reasonable inference favorable to the plaintiff from the testimony. When the plaintiff's proof fails in this manner, it is said that the plaintiff has failed to carry his or her *burden of proof*. If the judge grants the motion, the judge tells the jury that it must find for the defendant. In effect, granting the defendant's motion for directed verdict on the liability issue ends the trial for that defendant. Directed verdicts are granted in favor of defendants in a significant minority of torts trials, but similar motions by plaintiffs seldom prevail.

Assuming that the judge denies the defendant's motion for directed verdict, the defendant's lawyer then presents the defendant's case. If the defendant's lawyer feels that the plaintiff has not presented evidence that would justify recovery, no further evidence may be presented. But more typically, the defendant's lawyer will begin with an opening statement to the jury and follow up with witnesses and evidence for the defense.

When both sides have finished with the presentation of the evidence, motions for directed verdict by either party may be made again. Assuming such motions are denied by the judge, lawyers for both sides make their *closing arguments to the jury*, in which they review the evidence in the light most favorable to their case and indicate why, under the law as the judge will state it in the instructions, the jury ought to return a verdict one way or the other. At some point prior to the jury's deliberations—often just before or after closing arguments—the trial judge delivers *instructions to the jury* as to the applicable law and what the jury will have to find as facts to support a verdict for the plaintiff.

On most issues of fact in a torts case, the plaintiff has the *burden of persuasion*, often referred to as part of the *burden of proof*. What this means is that it is up to the plaintiff's lawyer to persuade the jury that his or her version of the events giving rise to the claim is true; it is not up to the defendant's lawyer to persuade the jury that the plaintiff's version is not true. In civil cases, disputes about the facts are resolved by the jury by assessing probabilities that either side's version is true. For example, in a battery case, the parties may dispute who struck the plaintiff. Putting the burden of persuasion on the plaintiff means that the plaintiff must persuade the jury that it was the defendant who caused the harm; it is not up to the defendant to persuade the jury that it was someone else. If, after analyzing the evidence, the jury believes that it was someone else, or concludes that there is no more reason to believe that it was the defendant than someone else, the plaintiff has not carried the burden of persuasion, and the jury should return its verdict for the defendant.

After the jury has been instructed on the law by the trial judge, it retires to determine its *verdict*. In a slight majority of jurisdictions, the verdict of a jury in a civil case must be unanimous, and if the jury cannot agree, the parties are entitled to a new trial by a different jury.

The remaining jurisdictions allow verdicts by the concurrence of fewer than all the jurors, but typically require more than a bare majority of votes.

After the jury has determined its verdict, it reports that verdict to the trial judge. The verdict may be either “general” or “special.” The former is a decision by the jury in favor of either the plaintiff or defendant. The latter contains the jury’s specific findings of fact made in response to specific questions put to it by the trial judge, and furnishes the factual basis for the trial judge’s decision in favor of either the plaintiff or the defendant. If the verdict is for the plaintiff, it will normally include the jury’s determination of the damages the defendant is to pay to the plaintiff. The trial judge then enters *judgment* in accordance with the verdict. (If the case is tried without a jury, the judgment is based on the facts as determined by the judge.) The court’s judgment in favor of a tort plaintiff is a written order, signed by the judge, directing the defendant to pay to the plaintiff the amount stated in the verdict. In contrast, a judgment for the defendant is not an order to anyone, but is simply a statement for the record that the defendant has won the trial.

Even after the jury verdict is returned, the losing party has an opportunity to make motions to the trial judge that may “save the day.” If the losing party made a motion for a directed verdict earlier, that party may renew the motion by asking the judge to enter judgment for that party, notwithstanding the jury verdict for the other side. This is a motion for *judgment non obstante veredicto* (JNOV or judgment notwithstanding the verdict) (referred to since 1991 as a *renewed motion for judgment as a matter of law* in federal court). In addition, either side may make a *motion for a new trial*. The latter motion will be granted if the trial judge concludes that the verdict is against the clear weight of the evidence, that the damages awarded are excessive, that procedural errors damaging to the moving party were committed, or that entering judgment on the verdict would cause manifest injustice. The judge will order a new trial on the ground that the verdict is against the clear weight of the evidence only if the judge is convinced that the jury has reached a seriously erroneous result; the order will not issue merely because the judge, if cast in the role of a juror, would have reached a different result.

The Appeal

Few cases proceed past conclusion of the trial process. However, the losing party has one last chance at victory: *appeal*. In all states, there is one highest court to which a final appeal may be taken. In many states, and in the federal judicial system, a system of intermediate appellate courts considers appeals in the first instance, with the highest court hearing most tort cases only when it chooses to hear them.

One reason for the infrequency of appeals is that not all issues that come up at trial can be appealed. The only issues that can be appealed are decisions, explicit or implicit, about the law by the trial judge.⁵ Thus, jury verdicts and judicial fact findings may be set aside because of errors of law committed by the trial judge, such as admitting (or refusing to

5. Appellate review of trial court decisions about the sufficiency of proof to support a given result, or whether a jury verdict is against the weight of the evidence, places the appellate court in a position that comes close to reviewing issues of fact. But strictly speaking the higher court, even in those instances, is reviewing the decisions of law reached by the court below concerning the sufficiency of the proof. It is noteworthy that appellate review of both law and facts occurs in Louisiana, an approach that can result in much greater discussion of factual detail in Louisiana appellate opinions. In her landmark article, *Torts, Race, and the Value of Injury, 1900-1949*, 49 *How. L. J.* 99 (2005), Professor Jennifer Wiggins identified Louisiana cases that applied segregated precedents to decide wrongful death damages (e.g., using “Black only” precedents to apply to wrongful death cases for deaths of Black people), and appellate cases that explicitly increased and decreased damages while referencing race.

admit) evidence, or erroneously instructing the jury. But absent such an error of law by the judge, the jury's verdict and the trial judge's findings of fact are binding on appeal.

