CARDOZO LAW

BENJAMIN N. CARDOZO SCHOOL OF LAW • YESHIVA UNIVERSITY

To: Torts Sections C & D
From: Professor James Macleod
Re: First class meetings and readings
Date: August 11, 2025

Our first Torts class meeting will be on **Thursday, August 21st** in **Room 204**.

The required casebook is **Farnsworth & Grady, Torts: Cases and Questions (3rd edition)**.

For the first week (Thursday plus Friday), students should be prepared to discuss the following: **Intro, Battery, Assault: xxvii-xxxix; 1- 11**.

If you would like to get a head start on the following week, you can read through the top of page 14. But during our first two class sessions (Thursday plus Friday), we'll almost certainly not get past page 6.

INTRODUCTION

The purpose of this introduction is to provide the newcomer to tort law with a sense of orientation and context for the materials that follow and for a typical first course on the subject. Part 1 describes the scope of the law of torts and some major distinctions used to organize the field. Part 2 sketches the historical development of tort liability. Part 3 explains the procedural steps involved in bringing a tort suit; it also explains the use of the "liability" (L) and "no liability" (NL) designations often used in this book to describe the outcomes of the cases. Part 4 introduces some major theoretical perspectives and analytical tools used by students and scholars of tort law. All of these issues are treated only briefly; the explanations here are just meant to give the reader a nodding acquaintance with issues that will be explored in more detail during the rest of the course.

1. *The Scope of the Law of Torts*

The word "tort" is derived from the Latin word "tortus," meaning crooked or twisted. In French the word "tort" continues to have a general meaning of "wrong," and this remains its meaning in English legal usage as well. Tort law governs legal responsibility, or "liability," for wrongs that people inflict on each other by various means: assaults, automobile accidents, professional malpractice (for example, errors by doctors or lawyers), defamation, and so forth. Torts is the body of law that furnishes the victim of any of these forms of conduct with a remedy against the party responsible for them. The person bringing the suit (the plaintiff) claims that the defendant should be required to pay for the damage done. That is a practical and nonlegalistic description of the office of tort law, and it is incomplete in various ways; but it provides a general sense of what the subject of torts is about and suggests

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how this branch of law differs from others such as criminal law. Let us consider that distinction and some others in more detail.

Torts vs. crimes. Some of the conduct addressed by the law of torts also is addressed by the criminal law; indeed, in early English law the two branches were unified, with damages to the victim of a wrong awarded as part of a criminal proceeding against the wrongdoer. Today, however, there is a broad division in the law between criminal liability on the one hand and civil liability on the other. Civil actions generally refer to lawsuits brought by one party against another seeking compensation for a wrong. Criminal prosecutions are brought by a government seeking to punish the defendant. Some key distinctions between these two types of proceedings may be summarized as follows.

First, tort and criminal law often differ in the conduct they govern. Some acts are both torts and crimes; a beating, for example, may result in both a criminal prosecution and a tort suit. But other crimes are not torts. Thus a crime may be committed without injury to anyone, as when a defendant is prosecuted for driving faster than the speed limit allowed. In this case there is no occasion for a tort suit by anyone seeking damages. Likewise, many torts are not crimes. A defendant who injures someone through an act of professional malpractice typically commits no crime and will not be prosecuted, but may be required by the law of torts to pay compensation to the injured party. Even where the same conduct does give rise to both tort and criminal liability, the legal doctrines governing the two types of case tend to be quite different, with different elements of proof and different defenses available.

Second, tort and criminal law differ in the procedures they involve. A crime is regarded by the law as an offense against the public; that is why it results in a prosecution brought by the government, not by the immediate victim of the wrong. A tort suit is brought by an injured party seeking compensation for damage the defendant has caused. And because the stakes of the two proceedings for the defendant are different, the standards of proof in the two proceedings differ as well. In a criminal prosecution the defendant must be proven guilty beyond a reasonable doubt; in a tort suit the plaintiff must establish the defendant's liability by a preponderance of the evidence, a weaker standard. A tort suit and a criminal prosecution based on the same conduct may go forward at the same time, or one after the other. The two proceedings generally have no effect on each other, though findings against a defendant made in a criminal case sometimes may be regarded as settled for purposes of the tort suit as well.

Third, tort and criminal law differ in their purposes. Both are partly concerned with deterring misconduct by attaching costs to it, but deterrence is just one of the purposes classically ascribed to the criminal law—along with retribution, rehabilitation, and incapacitation of the criminal. Retribution and incapacitation rarely are thought to play any role in the law of torts; the immediate purpose of a tort suit is to secure compensation for the victim. There remains some overlap between even the apparently different purposes served by criminal and tort suits. A criminal prosecution may serve compensatory as well as punitive purposes by forcing a defendant to pay restitution to the victim of a crime, and a tort suit may serve a punitive as well

as a compensatory function if the defendant is required to pay punitive damages. But the differences between the aims of tort and criminal law are large enough to result in quite different arguments about what rules and policies make sense in the two fields.

Common law vs. statutes. The law of torts comes from two principal sources: the common law and statutes. For our purposes, "common law" refers to the body of law created by judges over the course of many centuries in England and the United States. Judges deciding tort disputes in classic common law fashion reason from one case to the next, with the parties each arguing that their preferred result is the one most consistent with the decisions the court already has made. When the court decides the case it issues a written opinion explaining its decision; that opinion then becomes a precedent that can be used as authority in subsequent cases. Until well into the twentieth century most American tort law was common law—i.e., judge-made. To learn the law of torts was to know a great many cases.

