CHAPTER 2

Intentional Torts

Intentional torts are one of the three general categories of tort law. There are various types of intentional torts, each protecting a particular legally recognized interest. Although the injury required to demonstrate and prove the tort varies, the *prima facie* structure of each intentional tort is the same: intent, act, causation, and injury. As you study the following materials, remain mindful of the interest or interests protected by recognition of each tort. We begin by exploring the first element of any intentional tort, that being intent.

It's Latin to Me

Prima facie means "at first sight." Here, it refers to the requirement that the plaintiff produce enough evidence to allow the fact-finder to rule in his or her favor.

A. Intent

Garratt v. Dailey

46 Wash.2d 197, 279 P.2d 1091 (1955)

HILL, JUSTICE.

Take Note

The reference to Brian as an "infant" does not mean that he was a baby. Rather, the legal term infant used in this case means a person not yet of majority age.

The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair,

Brian deliberately pulled it out from under her. The only one of the three 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 $11,000. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions [C] state that when a minor has committed a tort with force he is liable to be proceeded against as any other person would be. [Cc]

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

. . . .

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

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

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

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

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

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (*i.e.*, that Brian had

pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the 'Character of actor's intention,' relating to clause (a) of the rule from 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.'

Take Note

Notice that the definition of "intent" can be satisfied by establishing that the defendant acted with either (1) purpose (specific intent) or (2) knowledge to a substantial certainty (general intent).

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

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

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

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for $11,000 in her favor on the record now before us.

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

Food for Thought

Should children be responsible for their intentional torts, as adults are? What are the policy reasons in favor of holding children responsible for their torts? Against?

What we have said concerning intent in relation to batteries caused by the physical contact of a plaintiff with the ground or floor as the result of the removal of a chair by a defendant furnishes the basis for the answer to the contention of the plaintiff that the trial court changed its theory of the applicable law after the trial, and that she was prejudiced thereby.

It is clear to us that there was no change in theory so far as the plaintiff's case was concerned. The trial court consistently from beginning to end recognized that if the plaintiff proved what she alleged and her eyewitness testified, namely, that Brian pulled the chair out from under the plaintiff while she was in the act of sitting down and she fell to the ground in consequence thereof, a battery was established. Had she proved that state of facts, then the trial court's comments about inability to find any intent (from the connotation of motivation) to injure or embarrass the plaintiff, and the italicized portions of his findings as above set forth could have indicated a change of theory. But what must be recognized is that the trial court was trying in those comments and in the italicized findings to express the law applicable, not to the facts as the plaintiff contended they were, but to the facts as the trial court found them to be. The remand for clarification gives the plaintiff an opportunity to secure a judgment even though the trial court did not accept her version of the facts, if from all the evidence, the trial court can find that Brian knew with substantial certainty that the plaintiff intended to sit down where the chair had been before he moved it, and still without reference to motivation.

. . . .

It is argued that some courts predicate an infant's liability for tort upon the basis of the existence of an estate in the infant; hence it was error for the trial court to refuse to admit as an exhibit a policy of liability insurance as evidence that

there was a source from which a judgment might be satisfied. In our opinion the liability of an infant for his tort does not depend upon the size of his estate or even upon the existence of one. That is a matter of concern only to the plaintiff who seeks to enforce a judgment against the infant.

. . . .

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

. . . .

Remanded for clarification.

[On remand, the trial court found that "the defendant knew, with substantial certainty, at the time he removed the chair, that the plaintiff would attempt to sit down where the chair had been, since she was in the act of seating herself when he removed the chair. Judgment was entered for the plaintiff in the amount of eleven thousand dollars, plus costs. . . . ." *See Garratt v. Dailey,* 304 P.2d 681 (Wash. 1956).]

Points for Discussion

1. How could Brian be held liable for a intending a battery when he had no intent to injure or embarrass Mrs. Garratt?

2. How can one's intent—what a person is thinking at the time he or she acts—ever be proven in a court of law?

3. What are the two ways that intent can be established in support of an intentional tort action?

4. Specific Intent and General Intent—The court here defines intent sufficient for the intentional tort of battery as satisfied by proof of the defendant's *specific intent*—the defendant desired to bring about the harm for battery (harmful or

offensive contact)—or *general intent*—the defendant had knowledge to a substantial certainty that such harm (in this case, harmful or offensive contact) would be caused by his actions.

Take Note

The court's definition of intent was adopted by the RESTATEMENT (SECOND) OF TORTS § 8A (1965), which defines intent as:

(1) desiring to cause the consequences of one's act or

(2) believing the consequences are substantially certain to result from one's act.

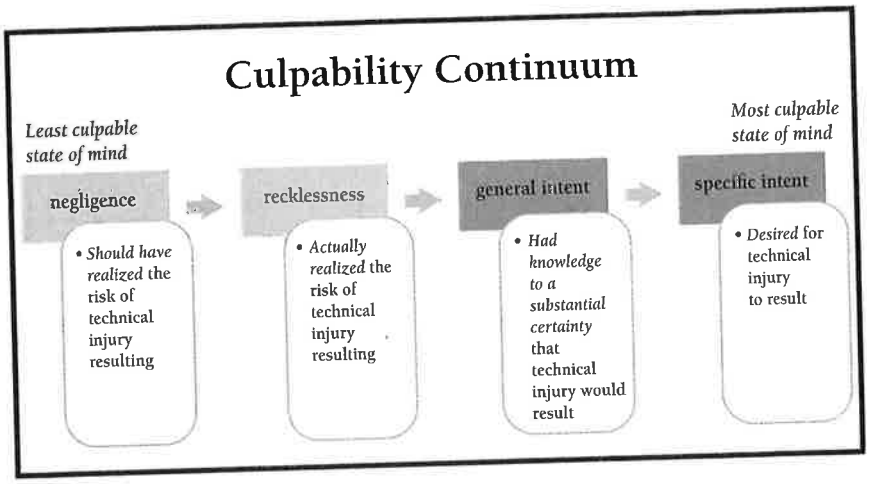
5. Liability of Minors—This decision explains what is now a well-accepted principle of tort law: in most jurisdictions, children are responsible for their intentional torts. Public policy in support of the rationale holding children liable includes considerations of deterrence, corrective justice, and compensation. Do you believe children can be deterred from tortious conduct by imposition of civil liability? Will holding children liable in tort prevent injured persons from engaging in self-help measures? Is the liability of children for tortious conduct justifiable because, as between the two parties, the person responsible for causing the injury should compensate the victim? Do you agree that children should be liable for their intentional torts? Why or why not? Should there be a minimum age before children may be liable in tort? If so, what should that age be? Why?

6. That children can be civilly responsible for their torts does not make their age irrelevant. A defendant child's age may be of consequence in determining what he or she knew in light of his or her age, capacity, and understanding.

FYI

The American Law Institute ("ALI") has recently adopted portions of The RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM. Section 1 provides that a "person acts with the intent to produce a consequence if (a) the person acts with the purpose of producing the consequence; or (b) the person acts knowing that the consequence is substantially certain to result." *See* The RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 1 (2010).

7. The trial court refused to admit into evidence proof of Brian's liability insurance. The court explains that such information, as well as information concerning the size of plaintiff's estate, is irrelevant to the battery action. Why is proof of insurance irrelevant?



Spivey v. Battaglia

258 So.2d 815 (Fla. 1972)

DEKLE, JUSTICE.

This cause is before us on petition for writ of certiorari to review a decision of the District Court of Appeal, Fourth District. [C] It will be seen below that there is a misapplication and therefore conflict with *McDonald v. Ford*, 223 So.2d 553 (2d DCA Fla. 1969).

Petitioner (plaintiff in the trial court) and respondent (defendant) were employees of Battaglia Fruit Co. on January 21, 1965. During the lunch hour several employees of Battaglia Fruit Co., including petitioner and respondent, were seated on a work table in the plant of the company. Respondent, in an effort to tease petitioner, whom he knew to be shy, intentionally put his arm around petitioner and pulled her head toward him. Immediately after this 'friendly unsolicited hug,' petitioner suffered a sharp pain in the back of her neck and ear, and sharp pains into the base of her skull. As a result, petitioner was paralyzed on the left side of her face and mouth.