Even if one or more appealable issues of law exist, the further delay and expense discourage the bringing of an appeal. Both sides must file briefs with the appellate court arguing why the result at the trial should or should not be overturned, and they must pay to have the relevant portions of the trial record printed. The trial record includes the pleadings, motions, the transcript of the testimony, if one is made, trial briefs, if any, and the orders of the trial judge. The appellate briefs are usually supplemented by oral arguments to the appellate court by the lawyers involved. Thus, the appellate process takes considerable time and money. And even if the party bringing the appeal is successful in having the results of the trial overturned, the victory may only be the right to a second trial.

In most cases, the appellate court announces the result of an appeal in a *written opinion*. This opinion serves a number of functions. It explains to the parties and their lawyers why the court decided the case the way it did, thereby providing some assurance to the parties that their claims and arguments were carefully considered. The opinion is of additional importance to the parties in cases where the result on appeal is the ordering of a new trial. The opinion functions as a lesson in the law to the judge who will preside at the new trial, spelling out the mistakes at the earlier trial that led to the necessity of a new trial.

However, an appellate opinion isn't only a source of psychic satisfaction to the parties and guidance to the trial judge. Appellate opinions are published and are made available to the general public. These appellate opinions are sources of law. As such, they are a part of the legal and moral environment, and consequently influence the way we conduct ourselves in society. And more particularly, and of greater immediate relevance to the lawyer, they are used in the resolution of subsequent legal disputes. Thus, the function of most opinions transcends the needs of the immediate parties in particular cases. Appellate opinions are part of our jurisprudence and have vitality even many years after they are written.

Mechanisms for Resolving Disputes: Adjudication

The foregoing text sketches only the general process by which torts cases are brought and decided. Yet even this brief description suggests a number of reasons why the torts process is currently undergoing critical analysis. It is thought by many to be too cumbersome, too time-consuming, and too expensive for both the immediate parties and society generally. It is also criticized on the ground that its outcomes are often unfair. Much of this criticism focuses on the use of adjudication as the primary means of resolving disputes and many reform efforts involve proposals to modify the adjudicative process or to replace it with alternative means of dispute resolution.

Although adjudication is undoubtedly central to the torts process, it is important not to overstate its function. To be sure, adjudication is the most formal method of resolving disputes in our legal system. But it is also the most ponderous and inefficient method, playing practically a far less important role in the day-to-day functioning of the torts process than most laypersons imagine. The truth is that very few torts disputes are resolved by the satisfaction of a judgment obtained in a court action.

Reflect for a moment upon the life cycle of a typical small tort claim. The parties probably would have to wait two years for their case to reach trial. Lawyers for both sides will in all likelihood have been connected with the case for more than three years before it is finally decided. There are expenses in connection with investigating and preparing the case, filing and serving the pleadings and other documents, assembling the witnesses, and

providing a court stenographer to record and preserve the testimony, not to mention the judge's time and the use of the courthouse for which the parties are not directly charged but for which they and the rest of us pay out of general tax revenues. And the lawyers expect to be, and are, paid more if the case goes to trial. Moreover, their burdens are substantially increased if the case is tried before a jury. Justice may be blind, but when asked to adjudicate torts disputes it can also be frustratingly slow and expensive.

And yet for all of that, adjudication remains the epitome of the torts lawyer's craft. It is the cutting edge of the system of righting civil wrongs, the basic device against which all else is measured and to which all else is related. Throughout this course we will be encountering mechanisms other than adjudication whereby torts disputes are resolved in our system. Taken together, these other methods dispose of the overwhelming majority of torts claims. Yet all of these other mechanisms for resolving disputes rely for their continued existence on the availability of the adjudicative process, for it is largely in adjudication that the rules of liability undergo the process of adjustment and development so necessary to their continued vitality. And the threat of a trial is a powerful incentive to resolve the dispute in some other way.

It is appropriate, therefore, that the adjudicative process occupy center stage in this course. It is probably appropriate also that a great percentage of attention and effort during law school be directed toward gaining an understanding of the adjudicative process as it functions generally in our legal system. However, it is a premise upon which these materials are based that adjudication is only one of a number of dispute-resolving processes that constitute what is collectively referred to here as the torts process. It is no less appropriate, therefore, that the adjudicative process be put into its proper perspective. As far as the day-to-day process of resolving torts disputes is concerned, adjudication has its greatest impact as a ponderous potentiality rather than as an efficient, useful tool.

C. The Substantive Law Governing Liability for Battery

Several reasons support choosing battery as the place to begin the detailed study of the torts process. For one thing, battery is one of the easiest torts to understand. The facts of a battery case are likely to be simple. The law is also relatively uncomplicated, and yet there are enough wrinkles to make it interesting. Moreover, battery is one of the oldest concepts in our law. To study the origins of the common law concept of battery is to study the origins of the common law itself.