Torts remains largely a common law field, but state legislatures now play a significant role in its development as well. During the past half-century it has become more common for judge-made tort doctrines to be codified, modified, or repudiated by statute, or for legislatures to make attempts to enact statutory "tort reform." Administrative agencies also supplement rules of tort liability with regulations that may cover some of the same ground. In this book we will examine a number of statutory contributions to the law of torts and consider the pros and cons of making tort law by judicial decision and by legislation. But in the main this book continues to treat torts as a common law subject, both because it largely remains so and because training in common law reasoning—the process of distinguishing cases and arguing about their precedential significance—is one of the distinctive pedagogical functions of a first-year course on tort law.

In the course of our studies we frequently will encounter the First, Second, and Third Restatements of the Law of Torts published by the American Law Institute (ALI). The ALI is an organization of lawyers, judges, and academics; the Restatements are a set of projects in which they attempt to clarify the content of the common law in various areas—torts, contracts, agency, and so forth. The creation of a Restatement begins with the appointment of a reporter (or more than one) responsible for drafting its various sections. The reporter has primary responsibility for the final result, but a Restatement is subject to comment, debate, and a vote by the membership of the ALI before it is released. The reporter generally attempts to state the best reading of the courts' position on a question—usually the position of the courts in a majority of jurisdictions, though sometimes the ALI will side with a minority view that it believes is better reasoned. Indeed, occasionally the ALI's attempt to "restate" what courts are doing will amount to a recommendation that they adopt a new framework for decision that better reflects the direction of the law. The resulting Restatements vary in the extent of their influence. In certain areas of law they have had a great impact; the Second Restatement, for example, formulated tests for products liability and invasion of privacy that have been adopted in most jurisdictions. Other sections have been less influential.

In all events, it is important to understand that the positions a Restatement takes, whether in its "black letter" statements of law or the illustrations and comments afterwards, are not law and may not reflect the position taken in some jurisdictions. Courts are under no obligation to follow the Restatements and sometimes reject them explicitly. Restatements are best viewed as useful attempts, with greater or lesser success, to summarize areas where the common law is complicated. We will consider them often in that spirit. The First Restatement of Torts, written in the 1930s, we will encounter only rarely. The Restatement (Second), written between 1964 and 1979, will make frequent appearances in the text. The new Restatement (Third) does not attempt to cover all the ground that the Second Restatement did, but we shall see that in some areas—including products liability, apportionment, and certain aspects of the negligence tort—the new work has made interesting revisions to the old and has provoked occasional controversy.

Intentional vs. unintentional torts; negligence vs. strict liability. For the sake of organization the substance of tort law can be divided along various lines. The first involves the distinction between liability for intentional and unintentional wrongs. The precise meaning of "intent" can become complicated, as we shall see, but for present purposes just think of intentional torts as those that typically involve deliberate conduct. Battery, trespass, and conversion are classic examples. Unintentional torts refer to harms caused inadvertently—"by accident," as it were. The doctrines governing liability for these two types of torts are different and are covered in different sections of the book.

The world of unintentional torts can be further divided into two types: strict liability and liability for negligence. A rule of strict liability generally requires a defendant to pay for damage caused by an activity regardless of how carefully it was conducted. A rule of negligence requires defendants to pay only for harms caused by their failure to use reasonable care—with the meaning of "reasonable" again subject to debate and qualification. Some activities are governed by the one rule and some by the other. The difference between these two types of liability is very important to an understanding of tort law as a doctrinal matter (in other words, to an understanding of how the rules work); the distinction also is central to much of the theory surrounding the law of torts. Students of tort law have long debated whether and when liability should be imposed on a defendant without any showing of fault.

2. *Historical Development*

By way of additional context it will help to understand some differences between the modern divisions in the law of torts just sketched and the somewhat different distinctions that dominated the field until roughly the second half of the nineteenth century. The American legal system borrowed most of its structure from the English, and in England the roots of tort doctrine are bound up with the historical development of jurisdictional rules and requirements. Thus Henry Maine, an English legal historian of the nineteenth century, wrote that in the early common law the

"substantive law has at first the look of being gradually secreted in the interstices of procedure." When the Normans invaded in 1066, England had no centralized set of courts; its legal system consisted of a variety of local courts. Over the next two hundred years the "King's courts" were established, but before bringing an action there a plaintiff had first to get permission from the Lord Chancellor of England by securing a *writ*: a document containing a standardized recital accusing the defendant of a particular type of misconduct. The plaintiff would fill in the names, dates, and place of the event. The writ directed the sheriff to produce the defendant at the next Assizes—i.e., the next session of the royal courts. The judge there was assisted in trying the case by a selection from the local citizens, known then as the "inquest" and the forerunner of what we now know as the jury.

The King's courts were in competition with the local courts that continued to be administered by English barons; as a concession to the latter, the number of writs available to gain access to the royal courts was frozen early on. More flexibility was to come later, but a lasting consequence of this initial step was that one writ became the origin of most actions we now would regard as sounding in tort: the writ of *trespass vi et armis*—"with force and arms"—alleging that the defendant had broken the King's peace, thus entitling the King's courts to jurisdiction over the dispute. The writ of trespass encompassed a range of harms much broader than suggested by its modern lay meaning of entry onto land without permission. It came to be used in cases involving collisions and accidents of all kinds, professional malpractice, and other conduct that the royal courts agreed to treat as fitting within the pigeonhole created by the trespass writ. Over time—by the fourteenth century, and then with greater clarity in the centuries that followed—the royal courts began to recognize a new form of action known as *trespass on the case* (or simply "case"). The old trespass writ came to be used in cases alleging that the defendant inflicted harm in a forcible and direct manner; case became the action used to allege that harm had been inflicted indirectly.