An action was commenced in the Circuit Court of Orange County, Florida, wherein the petitioners, Mr. and Mrs. Spivey, brought suit against respondent for, (1) negligence, and (2) assault and battery. Respondent, Mr. Battaglia, filed his answer raising as a defense the claim that his 'friendly unsolicited hug' was

an assault and battery as a matter of law and was barred by the running of the two-year statute of limitations on assault and battery. Respondent's motion for summary judgment was granted by the trial court on this basis. The district court affirmed on the authority of McDonald v. Ford, *supra*.

Behind the Scenes

Why is Mr. Spivey suing as well? The answer is likely that, at the time, women were not permitted to sue for their own injuries so her husband was required to sue on her behalf. He may also have been suing for his own injuries as a derivative claim based on her injuries, also known as a loss of consortium claim. *See infra* Chapter 8 on Damages.

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

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

What's That?

A statute of limitations is a statute defining the time period during which a cause of action must be filed.

> '. . . an assault and battery is not negligence, for such action is intentional, while negligence connotes an unintentional act.'

The intent with which such a tort liability as assault is concerned is not necessarily a hostile intent, or a desire to do harm. Where a reasonable man would believe that a particular result was substantially certain to follow, he will be held in the eyes of the law as though he had intended it.[1] It would thus be an assault (intentional). However, the knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent. Thus, the distinction between

[1] RESTATEMENT (SECOND) OF TORTS, § 8A (1965).

intent and negligence boils down to a matter of degree. 'Apparently the line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable man would avoid (negligence), and becomes a substantial certainty.'[2] In the latter case, the intent is legally implied and becomes and assault rather than unintentional negligence.

Major Themes

The court here is making the distinction between two of the three general categories of torts discussed in Chapter One—intentional torts and negligence actions. An intentional tort requires a showing of the defendant's intent, whereas negligence imposes liability based upon the defendant's unintentional conduct.

The distinction between the unsolicited kisses in *McDonald* . . . and the unsolicited hug in the present case turns upon this question of intent. In *McDonald*, the court, finding an assault and battery, necessarily had to find initially that the results of the defendant's acts were 'intentional.' This is a rational conclusion in view of the struggling involved there. In the instant case, the DCA must have found the same intent. But we cannot agree with that finding in these circumstances. It cannot be said that a reasonable man in this defendant's position would believe that the bizarre results herein were 'substantially certain' to follow. This is an unreasonable conclusion and is a misapplication of the rule in *McDonald*. This does not mean that he does not become liable for such unanticipated results, however. The settled law is that a defendant becomes liable for reasonably foreseeable consequences, though the exact results and damages were not contemplated. [C]

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

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

It is so ordered.

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[2] W. PROSSER, LAW OF TORTS, p. 32 (3d ed. 1964).

Points for Discussion

1. Is the fact that Mrs. Spivey was paralyzed on the left side of her face and mouth legally relevant in establishing the *prima facie* case for her battery claim? That she was paralyzed will certainly impact the amount of damages she is eligible to recover if her claim is permitted, but does it affect whether the defendant is liable for a battery at all?

2. The court in *Spivey v. Battaglia* states that the defendant is not liable for the intentional torts of assault or battery because the defendant could not have intended these bizarre results. Is this the legally relevant inquiry when determining whether the defendant acted with the requisite intent? Remember that intent in support of the *prima facie* case for an intentional tort is established by proof of either specific intent or general intent. Specific intent is established by proof that the actor desired to bring about a result that will invade the interests of another in a way that the law forbids. General intent is established by proof that the actor acted with knowledge to a substantial certainty that the act would invade the interests of another in a way that the law forbids.

RESTATEMENT (THIRD) OF TORTS (2010) seeks to clarify what the defendant must "intend"—"In general, the intent required in order to show that the defendant's conduct is an intentional tort is the intent to bring about harm (more precisely, to bring about the type of harm that the particular tort seeks to protect against)." See RESTATEMENT (THIRD) OF TORTS: LIAB. PHYSICAL HARM § 1, cmt. b (2010). Thus, the court's ruling in *Spivey* clearly reaches the wrong result, if indeed the defendant intended to contact the plaintiff in an offensive manner, as that would be intent sufficient to support a finding of offensive contact battery. Why might the court have made such a patently incorrect ruling?

3. What is a statute of limitations?

4. According to the *Spivey* court, are an intentional tort action and a negligence action, arising from the same set of facts, mutually exclusive theories of recovery?

Ranson v. Kitner

31 Ill.App. 241 (3d Dist. 1888)

CONGER, J.

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

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

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

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

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

Judgment affirmed.

Points for Discussion

1. The issue in this case is whether a defendant's good faith or mistake might negate the intent sufficient for imposing liability for an intentional tort. Does the defendant's good faith or mistake negate intent?

2. Why is the defendant liable when he was mistaken as to the legal character of the dog? Is the defendant morally to blame or at fault for the harm caused? Does the court's decision impose liability without fault? Why is the burden of mistake placed upon the defendant rather than on the plaintiff?

Hypo 2-1

V.P. was part of a group hunting wild quail on a ranch in the southern part of State. Hunting dogs pointed out a covey of quail, and the birds were flushed. V.P. turned to his right and fired his shotgun at a quail heading west and toward the sun. At the exact same moment that he fired at the bird, V.P. saw another member of the hunting party, 78-year-old Friend (who was dressed in orange), standing approximately 30 yards from V.P. Birdshot from V.P.'s weapon struck Friend in his face, neck, and chest. A pellet entered Friend's heart, and he suffered a heart attack. V.P. takes full responsibility for "my accidental shooting" of Friend. Did V.P. act with the requisite intent to commit an intentional tort when he shot Friend?

McGuire v. Almy

297 Mass. 323, 8 N.E.2d 760 (1937)

QUA, JUSTICE.

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

The following facts are established by the plaintiff's own evidence: In August, 1930, the plaintiff was employed to take care of the defendant. The plaintiff was a registered nurse and was a graduate of a training school for nurses. The defendant was an insane person. Before the plaintiff was hired she learned that the defendant was a "mental case and was in good physical condition," and that for some time two nurses had been taking care of her. The plaintiff was on "24 hour duty." The plaintiff slept in the room next to the defendant's room. Except when the plaintiff was with the defendant, the plaintiff kept the defendant locked in the defendant's room. There was a wire grating over the outside of the window of that room. During the period of "fourteen months or so" while the plaintiff cared for the defendant, the defendant "had a few odd spells," when she showed some hostility to the plaintiff and said that "she would like to try and do something to her." The defendant had been violent at times and had broken dishes "and things like that," and on one or two occasions the plaintiff had to have help to subdue the defendant.

On April 19, 1932, the defendant, while locked in her room, had a violent attack. The plaintiff heard a crashing of furniture and then knew that the defen-

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

FYI

A *lowboy* is a small dressing or side table, usually about three feet high.

The extent to which an insane person is liable for torts has not been fully defined in this Commonwealth. . . . . In *Morain v. Devlin*, 132 Mass. 87, at page 88,42 Am.Rep. 423, this court said, through Chief Justice Gray, "By the common law, as generally stated in the books, a lunatic is civilly liable to make compensation in damages to persons injured by his acts, although, being incapable of criminal intent, he is not liable to indictment and punishment," citing numerous cases. . . .

[C]ourts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent, nor do the courts discuss the effect of different kinds of insanity or of varying degrees of capacity as bearing upon the ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it, although it is sometimes said that an insane person is not liable for torts requiring malice of which he is incapable. Defamation and malicious prosecution are the torts more commonly mentioned in this connection. . . . . [Cc] These decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged. Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the

comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal mediaeval conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault. Notwithstanding these criticisms, we think that as a practical matter, there is strong force in the reasons underlying these decisions. They are consistent with the general statements found in the cases dealing with the liability of infants for torts [Cc] including a few cases in which the child was so young as to render his capacity for fault comparable to that of many insane persons [Cc]. Fault is by no means at the present day a universal prerequisite to liability, and the theory that it should be such has been obliged very recently to yield at several points to what have been thought to be paramount considerations of public good. Finally, it would be difficult not to recognize the persuasive weight of so much authority so widely extended.