A simple and workable definition of the modern concept of battery is the intentional, unprivileged, and either harmful or offensive contact with the person of another. The basic parameters of the battery concept are best described by a hypothetical example. Assume that *A* is walking along the sidewalk and sees *B*, whom *A* dislikes intensely, approaching from the opposite direction. *A* punches *B* on the jaw, knocking out three of *B*'s teeth and rendering *B* unconscious. On these facts *A* has committed a battery upon *B* for which *A* may be held liable in tort. All of the elements of battery are present: *A* intentionally contacted *B*'s person in a harmful manner under circumstances that did not give rise to a privilege on *A*'s part. A battery would also result if *A* rudely tweaked *B*'s nose—a contact that reasonable persons would find offensive. It should be noted that the fact that *A* dislikes *B* explains *A*'s conduct, but is not a necessary element of the tort. Even if *B* were a stranger to *A*, *A*'s conduct would be tortious if the above-described elements are present. On the other hand, if we eliminate any of the elements—intent, harmful or offensive contact, or absence of

privilege—there would be no battery. For example, if *A* had missed *B* or if *A* had acted out of sufficient necessity (e.g., in defense of a knife attack by *B*) to justify striking *B*, *A* would not have committed a *battery* upon *B* even if *A* in fact dislikes *B* intensely. (If *A* misses *B* but *B* is put in apprehension of imminent contact, *A* has committed an *assault* on *B*, a subject we discuss in Chapter 11.) But where, as in our hypothetical example, *A* intentionally and without justification strikes *B*, *A*'s liability in tort is clear from our preliminary definition of battery.

Although the informal definition of battery given above is satisfactory for most cases, the formal definitions contained in the Restatement (Second) of Torts are more suitable for detailed analysis:

§13. BATTERY: HARMFUL CONTACT

An actor is subject to liability to another for battery if

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

§18. BATTERY: OFFENSIVE CONTACT

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

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

Section 2 of the Restatement (Second) defines “act” as “an external manifestation of the actor’s will and does not include any of its results, even the most direct, immediate, and intended.”

The source of these rules, the Restatement (Second) of Torts, represents a revision of the original Restatement of Torts, which was first published by the American Law Institute from 1934 to 1939. The American Law Institute was created in 1923 by a distinguished group of judges, lawyers, and scholars. It is a nonprofit organization whose avowed purpose is improvement of the law. The Restatements of the law on a variety of topics, including Torts, have been the Institute’s chief reason for being. Since its creation, its members have convened annually to review developments in the law and to consider changes in their formal summaries of what the law is in a majority of jurisdictions in this country. Professor Francis H. Bohlen of the University of Pennsylvania was put in charge of the original Restatement of Torts and given the title of Reporter for the project. Professor William L. Prosser, then of the University of California Law School at Berkeley, was appointed Reporter of the Restatement (Second) of Torts. From 1970 to 1981, Dean John Wade of Vanderbilt University Law School acted as Reporter. In 1992, the Institute undertook a Restatement (Third) of Torts. Rather than a single, comprehensive Restatement covering all tort topics, there will be several topical Restatements, each with its own Reporters. Four of these topical Restatements have been completed: Products Liability (1998), Apportionment of Liability (2000), Liability for Physical and Emotional Harm (2009, 2012), and Liability for Economic Harm (2020). One additional project—Intentional Torts to Persons—remains in progress.

It is important for the law student to appreciate what these Restatements are and what they are not. The original purpose of the American Law Institute was to restate the rules of

tort law as recognized by most courts in this country. To some extent, the Second and Third Restatements have departed from this model, with the Reporters and the Institute adopting what was felt to be the “better” rule, even if not so recognized by a majority of states. Courts cite and rely upon the Restatements, but they are decidedly secondary authorities and give way to statutes and cases where the latter establish a different rule.

A further word is in order regarding the relative importance of the Second and Third Restatements in the materials in this book. Reliance herein will be mostly upon the Second Restatement of Torts, although the Third will be referenced when particularly relevant. Comment *a* to §5 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm offers this explanation of why the Second Restatement remains authoritative:

a. An Umbrella Rule. The rule of liability in this Section does not replace the doctrines for specific intentional torts, such as battery, assault, false imprisonment, and others. Rather, this Section provides a framework that encompasses many specific torts for intentionally caused physical harm. Restatement Second, Torts, remains authoritative in explaining the details of the specific torts encompassed by this Section and in specifying the elements and limits of the various affirmative defenses that might be available until the Third Restatement addresses the specific intentional torts.

1. The Prima Facie Case

Returning to the definitions of battery set forth in §§13 and 18 of the Restatement (Second), above, the elements of intent and harmful or offensive contact constitute what is known as the plaintiff’s prima facie case. To win, the plaintiff must prove these elements, together with the necessary causal connection between the harm incurred and the defendant’s conduct. If the defendant had a privilege to inflict harm upon the plaintiff it is up to the defendant to assert this privilege as a defense—it is not up to the plaintiff to assert the absence of privilege as a part of the prima facie case.

a. Intent

Beginning law students are often amazed at the extent to which lawyers can take common, everyday words and concepts and complicate their meanings. The concept of intent in the law of battery provides a good opportunity to test your own reactions in this regard. You have no doubt used the word *intent* for most of your life and never experienced any great difficulties with it—one intends a consequence of one’s action when one subjectively desires that consequence to follow.⁶ In what may be called the clear cases, the element of intent presents few difficulties even in the legal context of determining whether a battery has been committed. In the earlier hypothetical cases involving *A* and *B*, for example, it is clear that *A* intended to strike and harm *B*. *A* subjectively desired to achieve both of these consequences. And yet, there are other cases that are not so clear. The concept of intent can present difficulties regarding exactly what the defendant must intend in order to commit a

6. Interestingly, in tort law one is not said to intend the act, as such. As indicated in §2 of the Restatement (Second), quoted above, “act” is defined as inherently volitional. Thus, the question in cases involving intentional torts, such as battery, is whether the actor intended the consequences of his act, not the act, itself. Of course, determining where to draw the line between an act and its consequence can sometimes be difficult.

battery. For example, what if *A* had tapped *B* lightly on the chin, intending merely to startle *B*, and *B* had fallen to the sidewalk, hit his head, and died from the resulting concussion, a result *A* did not expect and certainly did not desire?