At first glance the distinction between trespass and case may seem to track the modern difference between intentional and unintentional torts, but that was not so. The classic illustration of the difference between trespass and case involved a log dropped by the defendant. If the log struck the plaintiff, the remedy would lie in an action for trespass because the injury was inflicted directly; if the plaintiff struck the log while driving in his carriage, the injury would be considered indirect and the remedy would lie in an action on the case. Notice that in either circumstance the defendant may have dropped the log deliberately or inadvertently.

But what of the other great modern distinction—that between strict liability and liability for negligence? The action on the case generally required a showing of some fault on the defendant's part, whether in the form of carelessness or a bad intent; the liability for negligence now familiar to us thus descends largely from old English action on the case. Legal historians differ, however, on the role that notions of fault played in early cases alleging *trespass vi et armis*. In the early leading case of Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616), the plaintiff and defendant were fellow soldiers; the defendant shot the plaintiff while they were skirmishing with their muskets. The defendant pled that the shooting had been accidental. The court

rejected this defense but said that the legal outcome might have been different if the accident had been shown to be "inevitable." Whether this amounted to strict liability or to an implied requirement that the defendant be shown to have been at fault is a matter of some debate. See, e.g., Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth Century Law of Torts*, 128 U. Pa. L. Rev. 361 (1979); Baker, An Introduction to English Legal History 337-345 (1979).

One naturally may wonder, then, how the transition was made from the old writs to the organizing ideas—negligence, strict liability, and intentional torts—sketched in the previous section of this introduction. During the nineteenth century the writ system was abolished in both England and the United States, and the distinction between trespass and case soon evaporated as well. Before this time, "torts" did not exist as an independent subject matter, so naturally the division of it into negligence, strict liability, and intentional torts did not exist, either. There simply was a collection of unrelated writs that lawyers used to bring claims for recovery in various non-contractual situations. The notion of "negligence" or "neglect" was used narrowly to refer just to situations where a defendant failed to carry out a specific duty to some plaintiff prescribed by law. As the writ system fell away, however, courts and scholars made attempts to replace it with broader efforts at conceptualization. The results of these conceptual efforts included the creation of categories and vocabulary that continue to be used now.

An important example of one of the judicial contributions was *Brown v. Kendall*, 60 Mass. 292 (1850). The defendant was trying to separate two fighting dogs by beating them with a stick; on the backswing the stick hit the plaintiff in the eye. The Chief Justice of the Supreme Judicial Court of Massachusetts, Lemuel Shaw, wrote an opinion saying that a plaintiff suing a defendant in trespass must show "either that the *intention* was unlawful, or that the defendant was *in fault*." Thus "if both plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care, and the plaintiff was not, or if at that time, both the plaintiff and defendant were not using ordinary care, then the plaintiff could not recover." This way of talking about liability for an accidental injury is not far from the language courts would use today. *Brown v. Kendall* is regarded as a landmark in American law because it was the first to so speak of "fault" as a standard of liability with wide application.

The idea then emerged gradually that a defendant might *in general* be held liable for misfeasance: for doing some act negligently, and thus violating a duty to be careful that was not limited to a specific group of beneficiaries. This notion was pressed forward in scholarship by Oliver Wendell Holmes, Jr., later in the nineteenth century. Holmes's examination of the case law led him to argue for the existence of a general principle that underpinned various forms of liability then capable of being summarized as "torts": liability required a showing of fault, or negligence. We will look at some of Holmes's writings, and consider the meaning that the fault principle came to acquire, in chapter three of this book: The Negligence Standard.

The social significance of the negligence standard has been the subject of extensive debate. Some scholars have argued that a fault requirement is best viewed as a nineteenth century innovation that served as a subsidy to encourage developing

industries—railroads, canals, and the like: firms would not be financially responsible for the injuries routinely caused by those sorts of enterprises unless they could be shown to have acted in some sense wrongfully. See, e.g., Morton Horwitz, The Transformation of American Law (1979). Others have argued that the fault requirement was in place from the outset of the nineteenth century and that it benefited many different sorts of defendants, thus undercutting the "subsidy" thesis. At various points in the book—principally in the chapters on Strict Liability and Nuisance—we shall have occasion to consider further the intersection between legal standards and industrial development.

Meanwhile some modern intentional tort actions still retain the names given to them under the old writ system: a suit for trespass to land, for example, or for replevin (a suit seeking the return of the plaintiff's goods). Traces of the old system also survive in the continued availability of certain writs in American law, such as the writ of mandamus, or of habeas corpus, or of coram nobis—none of which have much to do with tort law, however. Part of the value of understanding the English background is that it will help you to better comprehend old cases. But it also will help you to understand basic concepts and distinctions you will see in modern cases that wrestle with doctrines whose roots lie in the old forms of action.

3. *Modern Procedure: How to Understand the Posture of a Case*

This part of the introduction is meant to help you make sense out of the cases you will be reading by explaining a bit about how a legal question comes before a judge and results in a written opinion. (This is a topic that you will cover in more detail in your course on civil procedure.) It is important to understand, first, that when judges write opinions they generally are not making overall decisions about whether the defendant owes money to the plaintiff. Our legal system breaks that decision into parts. In every case you read, a plaintiff is making claims about two things: the *facts*—in other words, the events that occurred in the world ("the defendant's dog bit me"); and the *law*—in other words, the legal rules that apply to the facts ("when a dog bites someone, the dog's owner is obliged to pay compensation"). The opinions that judges write discuss propositions of the second sort: they decide legal issues, such as whether and when dog owners have to pay compensation when their dogs bite people. Judges generally do this by making certain assumptions about the facts of the case in front of them and then deciding whether the law imposes liability in those circumstances. If the factual questions in a case—such as whether the defendant's dog really did bite the plaintiff—are disputed, they typically must be decided separately by a jury (or perhaps by a judge acting as a "trier of fact"). The key distinction to grasp at this point is between (a) questions of law that result in opinions with significance for lots of cases, and (b) questions of fact that are hashed out by the parties in front of a jury, and that do not have significance for later cases (though of course they are of great importance to the parties themselves). If you want to understand the law governing dog bites, it is very important to know whether a dog owner is always liable for damage done by her dog. It is not important

for you to know whether, in the case where that legal question was settled, the defendant's dog really did bite the plaintiff.