But the present occasion does not require us either to accept or to reject the prevailing doctrine in its entirety. For this case it is enough to say that where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it.

Food for Thought

Should the imposition of intentional tort liability on insane persons apply to negligence actions as well? How about torts predicated upon strict liability? *See* Chapter 13, *infra*.

We do not suggest that this is necessarily a logical stopping point. If public policy demands that a mentally affected person be subjection to the external standard for intentional wrongs, it may well be that public policy also demands that he should be subjected to the external standard for wrongs which are commonly classified as negligent, in accordance with what now seems to be the prevailing view. We stop here for the present, because we are not

required to go further in order to decide this case, because of deference to the difficulty of the subject, because full and adequate discussion is lacking in most of the cases decided up to the present time, and because by far the greater number of those cases, however broad their statement of the principle, are in fact cases of intentional rather than of negligent injury.

Coming now to the application of the rule to the facts of this case, it is apparent that the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent. [C] We think this was enough.

Take Note

Notice here that after determining the correct law to apply, the court then applies the law to the facts of the case. Good legal analysis requires identifying the legal issue, determining the applicable law, applying the law to the facts of the case, and after analyzing the law to the fact, reaching a conclusion.

The defendant further argues that she is not liable because the plaintiff, by undertaking to care for the defendant with knowledge of the defendant's condition and by walking into the room in spite of the defendant's threat under the circumstances shown, consented to the injury, or, as the defendant puts it, assumed the risk, both contractually and voluntarily. Without considering to what extent consent is in general a defence to an assault. . ., we think that the defendant was not entitled to a directed verdict on this ground. Although the plaintiff knew when she was employed that the defendant was a mental case, and despite some show of hostility and some violent and unruly conduct, there was no evidence of any previous attack o[r] even of any serious threat against anyone. The plaintiff had taken care of the defendant for "fourteen months or so." We think that the danger of actual physical injury was not, as matter of law, plain and obvious up to the time when the plaintiff entered the room on the occasion of the assault. But by that time an emergency had been created. The defendant was breaking up the furniture, and it could have been found that the plaintiff reasonably feared that the defendant would do harm to herself. Something had to be done about it. The plaintiff had assumed the duty of caring for the defendant. We think that a reasonable attempt on her part to perform that duty under the peculiar circumstances brought about by the defendant's own act

The defense of *assumption of the risk* is not traditionally available in an action for an intentional tort. Rather, as will be explained in Chapter 6, it is historically an available defense to negligence actions.

did not necessarily indicate a voluntary consent to be injured. Consent does not always follow from the intentional incurring of risk. . . . .

Judgment for the plaintiff on the verdict.

Points for Discussion

1. Does proof of the defendant's mental illness negate the intent element for an intentional tort?

2. What is the common law rule regarding the liability of mentally ill persons for their torts? Does the common law impose liability on insane persons for both intentional torts as well as negligence actions? Should the same rule apply for insane persons who are found to be liable in strict liability?

3. What are the public policy considerations in favor of holding the mentally ill responsible for their torts? What are the criticisms? Do you agree with imposing liability on the mentally ill?

4. Are the policy concerns at issue in imposing liability upon the mentally ill the same concerns the law has in determining whether to impose liability on minors? Are liability of children and liability of the mentally ill comparable considerations?

5. Does imposition of tort liability upon the mentally ill impose liability without fault?

Alteiri v. Colasso

362 A.2d 798 (Conn. 1975)

LOISELLE, ASSOCIATE JUSTICE.

This action is one for battery brought by a minor, the plaintiff Richard Alteiri, to recover for injuries he suffered, and by his mother, the named plaintiff, to recover for expenses incurred. The complaint alleges that while the minor plaintiff was playing in the back yard of a home at which he was visiting, the defendant threw a rock, stone or other missile into the yard and struck the minor plaintiff in the eye and "(a)s a result of said battery by the defendant, the plaintiff Richard Alteiri suffered severe, painful and permanent injuries."

. . . .

Six interrogatories were submitted to the jury. Two interrogatories were answered in the affirmative as follows: "On April 2, 1966, did the defendant, John Colasso, throw a stone which struck the plaintiff, Richard Alteiri, in the right eye?" Answer: "Yes." "(W)as that stone thrown by John Colasso with the intent to scare any person other than Richard Alteiri?" Answer: "Yes." The jury answered "No" to four other questions concerning whether the defendant had intended to strike either the minor plaintiff or any other person and whether he had thrown the stone either negligently or wantonly and recklessly. A plaintiffs' verdict was returned. The defendant has appealed from the judgment rendered.

[The court's discussion dispensing of a statute of limitations defense is omitted.]

Error is assigned in the court's denial of the defendant's motions to set aside the verdict and for judgment notwithstanding the verdict. The defendant claims that the jury could not have reasonably and logically rendered a verdict under our law when in their answers to the interrogatories they expressly found that the defendant did not throw the stone with intent to strike either the minor plaintiff or any other person . . . . By their answers to the interrrogatories it is clear that the jury found that the battery to the minor plaintiff was one committed wilfully. The issue to be determined on this appeal is whether a jury upon finding that the defendant threw the stone with the intent to scare someone other than the one who was struck by the stone can legally and logically return a verdict for the plaintiffs for a wilful battery.

In *Rogers v. Doody*, 119 Conn. 532, 534, 178 A. 51, . . . the court stated that a "wilful and malicious injury is one inflicted intentionally without just cause or excuse. It does not necessarily involve the ill will or malevolence shown in express malice. Nor is it sufficient to constitute such an injury that the act resulting in the injury was intentional in the sense that it was the voluntary action of the person involved. Not only the action producing the injury but the resulting injury must be intentional." The defendant claims, in reliance upon this principle, that as there was no intention either to injure the minor plaintiff or to put him in apprehension of bodily harm there could be no recovery for a wilful battery. The intention of the defendant was not only to throw the stone—the act resulting in the injury was intentional—but his intention was also to cause a resulting injury, that is, an apprehension of bodily harm. If the stone had struck the one whom the defendant had intended to frighten, the defendant would have been liable for a battery. The statement in *Rogers* that the "resulting injury must be intentional" would be satisfied as the injury intended was the apprehension of bodily harm

and the resulting bodily harm was the direct and natural consequence of the intended act. RESTATEMENT (SECOND), 1 TORTS § 13;[3] [Cc].

It is not essential that the precise injury which was done be the one intended. 1 COOLEY, TORTS (4th Ed.) § 98. An act designed to cause bodily injury to a particular person is actionable as a battery not only by the person intended by the actor to be injured but also by another who is in fact so injured. RESTATEMENT (SECOND), 1 TORTS § 13; [Cc]; PROSSER, TORTS (4th Ed.) § 8; [c]. This principle of "transferred intent" applies as well to the action of assault. [Cc] And where one intends merely an assault, if bodily injury results to one other than the person whom the actor intended to put in apprehension of bodily harm, it is battery actionable by the injured person. RESTATEMENT (SECOND), 1 TORTS § 16;[5] [Cc]; Prosser, *supra*.

. . . .

It follows that the jury could logically and legally return a plaintiffs' verdict for wilful battery, and that the court in accepting that verdict and denying the defendants motions was not in error.

There is no error.

Points for Discussion

1. **Transferred Intent Doctrine**—The transferred intent doctrine originates in the old trespass actions, which permitted a plaintiff to recover only if the injury sustained was a direct consequence of the defendant's act. Trespass actions included actions for battery, assault, false imprisonment, trespass to land, and trespass to chattel. The transferred intent doctrine facilitates a plaintiff's task of proving intent for any one of these five intentional torts by estab-

Make the Connection

The distinctions between actions in trespass and actions for trespass on the case are discussed in Chapter 1, *supra*.

[3] (RESTATEMENT (SECOND), 1 TORTS § 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."