The concept of intent can also present analytical difficulties regarding exactly what mental states suffice to conclude that an actor “intends” a consequence of her actions. For example, suppose that *A*, while intending to throw an empty soda bottle into a trash container, knows that there is a very good chance that the bottle will strike *B*. If the bottle strikes *B*, causing injury, did *A* “intend” that consequence and therefore commit a harmful battery on *B*? We take up these questions in the sections that follow.

(1) What Consequences Must the Defendant Intend to Commit a Battery?

Vosburg v. Putney

80 Wis. 523, 50 N.W. 403 (1891)

The action was brought to recover damages for [a] battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged [battery] the plaintiff was a little more than fourteen years of age, and the defendant a little less than twelve years of age.

The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. The transaction occurred in a schoolroom in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for \$2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. 78 Wis. 84.

The case has been again tried in the circuit court, and [the second trial from which the defendant brings the present appeal] resulted in a verdict for plaintiff for \$2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice Orton on the former appeal. . . .

[The facts as stated in the first supreme court opinion referred to are: “The plaintiff was about fourteen years of age, and the defendant about eleven years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly. The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow. On the 1st day of January before,

the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revived by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff's injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant's foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff. . . .

"The learned circuit judge [at the first trial], said to the jury: 'It is a peculiar case, an unfortunate case, a case, I think I am at liberty to say, that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves.'"]

On the [second trial from the results of which the present appeal is taken,] the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. \$2,500."

The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff for \$2,500 damages and costs of suit was duly entered. The defendant appeals from the judgment.

LYON, J. Several errors are assigned, only three of which will be considered.

1. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. §83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school,

and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

2. [At trial the plaintiff's medical expert was allowed to testify, over the defendant's objection, that in his opinion the exciting cause of the inflammation in the plaintiff's leg was the kick by the defendant. The Supreme Court of Wisconsin concluded that the defendant's objection to such testimony should have been sustained for a reason having more to do with the law of evidence than with the law of battery: the form of the question put to the expert witness was improper.]

3. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in *Brown v. C., M. & St. P.R. Co.*, 54 Wis. 342, to be that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. . . .

[The judgment for the plaintiff was reversed and the case remanded for yet another new trial on the basis of the evidentiary error described in part 2 of the opinion.]

The possibility of a third trial was precluded when, upon Putney's motion, the action was dismissed based on Vosburg's failure to pay court costs associated with the prior appeals and to reinstate the action at the trial level in a timely fashion. This default is perhaps explained by the fact that the Vosburgs were pursuing legal remedies on multiple fronts, including a criminal complaint against Putney and an action by Vosburg's father against Putney to recover his own out-of-pocket expenses and for the loss of his son's services. While the guilty verdict in the criminal action was overturned on appeal, the civil action brought by Vosburg's father was ultimately successful, with a trial judgment in favor of Mr. Vosburg for \$1,200 that was affirmed on appeal in *Vosburg v. Putney*, 56 N.W. 480 (Wis. 1893).

Whether the four-year spate of litigation was actually a success for anyone involved is another matter. The Putneys originally offered to settle the suit for \$250, while the Vosburgs insisted on \$700. Neither party was willing to accept the other's offer or further compromise, and in all likelihood both suffered as a result. When court costs and attorneys' fees are considered, it is almost certain that the Vosburgs actually realized less than the Putneys' \$250 settlement offer, if indeed they recovered anything at all. It is equally certain that the Putneys, in defending the actions, expended considerably more than the \$700 the Vosburgs had originally requested. Thus, the first trial judge's observation that "[t]he parents of these children ought, in some way, if possible, to have adjusted it between themselves" rings true. For a detailed history of the litigation and its aftermath, see Zigurds L. Zile, *Vosburg v. Putney: A Centennial Story*, 1992 Wis. L. Rev. 877.

The central enigma of *Vosburg* involves the court's conclusion that the defendant could be held liable for a battery despite an express finding by the jury that he did not intend to harm the plaintiff. While a jury finding of intent to harm would clearly have sufficed to establish a battery, the court's opinion suggests that other, less malicious states of mind may support liability for a battery. The *Vosburg* court specifically refers to an intention to commit an unlawful act, yet this formulation seems circular—the intent necessary to make defendant's act an unlawful battery depends on whether the act was or was not unlawful. In the Wisconsin high court's view of *Vosburg*, what was the unlawful aspect of the defendant's act?

Another puzzling conclusion by the *Vosburg* court concerns the damages award. Once the defendant is determined to be liable, the court holds that all damages caused by the defendant's wrongdoing are recoverable, whether or not the damages were reasonably foreseeable and whether or not they flowed from an unusual trait or preexisting condition of the plaintiff. This rule—commonly referred to as the “thin skull” or “eggshell skull” rule—has remained a fixture of tort law despite frequent criticism from commentators. See, e.g., Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 Ohio St. L.J. 375 (2013).

The Law-Fact Distinction: In General

A number of facts appear in and accompany the opinion in *Vosburg*. Which ones are essential to the decision? In attempting to analyze *Vosburg*, it is important to begin to understand one of the most basic concepts of the torts process—the distinction between law and fact.

Whenever the plaintiff brings a torts case before a court, as in *Vosburg v. Putney*, a legal remedy is being sought based on particular conduct of the defendant that harmed the plaintiff in some way. In deciding whether to grant the remedy asked for, the court performs three functions: (1) it finds the relevant facts, (2) it states the applicable rule of law, and (3) it applies the rule of law to the facts to reach the proper result. When the court finds the facts of a case, it determines what happened—in a torts case, the conduct of the parties, the circumstances surrounding the conduct, and the consequences of that conduct. If the court determines, after hearing the evidence, that the defendant kicked the plaintiff, it concludes that that event took place in time and space, much in the same sense that a scientist might conclude that a given object weighs three grams.