When we read opinions, we often will refer to them as resulting in "liability" (L) or "no liability" (NL). This is a useful convention because it provides a quick way to keep straight the basic outcomes of the cases we consider. The labels nevertheless require a bit of explanation. An L case is one where the court decided the issue raised in favor of the plaintiff and against the defendant—though it need not be a case where the defendant ultimately (i.e., at the end of the case) was held liable in damages. The court may simply be saying that on certain assumptions which may or may not turn out to be accurate after a trial is held, liability would be appropriate. An NL case is one where the court says that the facts it describes do not give rise to liability. A court can make statements like these at several different moments during a case. Here is a summary of them.

a. *Dismissal of a complaint.* Suppose D's dog bites P. P files a lawsuit against D seeking damages. P's lawsuit begins the way that all lawsuits begin: P files a *complaint* (a short statement of his allegations and of the legal basis of his claim against D). Now suppose D responds, as defendants sometimes do, by making a motion in court to have P's complaint *dismissed* (sometimes also known as filing a *demurrer*). A court will decide D's motion to dismiss P's complaint by assuming that all the facts alleged in the complaint are true, and then asking whether those facts would—if true—entitle the plaintiff to recover damages from the defendant. If the answer is "yes," then for our purposes this is considered a case of liability: the court is saying that if the facts of a case are thus-and-so, the defendant is required to pay damages to the plaintiff. This is true whether the decision is being made by a trial court or a court of appeals.

Note that if the facts of the case turn out later (perhaps after a trial) *not* to be as the plaintiff alleged in the complaint, then the defendant will not be held liable and will not have to pay anything to the plaintiff after all. But we still will think of the court's earlier opinion a case of "liability," because the court was saying that liability would exist under the conditions that it described (namely, the conditions alleged in the plaintiff's complaint). If, on the other hand, the court dismisses the plaintiff's complaint (or "sustains the demurrer"), then we would consider it a case of no liability—both in the sense that the defendant won the case and did not owe the plaintiff anything, and also in the sense, more important for our purposes, that the court assumed certain facts to be true and said that they would create no liability.

b. *Summary judgment.* Assuming the plaintiff's complaint is not dismissed, the next step in the life of a lawsuit is discovery: the exchange of information about the case between the parties. Witnesses have their depositions taken (in essence they are interviewed under oath, with their answers recorded by a stenographer), perhaps the plaintiff is examined by a physician who writes a report, and so forth. This process results in the creation of a record of the case: a set of documents comprising all the evidence that a jury would hear if there were a trial.

At the end of the discovery process, a defendant often will move for *summary judgment*. The defendant's claim then is that there is no point in having a trial because the plaintiff has not come up with evidence that would allow a reasonable jury to bring in a verdict in the plaintiff's favor. This time the court would decide the motion not by assuming the claims in the plaintiff's complaint are true (we are beyond that stage of the case now), but rather by assuming that all of the plaintiff's witnesses would be believed by a jury and that a jury would draw all reasonable inferences from the evidence in the plaintiff's favor. Then, as in the previous example, the court would ask whether, *given those assumptions*, the law would hold the defendant liable to the plaintiff. If the answer is yes, then we would again consider it a case of "liability," even though the defendant's actual liability would have yet to be determined by a jury. The court merely would be saying that a jury *could* find the defendant liable if it believed the plaintiff's witnesses and so forth. Conversely, if the court gave summary judgment to the defendant, then it would be a case of no liability: we would know that the facts the court assumed to be true do not make a defendant liable to a plaintiff.

When you are thinking about the facts of a case where summary judgment was granted or denied, remember that the court was giving the benefit of a doubt to the party opposing the motion (the party who wants a trial—usually the plaintiff, though occasionally the parties' roles can be reversed). You can stylize the case accordingly in your mind's eye: the court's decision is based on the assumption that a jury would draw all reasonable inferences in favor of the plaintiff; you therefore can interpret the facts of the case accordingly, just looking at the plaintiff's evidence.

c. *Directed verdicts.* Now suppose the defendant does not succeed in getting the plaintiff's complaint dismissed and also does not succeed in obtaining summary judgment. There is then a trial to resolve disputes about the facts of the case. After the plaintiff has presented his case, or after both sides have presented their cases, or after the jury has reached a decision, the defendant has the option of moving for *judgment as a matter of law*. This also is known in many jurisdictions as moving for a *directed verdict* if the request is made before the jury deliberates or a request for *judgment notwithstanding the verdict* ("j.n.o.v.") if the request is made after the jury has returned its decision. A judge generally decides any of these motions by just looking at the plaintiff's evidence and asking whether, if it is accepted by the jury and interpreted as favorably to the plaintiff as it reasonably can be, a rational jury could find the defendant liable. If not, it is a case of no liability. If so, it is a case of liability for our purposes. As usual, the court has made certain assumptions and has said whether those assumed facts would lead to liability.