[5] "(RESTATEMENT (SECOND), 1 TORTS § 16) Character of Intent Necessary (1) If an act is done with the intention of inflicting upon another an offensive but not a harmful bodily contact, or of putting another in apprehension of either a harmful or offensive bodily contact, and such act causes a bodily contact to the other, the actor is liable to the other for a battery although the act was not done with the intention of bringing about the resulting bodily harm. (2) If an act is done with the intention of affecting a third person in the manner stated in Subsection (1), but causes a harmful bodily contact to another, the actor is liable to such other as fully as though he intended so to affect him."

lishing that the defendant intended to commit any one of these five intentional torts and accomplished any of those five intentional torts. The transferred intent doctrine only works within these five intentional torts; it does not facilitate proving intent outside of these five established torts with roots in the old trespass action. For a terrific read on the history and contours of the transferred intent doctrine, *see* William L. Prosser, *Transferred Intent*, 45 TEX. L. REV. 650 (1967).

2. What are the policy considerations driving application of the transferred intent doctrine? Against?

The RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 33 cmt. *c* (2010) describes the doctrine of transferred intent as applicable only to trespassory torts, the torts most likely to involve physical harm. The Restatement goes on to explain that "intent will be 'transferred' if the actor harms another person, even if that other person is unforeseeable."

Food for Thought

Be careful in your use of legal terms. For example, section 7 of the RESTATEMENT (SECOND) OF TORTS distinguishes between the terms "injury" and "harm." It defines *injury* as "denot[ing] the invasion of any legally protected interest of another." It defines *harm* as "denot[ing] the existence of loss or detriment in fact of any kind to a person resulting from any cause." Thus, in the context of intentional torts, "injury" refers to the technical injury required to establish commission of the tort, whereas "harm" refers to the actual damages sustained.

3. Of course, proof of intent establishes only the first element of the plaintiff's *prima facie* case. Recall that the elements of all intentional torts are: (1) intent, (2) act, (3) causation, and (4) injury. The following materials consider each intentional tort in turn, with focus on the definition and purpose of each individual intentional tort action. Note that the technical injury required to satisfy the fourth element for each intentional tort differs from tort to tort as the interest sought to be protected by the law changes.

Fisher v. Carrousel Motor Hotel, Inc.

424 S.W.2d 627 (Tex. 1967)

GREENHILL, JUSTICE.

This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. [C] The questions before this Court are whether there was evidence that an actionable battery was committed, and, if so, whether the two corporate defendants must respond in exemplary as well as actual damages for the malicious conduct of Flynn.

What's That?

Exemplary damages, also known as punitive damages, are damages above and beyond compensatory damages and are awarded to punish the defendant. *See* Chapter 8 for further exploration of both compensatory and punitive damages issues.

The plaintiff Fisher had been invited by Ampex Corporation and Defense Electronics to a one day's meeting regarding telemetry equipment at the Carrousel. The invitation included a luncheon. The guests were asked to reply by telephone whether they could attend the luncheon, and Fisher called in his acceptance. After the morning session, the group of 25 or 30 guests adjourned to the Brass Ring Club for lunch. The luncheon was buffet style, and Fisher stood in line with others and just ahead of a graduate student of Rice University who testified at the trial. As Fisher was about to be served, he was approached by Flynn, who snatched the plate from Fisher's hand and shouted that he, a Negro, could not be served in the club. Fisher testified that he was not actually touched, and did not testify that he suffered fear or apprehension of physical injury; but he did testify that he was highly embarrassed and hurt by Flynn's conduct in the presence of his associates.

The jury found that Flynn "forceably [sic] dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated

that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn's malicious conduct.

The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body. 1 Harper & James, The Law of Torts 216 (1956); RESTATEMENT OF TORTS 2D, §§ 18 and 19. In Prosser, Law of Torts 32 (3d Ed. 1964), it is said:

> 'The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient * * * The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it.'

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. "To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when, done i[n] an offensive manner, is sufficient." [C]

Such holding is not unique to the jurisprudence of this State. In *S. H. Kress & Co. v. Brashier*, 50 S.W.2d 922 (Tex.Civ.App.1932, no writ), the defendant was held to have committed "an assault or trespass upon the person" by snatching a book from the plaintiff's hand. The jury findings in that case were that the defendant "dispossessed plaintiff of the book" and caused her to suffer "humiliation and indignity."

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 RESTATEMENT OF TORTS 2D § 18 (Comment p. 31) as follows:

> Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his

> body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person.

We hold, therefore, that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery, and the trial court erred in granting judgment notwithstanding the verdict on the issue of actual damages.

In *Harned v. E-Z Finance Co.*, 151 Tex. 641, 254 S.W.2d 81 (1953), this Court refused to adopt the 'new tort' of intentional interference with peace of mind which permits recovery for mental suffering in the absence of resulting physical injury or an assault and battery. . . . However, it is not necessary to adopt such a cause of action in order to sustain the verdict of the jury in this case. The *Harned* case recognized the well established rule that mental suffering is compensable in suits for willful torts "which are recognized as torts and actionable independently and separately from mental suffering or other injury." [C] Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. RESTATEMENT OF TORTS 2D § 18. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. [Cc] We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.

We now turn to the question of the liability of the corporations for exemplary damages. [The court's discussion regarding the appropriateness of exemplary damages is omitted. The subject of tort damages, including exemplary or punitive damages, will be covered in Chapter 9.]

. . . .

The judgments of the courts below are reversed, and judgment is here rendered for the plaintiff for $900 with interest from the date of the trial court's judgment, and for costs of this suit.

Points for Discussion

1. Battery requires that the plaintiff's body or something intimately associated with plaintiff's body be contacted in a harmful or offensive manner.

2. It is essential to the battery action that the plaintiff's body be contacted, but it is not necessary that the defendant's body touch the plaintiff. What is important is that the bodily contact be caused by an act caused by the defendant. So if A pushes B against C, knocking C down and breaking his leg, A is liable to C for battery; B is not, even though B actually came into contact with A. For example, recall that in the case of *Garratt v. Dailey*, *supra* Chapter 1, Brian's person never touched Mrs. Garratt.

3. The interest to be free from unpermitted harmful or offensive bodily contact is protected even if the plaintiff is not aware of the contact at the time that it takes place. So if A (a stranger) kisses B while B is sleeping but does not waken or harm her, A is subject to liability to B. *See* RESTATEMENT (SECOND) OF TORTS § 18 cmt. *d* (1965). A's liability is based upon A's intentional invasion of and affront to B's person. Plaintiff's conscious awareness of the invasion at the time is not required.

4. A defendant's liability extends to consequences the defendant did not intend and also to those the defendant could not have anticipated. For example, assume that A intends to offend B by kicking him on the shin so lightly that it would not usually cause physical injury. However, at the time, B is suffering from a diseased leg about which A does not know or have reason to know. The light kick aggravates B's leg so much that he now suffers from a permanent disability to his leg. Should A be liable to B for the permanent disability his leg? *See* RESTATEMENT (SECOND) OF TORTS § 16 cmt. *a* (1965). What is the rationale in support of such a rule?

5. Martha Umana was a bakery employee at a Kroger supermarket. Kroger had a policy that required employees to wear name badges. According to Umana, when she approached her supervisor at the customer service desk to discuss the possibility of a transfer to another store, he questioned whether she was wearing a name badge. In response, Umana moved the left side of her plastic apron to reveal the name badge pinned to her shirt. Umana testified that her supervisor then grabbed her and said, "You don't have it. I don't see it." He then tore her apron. There was a surveillance videotape of the incident that showed Umana's supervisor tearing the apron strap from around her neck. Battery? *See* *Umana v. Kroger Texas, L.P.*, 239 S.W.3d 434 (Tex. Civ. App.—Dallas 2007).