When the court states the law governing the case, it recognizes a generalized rule calling for certain legal consequences to follow from a particular set of facts. For example, the tribunal might declare the rule to be: “If any person shall intentionally kick another in school after the class is called to order, and if the kick causes harm, then that person shall pay damages to the one kicked.” Observe that the description of facts appearing in the rule is general, in that it refers to generic kinds of behavior, and is not dependent on the specific identity of the parties. This characteristic of generality would be missing if the facts stated in the rule were: “If the defendant kicks the plaintiff on the right shin on February 20, 1889, in a school room in Waukesha, Wisconsin. . . .”

Observe also that the facts are connected to the legal consequences in the form of an *if-then* proposition. The portion of the rule following the *if* identifies the relevant facts, and the portion following the *then* describes the legal consequences. Thus, the substantive law of torts consists primarily of rules of conduct that match up generalized descriptions of fact patterns with appropriate legal consequences. In applying the rule of law to the facts of a particular case, the tribunal compares the facts, as it determines them to be, with the general description of the facts in the rule. If the particular facts of the case fit within this general description, the legal consequences described by the rule then follow.

So far we have spoken of the court as if it were composed of a single person who finds the facts, states the law, and applies the law to the facts. In *Vosburg*, however, the lower court consisted of two separate decisionmakers—the trial judge and the jury. When a jury is involved in a trial, the three functions of fact finding, law declaring, and law application

are split between the judge and the jury, with the judge declaring the law and the jury finding the facts and, in most cases, applying the law to them.⁷

The means by which the allocation of functions between judge and jury is accomplished are the judge's instructions to the jury and the jury's verdict. The instructions to the jury contain a statement of the law governing the case—that is, a description of the facts that under the law must be found by the jury in order to support recovery for the plaintiff. If the facts found by the jury fit within the fact pattern described in the rules of law contained in the instructions, the jury should return its general verdict for the plaintiff. If the facts do not fit within the rules, the jury should return its general verdict for the defendant.

Occasionally, the trial judge may perform the ultimate law-applying function. The procedural device that permits this is the special verdict, which was used in *Vosburg*. In that case, the jury stated its findings of fact in the form of answers to questions, framed by the judge, about the facts. To determine the outcome, the judge then applied the law governing the case to the facts so stated.

The closest that a judge comes to invading the fact-finding province of the jury is when the judge decides whether or not to grant a motion for a new trial on the ground that the verdict is against the clear weight of the evidence. When reacting to a motion for a directed verdict or for a JNOV, the judge may be said to be passing on the sufficiency of the proof itself, rather than on the reaction of the jury to that proof. In contrast, the “against the weight of the evidence” motion invites the trial judge to review the jury's reaction to the evidence, albeit on a standard weighted toward accepting that reaction. It is difficult to avoid the conclusion that in those cases, at least, the trial judge is to some extent acting as a “super-juror.” Two constraints lessen the significance of this “non-judge-like” role: first, judges are admonished to grant such motions only in the rare cases when jurors appear grossly in error (some courts hold that the verdict must be against the “great weight of the evidence”); and second, the judge is limited to ordering a new trial—unlike the situation when reacting to motions for directed verdicts or JNOVs, the judge may not enter judgment for a party that was “robbed” by the jury. If the second jury reacts in the same fashion as the first, presumably the trial judge will conclude that jurors know best, and will deny the defendant's motion for new trial. The special quality of these motions for new trial is reflected in the fact that an appellate court will not overturn the trial judge's denial of such a motion unless the appellate court concludes that the trial judge has committed a clear abuse of discretion.

The division of functions between the judge and jury also has an impact on what issues may be appealed. Just as it is improper for the trial judge to invade the province of the jury and decide issues of fact (except on the rare occasions when an “against the weight of the evidence” motion is granted), it is also improper for an appellate court to review and set aside decisions made by the jury (except on the even rarer occasions when an appellate court decides that the denial of an “against the weight of the evidence” motion was

7. The law-application function to which this discussion refers is the ultimate application that occurs after the trier of fact has resolved conflicts in the evidence relating to relevant factual issues. The judge performs a preliminary application of law to facts in reacting to motions to dismiss the complaint or to enter summary judgment because there is no substantial disagreement as to material facts. The facts to which the judge applies the law in these instances are not the facts ultimately found by the fact finder, however, but rather the facts as they are contained in the complaint or in supporting affidavits. In reacting to a motion for directed verdict or for a JNOV, the trial judge performs a similar function in reviewing the evidence introduced at the trial, viewing that evidence in the light most favorable to the nonmoving party.

reversible error). The right to a jury trial would be a hollow one if an appellate court were free to substitute its own conclusions of fact for those of the jury. The only issues an appellate court may decide for itself are issues of law—that is, the expressed or implied rulings of law made by the trial judge at the trial.

Note: Tort Liability of Minors and Their Parents

In *Vosburg*, the defendant was a minor. At common law, minors do not necessarily escape liability for intentionally causing harmful contacts. For example, in *Bailey v. C. S.*, 12 S.W.3d 159 (Tex. Ct. App. 2000), the four-year-old defendant struck his baby-sitter in the throat, crushing her larynx. The baby-sitter sued, alleging battery. In reversing the lower court's grant of summary judgment for the young defendant, the appellate court held that under Texas law there is no specific age minimum at which children are deemed incapable of forming the intent necessary to commit a battery. However, some courts have held as matter of law that very young children may not be capable of having the requisite intent. See, e.g., *Fromenthal v. Clark*, 442 So. 2d 608 (La. Ct. App. 1983), *cert. denied*, 444 So. 2d 1242 (La. 1984), holding that the two-year-old defendant, who had severely bitten a newborn child, could not be held liable for an intentional tort. Courts also have reached inconsistent conclusions regarding the age at which children are capable of forming the mental state required to commit an intentional tort. While the court in *Bailey* held that a four-year-old child could potentially form intent, the court in *DeLuca v. Bowden*, 329 N.E.2d 109 (Ohio 1975), held that a child under seven years of age was incapable of committing an intentional tort.