The procedural posture just described sounds (and is) very similar to the summary judgment procedure discussed a moment ago, because in either situation the court is asking whether, if the plaintiff's witnesses are believed and all inferences are drawn in the plaintiff's favor, a rational jury could find for the plaintiff. The difference is just that summary judgment asks the question before trial (in an effort to prevent the trial from occurring if its outcome is a foregone conclusion), whereas a motion for judgment as a matter of law asks the same question after the plaintiff's

evidence has been presented in court (in an effort to prevent the trial from continuing, or from ending with a judgment against the defendant that the evidence cannot support). In either case the defendant generally is arguing that the plaintiff's evidence is inadequate as a matter of law.

A variation on this last theme occurs when the defendant (or plaintiff, but assume it is the defendant for simplicity's sake) complains that the trial court gave the jury incorrect instructions. A court of appeals generally decides such claims by first deciding whether the instruction was incorrect; if so, the court then asks whether a correctly instructed jury could have brought in a verdict for the defendant if it believed all of the defendant's witnesses, etc.

May vs. Must. The explanation so far glosses over an important distinction. Occasionally a court says that if the factual assumptions it is making are found to be true, a defendant *cannot* be held liable or *must* be liable. Those are very strong precedents. In other cases—and commonly when a court denies a defendant's motion for summary judgment or judgment as a matter of law—a court offers a weaker holding: it concludes that on the facts it is assuming are true, a defendant *may* be held liable by a jury; in other words, it would be reasonable for a jury to find liability. But this does not mean the jury is required to do so. These holdings still are important because they mean that the facts the court describes entitle the plaintiff to a trial where a jury will decide whether the defendant behaved reasonably, or decide whether the plaintiff's injuries were a foreseeable result of the defendant's behavior, or answer other "jury questions." Indeed, in real tort cases that typically is the key legal determination: whether the plaintiff gets to a jury.

As a practical matter, this means that we will most often encounter two kinds of decisions in tort cases. First are the "NL" cases where the court dismissed the plaintiff's complaint or said that the defendant was entitled to summary judgment or a directed verdict. In these situations the court is saying that as a matter of law there cannot be liability on the facts the plaintiff claims to be able to prove. Second are the "L" cases where the court says there *could* be liability—cases where a jury must be permitted to find liability if it determines that the defendant acted in the way the plaintiff claims. These might more precisely be labeled "PL" cases for "potential liability," but for the sake of elegance we will stick with the "L" designation. We will only occasionally encounter cases where a court says there *must* be liability if the plaintiff's evidence is believed. Those cases will become easy to spot as you get the hang of working with the different procedural postures in which cases come before courts.

Summary. We have just surveyed the most common settings in which judges make statements about when defendants can be held liable to plaintiffs. A judge might make such a pronouncement when deciding a defendant's motion to dismiss a plaintiff's complaint; when deciding a defendant's motion for summary judgment; or when deciding a defendant's motion for a directed verdict (or judgment as a matter of law). Decisions made in these three procedural postures may be equally strong precedents. Regardless of the posture of the case, a court is making certain

assumptions about the facts and then deciding whether those facts would or could lead to liability if they eventually were found to be true by a jury. Whether the story is true is another question—one very important to the parties, of course, but not important to lawyers using the case later on, claiming that it is a precedent to which future courts must stay consistent.

Decisions on the motions just described are made first by trial judges, sometimes without written opinions. A party who does not like a trial judge's decision can ask at some point—usually when the case is over in the trial court—to have the decision reviewed by a court of appeals: a panel of judges that reviews questions of law and issues opinions about them. The holdings of the resulting appellate opinions are precedents that bind all lower courts whose work the court of appeals reviews; a decision by a state supreme court, for example, is a binding precedent that must be followed by all courts in the state. The opinion may also be given some weight by courts in other states, where the decision is not binding but may be found persuasive. All else equal, courts like to be consistent with other courts elsewhere.

This book often will ask you what distinctions can be drawn between two cases you have read. If the cases were decided in different jurisdictions (as usually will be true), it is always possible that there is no good distinction between them; it may just be that the courts involved adopted different rules of law, as jurisdictions sometimes do. But attempting to draw distinctions between cases that seem to reach contradictory results is a valuable exercise regardless of whether the cases purport to be consistent with each other. When a practicing lawyer is confronted with a similar case from another jurisdiction that resulted in an unhelpful opinion, saying that the other case should be disregarded because it is from a different state is an argument of last resort. The better route is to distinguish the adverse case by showing that there are good reasons why it came out as it did that do not apply to the case "at bar." This book is intended in part to help increase your skill at creating such arguments. So when the text asks "What is the distinction between X and Y," you may consider this the equivalent of a challenge—if only as an exercise—to come up with the best argument you can that the cases can be squared with each other.

If this is your first exposure to the nuts and bolts of procedure, it no doubt will seem complicated and confusing. It all will become clearer as you work through some cases (and a separate course on civil procedure).

4. *Analytical Perspectives*

A course on tort law typically has several goals. One is a mastery of the doctrines that comprise the field. Another, as just discussed, is the development of a lawyerly ability to work with case law. Still another is an improved capacity to think intelligently about the problems that tort law attempts to address. This final section of the introduction to the book briefly introduces some major perspectives and analytical tools that students and scholars of tort law bring to bear on the subject.

The dominant theoretical perspectives on torts often change from one generation to the next. Most torts scholars at this writing can be broadly divided into two

groups: those who believe the purpose of the law of torts is to regulate conduct and those who believe the purpose of the enterprise is to achieve some form of corrective justice. As we shall see, there are some who attempt to mix these approaches, but it will be convenient to begin by treating them as distinct.