6. Sandra Ponder was formerly employed by Colin Hales as a referral clerk. The atmosphere at Ponder's job was fine for the first several weeks, but then began to deteriorate when Hales began making unwanted advances toward Ponder. Accord-

ing to Ponder, Hales began requesting early morning meetings to discuss his personal life. She claims that at these meetings, he would hug her and "would slip a kiss in or try to." He would sit close to her on his couch, caress her hands, and put his arm underneath her arm. He would rub himself against her, and she would push away from him. Ponder claimed that this touching was uninvited and offensive to her. She claimed that this touching occurred every day until she was fired. In contrast, Hales testified that Ponder would voluntarily give him a big hug at the beginning and end of each day. He admitted kissing her on the cheek once, but denied other testimony by Ponder. Battery? *See* Ponder v. Hales, No. 09–07–411CV, 2008 WL 2129848 (Tex. Civ. App.—Beaumont May 22, 2008).

Make the Connection

An employee subjected to conduct such as that experienced by Ponder may also have a claim of sexual harassment under federal and state anti-discrimination statutes, a subject addressed in an employment discrimination course.

Hypo 2-4

Rachel and Jerry hire Flagstaff to cater their wedding. They instruct Flagstaff that many of the members of the wedding party will be Jewish and because of that they only want kosher food to be served at the reception. Flagstaff agrees, saying that he has experience preparing kosher food and that he will be able to handle their request. However, as the time for the reception approaches, Flagstaff finds himself short of some ingredients for the sushi plate. In a pinch, Flagstaff substitutes shrimp (a non-kosher food) for one of the types of sushi. The sushi is the only entree available for guests, with five pieces of sushi allotted per guest, and one of every five pieces of sushi is now non-kosher (because of the shrimp). Rachel and Jerry are horrified when they see the shrimp on the platter, and even more so when a rabbi brings his half-eaten sushi platter to them demanding to know what was going on. Does the rabbi have a viable cause of action against Flagstaff for an intentional tort? If so, which one(s)? Is there any additional information you might need to determine Flagstaff's tort liability to the rabbi?

C. Assault

The RESTATEMENT (SECOND) OF TORTS provides that a defendant is subject to liability for the intentional tort of assault if he acts intending to cause apprehension of an imminent harmful or offensive contact with the person of another and the person is thereby placed in such imminent apprehension. *See* RESTATEMENT (SECOND) OF TORTS § 21 (1965). Consider the next case.

Western Union Telegraph Co. v. Hill

150 So. 709 (Ala. App. 1933)

SAMFORD, JUDGE.

The action in this case is based upon an alleged assault on the person of plaintiff's wife by one Sapp, an agent of defendant in charge of its office in Huntsville, Ala. The assault complained of consisted of an attempt on the part of Sapp to put his hand on the person of plaintiff's wife coupled with a request that she come behind the counter in defendant's office, and that, if she would come and allow Sapp to love and pet her, he "would fix her clock."

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

. . . .

Food for Thought

Do you agree with the court's statement that "every battery includes an assault"?

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

Solicitation by a man to a woman for intercourse unaccompanied by an assault is not actionable. [Cc] Insulting words used when not accompanied by an assault are not the subject of an action for damages. [Cc]

What are the facts here? Sapp was the agent of defendant and the manager of its telegraph office in Huntsville. Defendant was under contract with plaintiff to keep in repair and regulated an electric clock in plaintiff's place of business. When the clock needed attention, that fact was to be reported to Sapp, and he in turn would report to a special man, whose duty it was to do the fixing. At 8:13 o'clock p.m. plaintiff's wife reported to Sapp over the phone that the clock needed attention, and, no one coming to attend to the clock, plaintiff's wife went to the office of defendant about 8:30 p.m. There she found Sapp in charge and behind a desk or counter, separating the public from the part of the room in which defendant's operator worked. The counter is four feet and two inches high, and so wide that, Sapp standing on the floor, leaning against the counter and stretching his arm and hand to the full length, the end of his fingers reaches just to the outer edge of the counter. The photographs in evidence show that the counter was as high as Sapp's armpits. Sapp had had two or three drinks and was "still slightly feeling the effects of whisky; I felt all right; I felt good and amiable." When plaintiff's wife came into the office, Sapp came from towards the rear of the room and asked what he could do for her. She replied: "I asked him if he understood over the phone that my clock was out of order and when he was going to fix it. He stood there and looked at me a few minutes and said: 'If you will come back here and let me love and pet you, I will fix your clock.' This he repeated and reached for me with his hand, he extended his hand toward me, he did not put it on me; I jumped back. I was in his reach as I stood there. He reached for me right along here (indicating her left shoulder and arm)." The foregoing is the evidence offered by plaintiff tending to prove an assault. Per contra, aside from the positive denial by Sapp of any effort to touch Mrs. Hill, the physical surroundings as evidenced by the photographs of the locus tend to rebut any evidence going to prove that Sapp could have touched plaintiff's wife across that counter even if he had reached his hand in her direction unless she was leaning against the counter or Sapp should have stood upon something so as to elevate him and allow him to reach beyond the counter. However, there is testimony tending to prove that, notwithstanding the width of the counter and the height of Sapp, Sapp could have reached from six to eighteen inches beyond the desk in an effort to place his hand on Mrs. Hill. The evidence as a whole presents a question for the jury. This was the view taken by the trial judge, and in the several rulings bearing on this question there is no error.

Nisi constat jus civile a posteriori

It's Latin to Me!

Respondeat superior literally translated means "let the superior make answer." It is a doctrine which allows an employer to be held liable for an employee's wrongful act committed within the scope of employment. *See* Chapter 12, *infra*, Vicarious Responsibility.

The next question is, Was the act of Sapp towards Mrs. Hill, plaintiff's wife, such as to render this defendant liable under the doctrine of respondeat superior? . . .

. . . To our minds, the evidence is conclusive to the effect that, while Sapp was the agent of defendant, in the proposal and technical assault made by him on plaintiff's wife he stepped aside wholly from his master's business to pursue a matter entirely personal. Where this is so, the doctrine of respondeat superior does not apply. [Cc] The rules of law governing cases of this nature are perfectly clear and well defined. The confusion arises now and then from a failure to keep in mind the distinction between the act done by the servant within the scope of, and the act done during, his employment. The act charged in this case is clearly personal to Sapp and not referable to his employer. [C]

The rulings of the trial court with reference to this question were erroneous. The defendant was entitled to the general charge [on the issue of respondeat superior], and for the error in refusing this charge as requested the judgment is reversed and the cause is remanded.

Reversed and remanded.

Points for Discussion

1. What interest is sought to be protected by recognition of the intentional tort of assault?

2. Assault actions were the first causes of action to recognize mental injury as a harm for which the law provides a remedy. A plaintiff is entitled to recover for an assault even in the absence of physical harm.

3. Who is the defendant in the *Western Union Telegraph* case? Why is Mr. Sapp's conduct at issue in this action, even though he is not part of the lawsuit brought by the Hills?

4. The *Western Union Telegraph* court is correct in stating that "an assault does not necessarily require a battery to complete it." Consider whether the court is similarly correct in stating that "every battery includes an assault." For example, in Note 3, page 51, it was established that a person can be the victim of a battery even if unaware of the offensive contact at the time of its occurrence because she was, for example, asleep. Has that same person been assaulted? *See* RESTATEMENT (SECOND) OF TORTS § 22 (no liability for assault if victim is not aware before defendant's conduct is terminated). What if intending to frighten Sally, who is deaf, Bob discharges a pistol next to Sally's ear? Sally does not see (or hear) Bob discharge the pistol and does not discover what has happened until later. Is Bob liable for assault? *See* RESTATEMENT (SECOND) OF TORTS § 22, cmt. *b*.

5. Does Mrs. Hill have a viable assault claim if it was physically impossible for Sapp to have actually touched her? Assault depends on the defendant's *apparent* ability to carry out a battery, not the defendant's *actual* ability. So if Bob points a gun at Jim threatening to shoot him, Bob is subject to liability for assault, whether the gun is loaded or not. *See* RESTATEMENT (SECOND) OF TORTS § 33.