Imposing liability on minors for intentionally causing harmful contact would not be remarkable if it were not for the fact that, in other areas of the law, minors receive special protection because of their age. One such area we will be dealing with later is negligence—children sometimes are not held to the same standard of care as adults, and young children are often held to be incapable of acting negligently even when they are deemed old enough to commit a battery. Thus, in many states, children under a certain age are incapable of negligence. See, e.g., *Stark ex rel. Jacobsen v. Ford Motor Co.*, 693 S.E.2d 253 (N.C. Ct. App. 2010), *rev'd on other grounds*, 723 S.E.2d 753 (N.C. 2012), in which the appellate court reiterated the North Carolina rule that children under the age of seven are, as a matter of law, incapable of negligence. There are even more stringent rules for the protection of children in both contract and criminal law. As you develop your knowledge of these other areas of law, you should ask yourself whether these different rules represent inconsistencies, or whether different considerations of policy permit, if they do not require, different treatment.

Because children typically do not have the financial resources to satisfy tort claims, persons injured by young tortfeasors may try to collect from the youngster's parents. Parents may be liable for their own negligence in failing to supervise their minor children, but under the common law they were not held vicariously liable for their children's torts solely by virtue of the parent-child relationship. This has led all 50 states to enact statutes imposing some degree of liability on parents for the torts of their children. These statutes, which vary significantly in detail, often impose limitations on the amount of damages a parent can be required to pay for the tortious conduct of a child. Such statutes also typically require that the minor's conduct be willful or malicious before the parent can be held liable. Thus, for example, in *Cogswell v. Holder*,

2004 Ohio App. LEXIS 5085 (Ohio Ct. App. 2004), the court of appeals held that the parents of a minor child who drove the getaway car in a fatal shooting were not liable because the child did not personally harm the victims. Other statutes impose broader liability on parents. See, e.g., La. Civ. Code Ann. art. 2318 (“The father and the mother are responsible for the damage occasioned by their minor child . . .”). The Louisiana statute imposes parental liability regardless of whether the parents could have prevented the act of the child and regardless of whether the child was too young to be capable of committing a tort. See *Turner v. Bucher*, 308 So. 2d 270 (La. 1975).

At the practical level, a potential source of recovery for plaintiffs is the homeowner’s insurance that covers many American households against, among other contingencies, tort liability. Under such policies, the liability need not have any connection with the home, as such, and both the parents and their children are covered as insureds. The interesting wrinkle here is that the liability portion of most homeowner’s policies excludes liability for intentional torts. See generally James L. Rigelhaupt, Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured, 31 A.L.R.4th 957 (1984). If the only tort for which a young child is likely to be held liable is the intentional tort of battery, homeowner’s insurance is probably not available to cover the child’s liability. However, if the child’s parents are liable for their own negligent supervision, or are held vicariously liable without fault on their parts, homeowner’s insurance covers the situation. See, e.g., *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 704 A.2d 597 (N.J. Super. Ct. App. Div. 1998).

Statutory extensions of parental liability are generally recognized to be aimed at reducing juvenile delinquency. See generally Lisa Gentile, Parental Civil Liability for the Torts of Minors, 6 J. Contemp. Legal Issues 125 (2007). Under the threat of potential liability, parents are encouraged to supervise their children. As Professor Chapin notes, however, the assumption that parental control will reduce delinquency ignores other factors that influence the child’s behavior. She cautions that in the absence of empirical evidence, parental liability should not be the primary focus in the effort to reduce juvenile delinquency, but acknowledges that an innocent victim will at least be partially compensated as a result of parental liability. Linda A. Chapin, Out of Control? Uses and Abuses of Parental Liability, 37 Santa Clara L. Rev. 621 (1997). See also Judith G. McMullen, “You Can’t Make Me!”: How Expectations of Parental Control over Adolescents Influence the Law, 35 Loy. U. Chi. L.J. 603 (2004). The author observes that authorities in the field of child-rearing contend that parents have only limited control over their children, and that children are motivated largely by peer influence and inborn personality traits.

(2) Which Mental States Constitute Intent to Cause a Harmful or Offensive Contact?

As observed at the outset, an actor intends a consequence when the actor subjectively desires that the consequence flow from her act. In *Vosburg*, the defendant conceded that he intended/desired to kick the plaintiff’s shin, at least “ever so slightly.” The argument in *Vosburg* was over what legal result followed from the jury findings that the kick caused the injury and that the defendant did not intend/desire to cause any harm by what he did. In this section we explore whether any mental state, other than a desire that one’s act cause a particular consequence, will suffice legally to constitute an actor’s intent to cause that consequence.

Garratt v. Dailey*46 Wash. 2d 197, 279 P.2d 1091 (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.

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.

The trial court's finding that Brian was a visitor in the Garratt backyard is supported by the evidence and negatives appellant's assertion that Brian was a trespasser and had no right to touch, move, or sit in any chair in that yard, and that contention will not receive further consideration.

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.

See also, Prosser on Torts 41, §8.

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.

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. *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 case 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.

SCHWELLENBACH, DONWORTH, and WEAVER, JJ., concur.