Regulation, deterrence, and economics. In the view of the first camp of scholars, the most important aspect of a court's decision in a tort case is the impact it will have on the behavior of others in the future. The most prominent advocates of this view are economists who believe that the purpose of tort law should be to minimize the costs of accidents. Every accident or other tort creates costs for its victims; but precautions against accidents are expensive, too—as are lawsuits afterwards. The goal of the legal system, on this view, should be to keep to a minimum the *combined* costs of precautions, accidents, and litigation. Sometimes this will mean that the law should try to induce people to take more precautions than they do; sometimes it will mean that people take too many precautions already, or that it is too costly to use the legal system to try to change their behavior. The rules of tort law thus should give people incentives to take precautions that are efficient—i.e., cost-justified: precautions that prevent injuries more costly than the precautions but that allow injuries to occur if they are less costly than the precautions. The economic approach to tort law was pioneered by Guido Calabresi and Richard Posner, both of whom did seminal scholarly work in the 1960s and 1970s and later became federal appellate judges. (We will encounter their judicial work at various points in this book.) Their initial contributions have been followed by a vast economic literature analyzing the efficiency of tort doctrines.

Corrective justice. The other large branch of torts scholarship views the law of torts as a moral enterprise, the purpose of which is to produce justice between plaintiff and defendant. Some of the work in this area attempts to build formally on Aristotle's notion of corrective justice or on the work of Kant and other philosophers. Other influential efforts by legal scholars have been reasoned out less formally—from notions of personal autonomy, and the right to redress when one's personal integrity is unjustifiably invaded; from reciprocal obligations of care owed between members of the same community and the duty to compensate that arises when a party fails to live up to those obligations; or from the snug connection in tort law between a defendant's wrong and a plaintiff's right to collect damages for the resulting injuries, which might seem at odds with the economic view that tort damages are assessed just for the sake of deterring future misconduct. What these theories have in common is a deontological thrust—in other words, a perspective that evaluates rules according to their moral content, not whether they induce people to act in desirable ways. (The economic approach to tort law might be considered a moral enterprise, too, but the relevant morality is consequentialist: a variety of utilitarianism.)

Adherents to these schools of thoughts have a set of standard criticisms to exchange with each other. Economists often regard theories of corrective justice as mush—lacking in clear or persuasive guidelines for determining what conduct counts as

"wrongful," unable by their terms (their self-professed hostility to instrumental thinking) to contribute to human welfare, and lacking as well in empirical content that might be verified. Moral theorists are known to dismiss the economic approach on grounds of their own: skepticism about whether people have the knowledge and rationality to be deterred by tort law in the way that economists suggest, and rejection of efficiency as a morally appealing goal for the legal system.

At the same time, some scholars have advanced "mixed theories" that draw on both traditions of argument. They may argue, for example, that appeals to efficiency actually have an underlying moral component. Meanwhile there are still others who embrace the idea that tort law should be viewed as a regulatory regime that provides incentives to people deciding what precautions to take, but who reject the economists' view that the purpose of the regulatory enterprise is just to minimize the joint cost of precautions and accidents. They may adopt other, more distributional goals, viewing tort law as a form of social insurance that protects victims of injuries from unanticipated losses and that shifts the costs of accidents onto the activities that cause them.

We will revisit some of these ideas later, and your instructor may pursue them during class discussions. In the meantime, however, these large debates over tort theory can be reduced to some questions and considerations you can ask as you start to think about the cases you read in this book. What incentives do the courts' rulings create? Are the incentives likely to have practical significance? What administrative costs does a court's holding create or avoid—in other words, what difficulties of application and what potentials for error? Is the court's decision fair—and to whom, and by what criterion? These are important questions to ask in thinking about problems of tort law and trying to assess the merits of the courts' responses to them. They also can be powerful tools for lawyers, as they serve as sources of the types of policy arguments that often are central to a court's resolution of a case.

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TORTS

Cases and Questions

Third Edition

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Chapter 1

Intentional Torts: The *Prima Facie* Case

Torts come in two general varieties: unintentional and intentional. Unintentional torts include most sorts of harms generally regarded as accidental; they are covered in later chapters. Intentional torts — the subject of this chapter — are harms inflicted more or less deliberately. For each intentional tort there is a distinct *prima facie* case consisting of certain things ("elements" of the claim) that a plaintiff must allege and then prove in order to win a lawsuit. The defendant can respond to that *prima facie* case either by denying what the plaintiff has said or by raising an affirmative defense — in other words, by alleging and then proving some additional facts that undercut the plaintiff's case, perhaps by justifying the defendant's actions. Those defenses are considered in the next chapter; this chapter is devoted to the elements of the plaintiff's *prima facie* case. We will begin by considering the tort of battery in some detail. Afterwards we will look in a bit less detail at trespass, conversion, false imprisonment, assault, and outrage (otherwise known as the intentional infliction of emotional distress).

A. BATTERY

1. *Intent and Volition*

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

[The plaintiff, 14 years old at the time in question, brought an action for battery against the defendant, who was 12 years old. The complaint charged that the defendant kicked the plaintiff in the shin in a schoolroom in Waukesha, Wisconsin, after the teacher had called the class to order. The kick, though so light that

the plaintiff didn't feel it at first, aggravated a prior injury that the plaintiff had suffered and caused his leg to become lame. The jury rendered a special verdict as follows:

(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed and produced pus? A. Yes.
(2) Had such injury on the 20th day of February, 1889, nearly healed at the point of the injury? A. Yes.
(3) Was the plaintiff, before said 20th of February, lame as the result of such injury? A. No.
(4) Had the *tibia* in the plaintiff's right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No.
(5) What was the exciting cause of the injury to the plaintiff's leg? A. Kick.
(6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No.
(7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars.

The trial court entered judgment for the plaintiff on the special verdict. The defendant appealed.]