6. Mere words, no matter how threatening, are insufficient to constitute an assault, unless they are coupled with other acts or circumstances to put the plaintiff in reasonable apprehension of imminent harmful or offensive contact. *See* RESTATEMENT (SECOND) OF TORTS § 31. Likewise, threatening future harm does not constitute an assault. So when Mr. Crip, a known member of a notoriously dangerous gang, telephones Mr. Blood and says, "The next time I see you, I will shoot you," Mr. Crip has not committed an assault, even if Mr. Crip is known to have killed in the past. However, if shortly thereafter, Mr. Blood unexpectedly encounters Mr. Crip who, without moving, says, "Your time has come," Mr. Crip has committed a civil assault. *See* RESTATEMENT (SECOND) OF TORTS § 31. But if instead Mr. Crip says, "If I had my gun, I'd shoot you dead right now," he has not committed an assault, as threats dependent upon statements contrary to fact do not constitute an assault. By informing Mr. Blood that he does not have a gun, Mr. Crip's words have negated the imminence of the bodily contact.

7. Rizzo is furious with Danny because he has told Kenickie, the love of her life, that she has been kissing another guy. Rizzo spots Danny a few yards away hanging out with his friends, the T-Birds. Rizzo picks up a stick and begins to charge toward Danny, intending to hit him with it. Danny sees Rizzo walking quickly toward him swinging the stick wildly in his direction. When Rizzo is within a few feet of him, Rizzo continues toward him with the stick still raised, threatening to strike him. Because Danny is with his fellow T-Birds, he is not afraid or fearful of Rizzo because Danny knows that his friends will interfere to prevent Rizzo from striking him, which they do. Has Rizzo assaulted Danny? *See* RESTATEMENT (SECOND) § 24 (apprehension and not fear is required to sustain action for assault). Assault requires *apprehension*, the belief that the defendant's act is capable of immediately inflicting contact upon the plaintiff unless something further occurs. It does not require that the plaintiff actually *fear* that the contact will ensue.

CHAPTER 3

Defenses to Intentional Torts

There are several ways that a defendant can avoid tort liability. The defendant may attack the plaintiff's *prima facie* case. In an intentional tort action, this may be done, for example, by putting on evidence disputing intent, the first element of the plaintiff's *prima facie* case. A defendant may also avoid liability by establishing that she was privileged to commit the tort. To do so, the defendant does not defeat an element of the plaintiff's *prima facie* case, but rather avoids liability by providing an independent reason that the plaintiff should not be permitted to recover. Such avoidance is what is known as an affirmative defense. An affirmative defense provides an independent reason why the plaintiff should not recover even though the plaintiff may be able to prove the *prima facie* claim. Affirmative defenses are typically required to be pleaded and proven by the defendant. This chapter will focus on affirmative defenses to intentional tort actions.

Make the Connection

In *Garratt v. Dailey*, *see* Chapter 2, *supra*, the defendant Brian Dailey sought to avoid liability by proving that he did not act with the requisite intent, thereby defeating the first element of the plaintiff's battery claim. If he had been successful, it would be a successful defense, but not by proof of a privilege. Rather, the plaintiff would not have been able to prove her *prima facie* case.

A. Consent

A plaintiff may not recover for an intentional tort if it is established that the plaintiff was willing for the conduct or result to occur or when the plaintiff has manifested apparent consent. In other words, a defendant is privileged to commit an intentional tort that the plaintiff was willing to have occur. This affirmative defense of consent, explored in the next case, is set forth in the RESTATEMENT (SECOND) OF TORTS § 892A: "[o]ne who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it."

Koffman v. Garnett

574 S.E.2d 258 (Va. 2003)

Opinion by JUSTICE ELIZABETH B. LACY.

In this case we consider whether the trial court properly dismissed the plaintiffs' second amended motion for judgment for failure to state causes of action for . . . assault . . . and battery. [The plaintiff alleged gross negligence as well. The court's discussion reinstating the gross negligence claim is omitted.]

Because this case was decided on demurrer, we take as true all material facts properly pleaded in the motion for judgment and all inferences properly drawn from those facts. [C]

In the fall of 2000, Andrew W. Koffman, a 13-year old middle school student at a public school in Botetourt County, began participating on the school's football team. It was Andy's first season playing organized football, and he was positioned as a third-string defensive player. James Garnett was employed by the Botetourt County School Board as an assistant coach for the football team and was responsible for the supervision, training, and instruction of the team's defensive players.

The team lost its first game of the season. Garnett was upset by the defensive players' inadequate tackling in that game and became further displeased by what he perceived as inadequate tackling during the first practice following the loss.

Food for Thought

Even though the focus of this chapter is affirmative defenses to intentional torts, as you read the following opinions, consider whether the facts provided by the court establish the *prima facie* case for the intentional tort sought.

Garnett ordered Andy to hold a football and "stand upright and motionless" so that Garnett could explain the proper tackling technique to the defensive players. Then Garnett, without further warning, thrust his arms around Andy's body, lifted him "off his feet by two feet or more," and "slamm[ed]" him to the ground. Andy weighed 144 pounds, while Garnett weighed approximately 260 pounds. The force of the tackle broke the humerus bone in Andy's left arm. During prior practices, no coach had used physical force to instruct players on rules or techniques of playing football.

In his second amended motion for judgment, Andy, by his father and next friend, Richard Koffman, and Andy's parents, Richard and Rebecca Koffman, individually, (collectively "the Koffmans") alleged that Andy was injured as a result of

Garnett's . . . intentional acts of assault and battery. Garnett filed a demurrer and plea of sovereign immunity, asserting that the second amended motion for judgment did not allege sufficient facts to support a lack of consent to the tackling demonstration and, therefore, did not plead causes of action for either . . . assault . . . or battery. The trial court dismissed the action, finding that . . . the facts alleged were insufficient to state causes of action for . . . assault . . . or battery because the instruction and playing of football are "inherently dangerous and always potentially violent."

What's That?

Sovereign immunity essentially means that a governmental entity cannot be sued in tort in its own courts without its consent. *See* Chapter II, Immunities, *infra*, for further exploration of immunities issues.

In this appeal, the Koffmans do not challenge the trial court's ruling on Garnett's plea of sovereign immunity but do assert that they pled sufficient facts in their second amended motion for judgment to sustain their claims of . . . assault . . . and battery.

. . . .

The trial court held that the second amended motion for judgment was insufficient as a matter of law to establish causes of action for the torts of assault and battery. We begin by identifying the elements of these two independent torts. [C] The tort of assault consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery. RESTATEMENT (SECOND) OF TORTS § 21 (1965); [Cc].

The tort of battery is an unwanted touching which is neither consented to, excused, nor justified. [C] Although these two torts "go together like ham and eggs," the difference between them is "that between physical contact and the mere apprehension of it. One may exist without the other." [Cc]

The Koffmans' second amended motion for judgment does not include an allegation that Andy had any apprehension of an immediate battery. This allegation cannot be supplied by inference because any inference of Andy's apprehension is discredited by the affirmative allegations that Andy had no warning of an imminent forceful tackle by Garnett. The Koffmans argue that a reasonable inference of apprehension can be found "in the very short period of time that it took the coach to lift Andy into the air and throw him violently to the ground." At this point, however, the battery alleged by the Koffmans was in progress. Accordingly,

we find that the pleadings were insufficient as a matter of law to establish a cause of action for civil assault.

The second amended motion for judgment is sufficient, however, to establish a cause of action for the tort of battery. The Koffmans pled that Andy consented to physical contact with players "of like age and experience" and that neither Andy nor his parents expected or consented to his "participation in aggressive contact tackling by the adult coaches." Further, the Koffmans pled that, in the past, coaches had not tackled players as a method of instruction. Garnett asserts that, by consenting to play football, Andy consented to be tackled, by either other football players or by the coaches.

Whether Andy consented to be tackled by Garnett in the manner alleged was a matter of fact. Based on the allegations in the Koffmans' second amended motion for judgment, reasonable persons could disagree on whether Andy gave such consent. Thus, we find that the trial court erred in holding that the Koffmans' second amended motion for judgment was insufficient as a matter of law to establish a claim for battery.

For the above reasons, we will reverse the trial court's judgment that the Koffmans' second amended motion for judgment was insufficient as a matter of law to establish the causes of actions for gross negligence and battery and remand the case for further proceedings consistent with this opinion.[1]

Reversed and remanded.