On remand, the trial court found for the plaintiff. On appeal, the Supreme Court of Washington affirmed, 304 P.2d 681 (Wash. 1956), disposing of the defendant's argument that the evidence did not support a finding of knowledge on the part of the defendant in the following manner:

The record was carefully reviewed by this court in *Garratt v. Dailey*. Had there been no evidence to support a finding of knowledge on the part of the defendant, the remanding of the case for clarification on that issue would have been a futile gesture on the part of the court. As we stated in that opinion, the testimony of the two witnesses to the occurrence was in direct conflict. We assumed, since the trial court made a specific finding that the defendant did not intend to harm the plaintiff, that the court had accepted the testimony of the defendant and rejected that of the plaintiff's witness. However, on remand, the judge who heard the case stated that his findings had been made in the light of his understanding of the law, i.e., that the doctrine of constructive intent does not apply to infants, who are not chargeable with knowledge of the normal consequences of their acts. In order to determine whether the defendant knew that the plaintiff would sit in the place where the chair had been, it was necessary for him to consider carefully the time sequence, as he had not done before; and this resulted in his finding that the arthritic woman had begun the slow process of being seated when the defendant quickly removed the chair and seated himself upon it, and that he knew, with substantial certainty, at that time that she would attempt to sit in the place where the chair had been. Such a conclusion, he stated, was the only reasonable one possible. It finds ample support in the record. Such knowledge, we said in *Garratt v. Dailey*, is sufficient to charge the defendant with intent to commit a battery.

The defendant also argued on the second appeal that the findings on remand were technically inconsistent with the original findings. The Supreme Court refused to address this issue because the defendant had failed to preserve the issue on appeal.

Knowledge-based intent, often referred to as *constructive intent*, is universally recognized by American courts. For an exposition of the doctrine, see generally James A. Henderson, Jr. & Aaron D. Twerski, *Intent and Recklessness in Tort: The Practical Craft of Restating the Law*, 54 Vand. L. Rev. 1133, 1138-43 (2001). See also §1(b) of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). Constructive intent has played an important role in a number of different areas of tort law in recent years. One such area involves employment-related torts. Statutory workers' compensation systems offer exclusive no-fault remedies and bar tort claims by employees against the employer. Many courts have held that such statutes impliedly recognize an exception for intentional torts, typically on the ground that the limited remedies of the workers' compensation systems would provide inadequate compensation and deterrence incentives in the case of batteries and other intentional torts. See generally David B. Harrison, Annotation, *What Conduct Is Willful, Intentional, or Deliberate Within Workmen's Compensation Act Provision Authorizing Tort Action for Such Conduct*, 96 A.L.R.3d 1064 (1979). Thus, in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000), the plaintiff's decedent, an employee of PCR, was killed in an explosion that occurred in the company's chemical plant. The plaintiff brought a wrongful death action against PCR. The trial court granted summary judgment on the grounds of PCR's workers' compensation defense. On appeal, the Supreme Court of Florida reversed, recognizing an intentional tort exception to workers' compensation and finding that a triable issue of fact may have existed as to whether it was substantially certain that an employee would suffer injury or death while working in the chemical plant. This holding was based on the fact that at least three other uncontrolled explosions had occurred at the PCR plant in the two years prior to the fatal accident, thereby giving credence to the plaintiff's claim that the decedent's death in a plant explosion was substantially certain to occur. Compare with *Batiste v. Bayou Steel Corp.*, 45 So. 3d 167 (La. 2010) (noting that an employer's mere awareness of prior similar accidents is insufficient to establish an employer's knowledge that an accident that injured the plaintiff was substantially certain to occur).

The Florida legislature codified the intentional tort exception in 2003. See Fla. Stat. §440.11(1). However, this codification modified the standard announced by the Supreme Court of Florida in *Turner*. The Florida statute requires that for an injured employee to recover in tort, he must prove by clear and convincing evidence either that his employer "deliberately intended to injure him" or that his employer engaged in conduct that the employer actually knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was "virtually certain" to result in injury or death. The "virtually certain" standard has been adopted in other states, and clearly makes it more difficult for an employee to use the doctrine of constructive intent as a way of avoiding the exclusive, limited remedies of workers' compensation systems. See, e.g., *List Indus., Inc. v. Dalien*, 107 So. 3d 470, 471 (Fla. Dist. Ct. App. 2013) ("The change from 'substantial certainty' to 'virtually certain' is an extremely different and manifestly more difficult standard to meet. It would mean that a plaintiff must show that a given danger will result in an accident every—or almost every—time.").

The Supreme Court of Florida in *Travelers Indemnity Co. v. PCR Inc.*, 889 So. 2d 779 (Fla. 2004), considered whether liability insurance companies would be responsible for covering intentional torts based on the substantial certainty or virtual certainty standard. The liability insurance policy involved in the case specifically stated that the insurance company would cover all sums PCR must legally pay as damages because of bodily

injuries to PCR's employees and that the policy applied only to claims of "bodily injury by accident . . . arising out of and in the course of . . . employment by [PCR]." The policy, however, enumerated several exclusions from coverage, one of which said that "this insurance does not cover . . . bodily injury intentionally caused or aggravated by [PCR]." The Florida Supreme Court held that, while the policy explicitly excluded coverage of intentionally caused bodily injury, the insurance company was responsible for extending coverage to claims brought against the employer under the substantial certainty or virtual certainty standard. The court reasoned that the word "accident" in the liability policy should not be interpreted so narrowly as to cover only circumstances deemed accidental under workers' compensation and tort law. How can the court defend its view that harms caused with substantial or virtually certain knowledge can be both "intentional" for purposes of workers' compensation and tort law, and "accidental" for purposes of construing the liability insurance contract? For an overview of case law considering "intent" in the context of liability insurance, see James E. Scheuermann, *Where's the Intent in the New Restatement of Law, Liability Insurance?*, 54 *Tort Trial & Ins. Prac. L.J.* 125 (2019).