LYON, J. — [After stating the facts:] The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. §83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful. Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of the defendant unlawful, or that he could be held liable in this action. Some consideration is due to the implied license of the play-grounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained. . . .

Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in *Brown v. Railway Co.*, 54 Wis. 342, to be that the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages — the rule here contended for — was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages. . . .

NOTES

1. *Seven questions.* When a jury renders a *general verdict*, it simply finds the defendant liable or not liable. Sometimes, as in *Vosburg*, a judge will instead ask the jury to render a *special verdict*: a set of answers to more specific questions. A special verdict shows the basis of the jury's conclusions and thus makes it easier for a court reviewing the verdict to know what the jury thought about particular issues that may seem critical in retrospect. The defendant in *Vosburg* fastened onto one particular finding in its special verdict and claimed that it entitled him to victory. Which one?

2. *Touch football.* In Knight v. Jewett, 275 Cal. Rptr. 292 (Cal. App. 1990), *aff'd*, 834 P.2d 696 (Cal. 1992), Knight, Jewett, and several other friends gathered at a house in Vista to watch the Super Bowl. Knight and Jewett were among those who decided to play a game of touch football during halftime using the kind of miniature football often used by children. Knight and Jewett were on different teams. The only rule they explicitly agreed upon was that to stop the player with the ball it was necessary to touch the player above the waist with two hands. Knight's understanding was that the game would not involve forceful pushing or shoving.

Soon after the game started, Jewett ran into Knight during a play; Knight told Jewett that she would leave the game if he didn't stop playing so rough. On the next play Jewett knocked Knight down and stepped on the little finger of her right hand. Jewett's account was that he had jumped up to intercept a pass and knocked Knight over as he came down; when he landed, he stepped back and onto Knight's hand. Knight's version of the events was somewhat different: as Jewett was chasing one of her teammates who had caught the ball, he came up from behind Knight and knocked her down. Knight put her arms out to break the fall and Jewett ran over her, stepping on her hand. Knight conceded in deposition testimony that Jewett did not intend to step on her hand and did not intend to hurt her.

Knight had three surgeries on the finger, but they proved unsuccessful. Ultimately the finger was amputated. She sued Jewett for battery, among other things. The trial court gave summary judgment to Jewett, and the court of appeals affirmed:

> A requisite element of assault and battery is intent. Here, however, there is no evidence that Jewett intended to injure Knight or commit a battery on her. Moreover, the record affirmatively shows Knight does not believe Jewett had the intent to step on her hand or injure her. Without the requisite intent, Knight cannot state a cause of action for assault and battery.

What is the superficial similarity between *Knight v. Jewett* and *Vosburg v. Putney*? What is the distinction between them?

3. *The piano lesson (problem).* In White v. University of Idaho, 768 P.2d 827 (Idaho 1989), Richard Neher was a professor of music at the University of Idaho. One morning he was visiting the home of one of his students, Carol White. White was seated at a counter when Neher walked up behind her and touched her back with both of his hands in a movement later described as one a pianist would make in striking and lifting the fingers from a keyboard. The resulting contact generated unexpectedly harmful injuries: White suffered thoracic outlet syndrome, requiring the removal of the first rib on the right side; she also experienced scarring of the brachial plexus nerve, which necessitated the severing of the scalenus anterior muscles in her neck. White sued Neher and the University of Idaho to recover her damages.

The University sought summary judgment on the ground that under a state statute it could not be held liable for a battery committed by one of its employees. The question thus became whether Neher's act *had* been a battery. Neher stated that he intentionally touched the plaintiff's back but said that his purpose was to demonstrate the sensation of this particular movement by a pianist, not to cause any harm. He explained that he has occasionally used this contact method in teaching his piano students. The plaintiff said that Neher's act took her by surprise, that she would not have consented to such contact, and that she found it offensive. What result on the summary judgment motion?

4. *Doctrinal distinctions.* The definition of battery raises some issues on which courts do not always agree. The approach to intent shown in the cases above, and followed by a majority of courts, is known as "single intent": the plaintiff in a battery case must show that the defendant intended the touching, not that the defendant intended the harm that followed from it. A minority of courts require "dual intent" — that is, a showing that the defendant intended both of those things.

Note that the word "intent" must be used with care in the law of torts, because it is often used to refer to states of mind that do not seem intentional in the casual sense of the word. A person is typically said to "intend" a result if achieving it was the purpose of whatever act the person committed. But a result is also said to be "intended," for purposes of a tort claim, if one commits an act knowing that the

result is substantially certain to follow from it — whether that result was desired or not. This distinction makes no difference in the most typical cases of battery. Can you think of atypical situations in which it would be likely to matter?

5. *Offensive battery.* We can distinguish between two kinds of battery: touchings that are physically harmful and touchings that are offensive. From Restatement Third, Torts: Intentional Torts to Persons (Tentative Draft):

> §3. BATTERY: DEFINITION OF OFFENSIVE CONTACT
>
> A contact is offensive [for purposes of the tort of battery] if:
>
> (a) the contact is offensive to a reasonable sense of personal dignity; or
>
> (b) the contact is highly offensive to the other's unusually sensitive sense of personal dignity, and the actor knows that the contact will be highly offensive to the other.
>
> Liability under Subsection (b) shall not be imposed if the court determines that avoiding the contact would have been unduly burdensome or that imposing liability would violate public policy.

Illustration 6 to that portion of the Restatement begins as follows:

> Caterer is hired to serve food for a wedding reception. He is informed that one of the guests, Omar, refuses to eat pork because under his religion consuming pork is a great sin. During the reception, as guests are about to be served food, Caterer realizes that he neglected to inform the food-preparation team of Omar's request. Caterer decides not to inform Omar that the main course contains pork, in order to avoid the burden of preparing another meal for Omar at the last minute. After Omar has eaten the main course, he discovers that it contained pork, and he is extremely upset.