JUSTICE KINSER, concurring in part and dissenting in part.

I agree with the majority opinion except with regard to the issue of consent as it pertains to the intentional tort of battery. In my view, the second amended motion for judgment filed by the plaintiffs, Andrew W. Koffman, by his father and next friend, and Richard Koffman and Rebecca Koffman, individually, was insufficient as a matter of law to state a claim for battery.

Absent fraud, consent is generally a defense to an alleged battery. [Cc]; RESTATEMENT (SECOND) OF TORTS § 13, cmt. d (1965). In the context of this case, "[t]aking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages." RESTATEMENT (SECOND) OF TORTS § 50, cmt. b (1965) [Cc]. However, participating in a particular sport "does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and

[1] Because we have concluded that a cause of action for an intentional tort was sufficiently pled, on remand, the Koffmans may pursue their claim for punitive damages.

not merely to secure the better playing of the game as a test of skill." RESTATEMENT (SECOND) OF TORTS § 50, cmt. b (1965); [Cc].

The thrust of the plaintiffs' allegations is that they did not consent to "Andy's participation in aggressive contact tackling by the adult coaches" but that they consented only to Andy's engaging "in a contact sport with other children of like age and experience." They further alleged that the coaches had not previously tackled the players when instructing them about the rules and techniques of football.

It is notable, in my opinion, that the plaintiffs admitted in their pleading that Andy's coach was "responsible . . . for the supervision, training and instruction of the defensive players." It cannot be disputed that one responsibility of a football coach is to minimize the possibility that players will sustain "something more than slight injury" while playing the sport. [C] A football coach cannot be expected "to extract from the game the body clashes that cause bruises, jolts and hard falls." [C] Instead, a coach should ensure that players are able to "withstand the shocks, blows and other rough treatment with which they would meet in actual play" by making certain that players are in "sound physical condition," are issued proper protective equipment, and are "taught and shown how to handle [themselves] while in play." [C] The instruction on how to handle themselves during a game should include demonstrations of proper tackling techniques. [C] By voluntarily participating in football, Andy and his parents necessarily consented to instruction by the coach on such techniques. The alleged battery occurred during that instruction.

The plaintiffs alleged that they were not aware that Andy's coach would use physical force to instruct on the rules and techniques of football since neither he nor the other coaches had done so in the past. Surely, the plaintiffs are not claiming that the scope of their consent changed from day to day depending on the coaches' instruction methods during prior practices. Moreover, they did not allege that they were told that the coaches would not use physical demonstrations to instruct the players.

Additionally, the plaintiffs did not allege that the tackle itself violated any rule or usage of the sport of football. Nor did they plead that Andy could not have been tackled by a larger, physically stronger, and more experienced player either during a game or practice. Tackling and instruction on proper tackling techniques are aspects of the sport of football to which a player consents when making a decision to participate in the sport.

In sum, I conclude that the plaintiffs did not sufficiently plead a claim for battery. We must remember that acts that might give rise to a battery on a city street will not do so in the context of the sport of football. [C] . . .

For these reasons, I respectfully concur, in part, and dissent, in part, and would affirm the judgment of the circuit court sustaining the demurrer with regard to the claim for battery.

Points for Discussion

1. Do you agree with that part of the *Koffman* court's decision holding that the defendant did not assault Andy? Why or why not?

2. Consent is an affirmative defense to an intentional tort and requires proof that the plaintiff was in fact willing for the tortious conduct to occur. Thus, words or conduct reasonably understood to be consent may provide effective consent. *See* RESTATEMENT (SECOND) OF TORTS § 892(2); *see also* *O'Brien v. Cunard S.S. Co.*, 28 N.E. 266 (Mass. Ct. App. 1891) (plaintiff's apparent willingness to be vaccinated through her actions, even when not verbally communicated to defendant, amounted to valid consent).

3. As indicated by the court's discussion in *Koffman*, consent is often an issue of fact. Consent may be express or implied by conduct. Likewise, culture and social mores may inform whether the plaintiff impliedly consented to the conduct at issue. Consent also may be assumed based on local custom in the absence of any notification to the contrary.

Hypo 3-1

Lynne is traveling in New York for the very first time, having lived her entire life on the west coast. Her friend introduces her to LuAnn, who warmly embraces Lynne and kisses her on both cheeks. Battery? If so, has Lynne consented?

4. As discussed in the principal case, a participant in a sporting activity impliedly consents to conduct permitted by the rules of the game. However, a player does not consent to conduct prohibited by the rules if those rules are designed for the safety of the players rather than just the enjoyment of the game. *See* *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (1979) (ruling in battery action against one professional football player against another that players of sport do not consent to intentional striking of players in face or from rear).

5. The rematch in June 1997 between boxing heavyweights Evander Holyfield and Mike Tyson is one of the most memorable boxing matches ever, but not for the typical reasons. Rather, this fight is infamous because in the third round of the rematch, while losing miserably and holding Holyfield in a clinch, Tyson spat out his own mouthpiece and bit off a chunk of Holyfield's right ear. After Tyson spat the piece of Holyfield's ear onto the ground, the match was temporarily halted in order for the official to instruct Tyson as to the inappropriateness of his conduct, as biting off an opponent's ear during a boxing match is outside of the rules of boxing. Moments later, the match resumed, only to be stopped for good and Holyfield declared the victor, after Tyson unbelievably bit off an even larger piece of flesh from Holyfield's *other* ear. Holyfield had to undergo plastic surgery immediately following the match to have his ears surgically repaired (fortunately for Holyfield, a bystander saved a one-inch piece of his right ear). Boxing is a violent sport, but might Holyfield have had a viable tort action against Tyson?

For More Information

The Tyson-Holyfield match has been selected by ESPN as one of the most memorable moments in sports history. Click here to read further about this incredible boxing match.

Hypo 3-2

Friends Graham and Trey, 22 years old each, are playing a game of touch football one sunny, fall weekend day at the neighborhood park. Graham is playing at wide receiver, and Trey is a defensive back for the opposing team. The quarterback for Graham's team throws a perfect spiral in Graham's direction. As the ball has been thrown a little high (so as to make it catchable only by Graham and not any of the defenders), both Graham and Trey leap in the air, simultaneously attempting to catch the ball, all the while knowing that doing so would result in bumping into the other. (The rules of football allow for both the receiver and the defender to attempt to catch the ball in the way that Graham and Trey did on this day.) The two collide and fall to the ground. Graham gets up, ball in hand. Trey gets up, cradling one of his arms in his other hand. His forearm has two fractures that require surgery, complete with four pins and a metal plate. Trey wishes to sue Graham for battery. Discuss.

Mohr v. Williams

104 N.W. 12 (Minn. 1905)

BROWN, J.

Defendant is a physician and surgeon of standing and character, making disorders of the ear a specialty, and having an extensive practice in the city of St. Paul. He was consulted by plaintiff, who complained to him of trouble with her right ear, and, at her request, made an examination of that organ for the purpose of ascertaining its condition. He also at the same time examined her left ear, but, owing to foreign substances therein, was unable to make a full and complete diagnosis at that time. The examination of her right ear disclosed a large perforation in the lower portion of the drum membrane, and a large polyp in the middle ear, which indicated that some of the small bones of the middle ear (ossicles) were probably diseased. He informed plaintiff of the result of his examination, and advised an operation for the purpose of removing the polyp and diseased ossicles. After consultation with her family physician, and one or two further consultations with defendant, plaintiff decided to submit to the proposed operation. She was not informed that her left ear was in any way diseased, and understood that the necessity for an operation applied to her right ear only. She repaired to the hospital, and was placed under the influence of anesthetics; and, after being made unconscious, defendant made a thorough examination of her left ear, and found it in a more serious condition than her right one. A small perforation was discovered high up in the drum membrane, hooded, and with granulated edges, and the bone of the inner wall of the middle ear was diseased and dead. He called this discovery to the attention of Dr. Davis—plaintiff's family physician, who attended the operation at her request—who also examined the ear, and confirmed defendant in his diagnosis. Defendant also further examined the right ear, and found its condition less serious than expected, and finally concluded that the left, instead of the right, should be operated upon; devoting to the right ear other treatment. He then performed the operation of ossiculectomy on plaintiff's left ear; removing a portion of the drum membrane, and scraping away the diseased portion of the inner wall of the ear. The operation was in every way successful and skillfully performed. It is claimed by plaintiff that the operation greatly impaired her hearing, seriously injured her person, and, not having been consented to by her, was wrongful and unlawful, constituting an assault and battery; and she brought this action to recover damages therefor. The trial in the court below resulted in a verdict for plaintiff for $14,322.50. Defendant thereafter moved the court for judgment notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover, or, if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive; appearing to have been given under the influence of passion and prejudice. The trial court denied the motion for judgment, but granted a new trial on the ground, as stated in the order, that the

damages were excessive. Defendant appealed from the order denying the motion for judgment, and plaintiff appealed from the order granting a new trial.