Another case that turned on the issues of whether and in what situations a work-related hazard with substantial certainty of injury will fall into the intentional tort exception to workers' compensation is *Laidlow v. Hariton Machinery Co.*, 790 A.2d 884 (N.J. 2002). In *Laidlow*, the plaintiff caught his hand in a rolling mill due to the lack of a safety guard on the machine. The high court of New Jersey formulated a test with two required prongs to determine whether the injury fell under the intentional tort exception to the workers' compensation exclusivity provision. First, similarly to *Garratt*, the court asked if the employer knew with substantial certainty that the injury would result. Second, the court formulated a "context" prong that examined whether the injury was simply the result of everyday industrial life, in which case workers' compensation was the exclusive remedy, or was plainly outside the legislative grant of immunity from tort under the workers' compensation statute, in which case the claimant could pursue a remedy in tort. Under this second prong, the court appeared to be inquiring into whether the injury was the type of injury that should be expected in a normal working environment and thus be compensated for exclusively under the workers' compensation statute. See also *Price v. Howard*, 236 P.3d 82 (Okla. 2010) (holding that even a willful and knowing violation of government safety standards by an employer did not rise to the level of an intentional tort against the decedent employee so as to subject the employer to liability beyond the workers' compensation act); *Kerans v. Porter Paint Co.*, 575 N.E.2d 428 (Ohio 1991) (construing the definition of injury within the Ohio workers' compensation statute not to include "a non-physical injury with purely psychological consequences," such that a claim against an employer for sexual harassment could proceed outside the workers' compensation scheme).

Writers have argued for the use of battery as a basis for products liability. In 1980, Paul A. LeBel observed that the plaintiff could establish a battery claim based on the manufacturer's knowledge with substantial certainty that the product would injure unidentified persons. He concluded that the advantages of this strategy, such as recovery of punitive damages and avoidance of defenses based on the plaintiff's fault, encourage manufacturers to reevaluate their cost-benefit analysis, produce safer products, and better inform the consumer. See Paul A. LeBel, *Intent and Recklessness as Bases of Products Liability: One Step Back, Two Steps Forward*, 32 *Ala. L. Rev.* 31 (1980). More recently, the elements of battery have been applied to exposure to secondhand smoke. Such an analysis appears to suggest that the cigarette manufacturer acts voluntarily by placing its product on the market with the intent that the smoker smoke the cigarette. The manufacturer also manifests a constructive intent that contact with nonsmokers will be achieved. The force set in motion by the

manufacturer thus results in a harmful/offensive contact. See generally Darren S. Rimer, Note, Secondhand Smoke Damages: Extending a Cause of Action for Battery Against a Tobacco Manufacturer, 24 Sw. U. L. Rev. 1237 (1995); Irene Scharf, Breathe Deeply: The Tort of Smokers' Battery, 32 Hous. L. Rev. 615 (1995).

Thus, in *Shaw v. Brown & Williamson Tobacco Corp.*, 973 F. Supp. 539 (D. Md. 1997), the plaintiff brought an action for battery based on his exposure to secondhand smoke. The plaintiff was a long-distance trucker who, over an 11-year period, spent significant amounts of time in a truck cab with a co-worker who smoked. The plaintiff, himself, did not smoke, but he eventually developed lung cancer. He sued the defendant tobacco company alleging, *inter alia*, battery. The plaintiff claimed that it was substantially certain that Brown & Williamson's tobacco would contact nonsmokers, who, unlike smokers, did not consent to such contact. The trial court dismissed the battery count for failure to state a claim. The court concluded that the defendant did not know with substantial certainty that secondhand smoke from their cigarettes would contact any particular nonsmoker. The fact that the defendant knew that their products would impact some nonsmokers was, according to the court, too generalized to satisfy the knowledge-based intent requirement for battery. This approach has been more generally echoed in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). Comment *e* of §1 limits applications of the substantial-certainty test to "situations in which the defendant has knowledge to a substantial certainty that the conduct will bring about harm to a particular victim, or to someone within a small class of potential victims within a localized area."

One major problem with arguments that the distribution of products by manufacturers should carry with it constructive intent on the part of the distributor that people suffer injury using and consuming products is that manufacturers would be liable in tort for all of the harm their products cause, regardless of whether those products are legally defective. Whenever a manufacturer distributes hundreds of thousands of units of any product, the manufacturer knows that a certain number of people will suffer product-related harm. If courts have chosen to impose liability on manufacturers when the products they market are defective—as they have, which we will find in Chapter 7—then by what reasoning can they avoid the clear implications of the doctrine of constructive intent? The Third Restatement's blunt distinction between individualized and statistical knowledge has been viewed as promising but limited by commentators. One important qualification offered in the literature would place intentional tort liability for defendants back on the table when statistical knowledge exists of a risk that is "extremely unjustifiable." Kenneth W. Simons, *Statistical Knowledge Deconstructed*, 92 B.U. L. Rev. 1 (2012). What circumstances can you imagine in which a defendant holds merely "statistical knowledge" that its conduct poses a risk of harm, but the risk is "extremely unjustifiable"?

While you are pondering that question, remember that subjective intent may be present even when the probabilities of injury approach zero. Thus, *Garratt* describes a sufficient, but not an invariably necessary, basis for concluding that an actor intends a result. The *Garratt* rule governs situations where the actor does not subjectively desire the harmful or offensive contact. But when a defendant subjectively desires to harm the plaintiff, there is no requirement that success be highly probable. Instead, as long as the defendant desires to cause the harmful or offensive contact and the contact actually occurs as a result of the defendant's actions, a battery is established. Thus, if the defendant shoots at the plaintiff with a gun from a great distance, with minimal chances of success, a battery is committed as long as the desired result—the wounding of the plaintiff—actually occurs.