. . . .

2. We come then to a consideration of the questions presented by defendant's appeal from the order denying his motion for judgment notwithstanding the verdict. It is contended that final judgment should be ordered in his favor for the following reasons: (a) That it appears from the evidence received on the trial that plaintiff consented to the operation on her left ear. (b) If the court shall find that no such consent was given, that, under the circumstances disclosed by the record, no consent was necessary. (c) That, under the facts disclosed, an action for assault and battery will not lie; it appearing conclusively, as counsel urge, that there is a total lack of evidence showing or tending to show malice or an evil intent on the part of defendant, or that the operation was negligently performed.

We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. . . . . We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary. The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him. . . . . "The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal one[.] Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate." [C] . . . No reason occurs to us why the same rule should not apply between physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its per-

What's That?

The informed consent doctrine is a topic that also arises in medical malpractice actions, a subject explored more thoroughly in the materials on negligence. *See* Chapter 4, Negligence, *infra*.

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

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

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

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

Food for Thought

Is the court correct here that "any unlawful or unauthorized touching . . . of another . . . constitutes an assault and battery"? Was the plaintiff in *Mohr* assaulted?

The amount of plaintiff's recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial

nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Order affirmed.

Points for Discussion

1. The plaintiff's family physician was present at the surgery, and the court discusses whether he may have consented on behalf of the plaintiff while she was unconscious. Who has authority to consent on behalf of another? In order to be able to consent, the plaintiff must have the capacity to consent or must be capable of appreciating the nature, extent, and probable consequences of the conduct consented to. *See* RESTATEMENT (SECOND) OF TORTS § 892A (1965). To be effective, consent must be made by the individual or by a person empowered to consent on his or her behalf. Similarly, consent must be provided by one having the capacity to do so or by one authorized to consent for the person. Infancy, intoxication, or mental incompetence normally vitiates effective consent. Minors may not provide valid consent to medical procedures. Consent of their parent or legal guardian is ordinarily required. If a parent refuses to provide consent based on the parent's religious beliefs, the hospital or medical provider may be liable for any intentional tort if treatment is provided, unless the treatment is life threatening.

2. Patricia Saucier is a mentally disabled young woman who has required special attention since a young age when she contracted spinal meningitis and was left with diminished mental capacity. *Saucier v. McDonald's Rests. of Mont., Inc.*, 179 P.3d 481 (Mont. 2008). After living most of her life in state facilities, she eventually was able to move into an apartment of her own with limited supervision and work at a local McDonald's Restaurant. After working there for four months, she became sexually involved with the married manager of the restaurant. The manager was aware of Patricia's diminished capacity and had convinced Patricia that he was in love with her and she with him. On Patricia's behalf, her sister brought battery charges against the manager and McDonald's, arguing that because of Patricia's diminished capacity, she was not able to provide effective consent to the sexual contact. Should Patricia be able to consent to such contact? *See id.*

3. Why was the plaintiff in the principal case not permitted to pursue a negligence action against the doctor? Why did she have to rely on the intentional tort of battery?

4. As illustrated by the principal case, when consent is an asserted defense to a battery action, the fact that the battery was beneficial does not negate the battery action itself. Rather, the beneficial quality of the battery may inform as to the

appropriateness of any damages award; it does not shield the defendant from liability for the technical battery itself. For example, upon a new trial in the principal case, the jury awarded the plaintiff just $39, a paltry sum even at that time.

5. As discussed in the principal case, consent may be implied when an injured person is unconscious and suffering from injuries requiring prompt medical attention as long as there is no time to wait for consent. If a patient is unable to provide consent, for whatever reason, and there is a reasonable risk of serious bodily harm if treatment is delayed, consent may similarly be implied as long as the defendant has no reason to believe that the plaintiff would not consent and a reasonable person would consent under the circumstances. What if a person in need of life saving medical treatment is conscious and otherwise able to consent, but refuses to do so?

Hypo 3-3

Tennis Star, a well-known professional tennis player, is playing in an important tennis match. Physically imposing at 5'9" tall and 150 pounds, Tennis Star is unquestionably a tremendous athlete. It is well known that she is a physically strong person, often serving the ball at her opponents at speeds in excess of 100 miles per hour. At a critical point in this particular match, an official officiating the match, Line Judge, makes a controversial call that may put Tennis Star's chance of prevailing at the match in jeopardy. (When officiating, Line Judge sits in a chair approximately thirty feet away from the player who is serving.) Tennis Star becomes furious. With a tennis ball in one hand and her tennis racket in the other, Tennis Star begins walking quickly toward Line Judge, and pointing at Line Judge with her racket, she screams, "If I could, I would take this [expletive deleted] ball and shove it down your [expletive deleted] throat! I should kill you!" During her tirade, Tennis Star gets no closer than six feet away from Judge. Star then returns to the court to complete the match. However, Tennis Star has allowed herself to become so upset that when she attempts to hit the next serve toward her opponent, it misfires terribly, ricochets off the far wall, and whizzes right by Line Judge with enough force to knock her hat right off her head. The hat falls to the ground. Although she didn't mean to hit Line Judge with the serve, Tennis Star is not upset that it has happened. She thinks to herself, "Karma," and continues playing. The match continues without incident, but Tennis Star loses. (More karma.)

As a result of this episode, Line Judge is traumatized. She tells her friends that she thought that Tennis Star was going to kill her, right there on national TV for everyone to see! Line Judge ends up suffering from nightmares and nausea for weeks following this event. In fact, it upsets her so much that she is unable to return to her job as a tennis official. Her husband suggests that she speak to you, a lawyer, to discuss possible tort actions against Tennis Star. Discuss.

De May v. Roberts

9 N.W. 146 (Mich. 1881)

MARSTON, C.J.

The declaration in this case in the first count sets forth that the plaintiff was at a time and place named a poor married woman, and being confined in child-bed and a stranger, employed in a professional capacity defendant De May who was a physician; that defendant visited the plaintiff as such, and against her desire and intending to deceive her wrongfully, etc., introduced and caused to be present at the house and lying-in room of the plaintiff and while she was in the pains of parturition the defendant Scattergood, who intruded upon the privacy of the plaintiff, indecently, wrongfully and unlawfully laid hands upon and assaulted her, the said Scattergood, which was well known to defendant De May, being a young unmarried man, a stranger to the plaintiff and utterly ignorant of the practice of medicine, while the plaintiff believed that he was an assistant physician, a competent and proper person to be present and to aid her in her extremity.

. . . .

The evidence on the part of the plaintiff tended to prove the allegations of the declaration. On the part of the defendants evidence was given tending to prove that Scattergood very reluctantly accompanied Dr. De May at the urgent request of the latter; that the night was a dark and stormy one, the roads over which they had to travel in getting to the house of the plaintiff were so bad that a horse could not be rode or driven over them; that the doctor was sick and very much fatigued from overwork, and therefore asked the defendant Scattergood to accompany and assist him in carrying a lantern, umbrella and certain articles deemed necessary upon such occasions; that upon arriving at the house of the plaintiff the doctor knocked, and when the door was opened by the husband of the plaintiff, De