Complete the illustration: should Caterer be subject to liability for battery? What result under §3?

6. *The insanity defense.* In Polmatier v. Russ, 537 A.2d 468 (Conn. 1988), the defendant, Norman Russ, opened fire on his father-in-law with a shotgun, killing him. Five hours later Russ was found in a wooded area two miles away, crying and sitting naked on a tree stump holding the shotgun and his infant daughter. Russ later described himself as a supreme being who had the power to rule the destiny of the world. He further claimed that his father-in-law was a spy for the Red Chinese who had planned to kill him. Russ was prosecuted for murder and found not guilty by reason of insanity; a psychiatrist testified that Russ suffered from a severe case of paranoid schizophrenia with auditory hallucinations. The decedent's wife then brought a civil suit against Russ for wrongful death. The same psychiatric testimony was offered. The trial court gave judgment to the plaintiff and the Connecticut Supreme Court affirmed. The court first announced its general adherence to the

traditional rule against making an allowance for insanity in measuring a defendant's intent, adopting this statement of the rationale from an earlier Illinois case:

> There is, to be sure, an appearance of hardship in compelling one to respond for that which he is unable to avoid for want of the control of reason. But the question of liability in these cases is one of public policy. If an insane person is not held liable for his torts, those interested in his estate, as relatives or otherwise, might not have a sufficient motive to so take care of him as to deprive him of opportunities for inflicting injuries upon others. There is more injustice in denying to the injured party the recovery of damages for the wrong suffered by him, than there is in calling upon the relatives or friends of the lunatic to pay the expense of his confinement, if he has an estate ample enough for that purpose. The liability of lunatics for their torts tends to secure a more efficient custody and guardianship of their persons. Again, if parties can escape the consequences of their injurious acts upon the plea of lunacy, there will be a strong temptation to simulate insanity with a view of masking the malice and revenge of an evil heart.

The court then further rejected Russ's claim that his act was involuntary:

> The defendant argues that for an act to be done with the requisite intent, the act must be an external manifestation of the actor's will. The defendant specifically relies on the Restatement (Second) of Torts §14, comment b, for the definition of what constitutes an "act," where it is stated that "a muscular movement which is purely reflexive or the convulsive movements of an epileptic are not acts in the sense in which that word is used in the Restatement. So too, movements of the body during sleep or while the will is otherwise in abeyance are not acts. An external manifestation of the will is necessary to constitute an act, and an act is necessary to make one liable [for a battery]. . . ." The defendant argues that if his "activities were the external manifestations of irrational and uncontrollable thought disorders these activities cannot be acts for purposes of establishing liability for assault and battery." We disagree.
>
> We note that we have not been referred to any evidence indicating that the defendant's acts were reflexive, convulsive or epileptic. Furthermore, under the Restatement (Second) of Torts §2, "act" is used "to denote an external manifestation of the actor's will and does not include any of its results, even the most direct, immediate, and intended." Comment b to this section provides in pertinent part: "A muscular reaction is always an act unless it is a purely reflexive reaction in which the mind and will have no share." Although the trial court found that the defendant could not form a rational choice, it did find that he could make a schizophrenic or crazy choice. Moreover, a rational choice is not required since "[a]n insane person may have an intent to invade the interests of another, even though his reasons and motives for forming that intention may be entirely irrational." Restatement (Second) of Torts §895J, comment c. The following example is given in the Restatement to illustrate

the application of comment c: "A, who is insane believes that he is Napoleon Bonaparte, and that B, his nurse, who confines him in his room, is an agent of the Duke of Wellington, who is endeavoring to prevent his arrival on the field of Waterloo in time to win the battle. Seeking to escape, he breaks off the leg of a chair, attacks B with it and fractures her skull. A is subject to liability to B for battery."

7. *The first law of nature.* In Laidlaw v. Sage, 158 N.Y. 73, 52 N.E. 679 (1899), *rev'g* 2 A.D. 374, 37 N.Y.S. 770 (1896), a mysterious stranger, later determined to be a man called Norcross, appeared one afternoon at the New York office of Russell Sage, a wealthy financier and philanthropist. The stranger was carrying a carpet bag and said that he wanted to see Sage about some railroad bonds; he claimed to have a letter of introduction from John D. Rockefeller. Sage invited Norcross in and then read the letter; it ran as follows: "The bag I hold in my hand contains ten pounds of dynamite. If I drop this bag on the floor, the dynamite will explode, and destroy this building in ruins, and kill every human being in the building. I demand $1,200,000, or I will drop the bag. Will you give it? Yes or no?" Sage returned the letter to Norcross and then started to talk, saying that he was short of time and that if Norcross's business was going to take long he should come back later. While Sage was talking he slowly moved toward a clerk in his office who did not realize what was happening. Sage placed his hand on his clerk's shoulder and gently moved him in front of Norcross so that the clerk's body was blocking Sage from the possible blast. Norcross soon concluded that he was not going to get the money and pulled the fuse on the carpet bag; this detonated a tremendous explosion that wrecked Sage's office and much of the rest of the building. Norcross was obliterated by the blast and the clerk was injured. Russell Sage was unharmed. The clerk sued Sage for battery.

The case was tried several times due to the appellate courts' determinations of error in the trial court. The evidence in the resulting trials raised questions about whether the plaintiff might have sustained the same injuries whether or not the defendant had used him as a shield and whether the defendant had acted voluntarily. In the fourth trial the jury returned a verdict for the plaintiff and the trial court entered judgment upon it. The defendant appealed to the New York Court of Appeals, which held that the trial court misdirected the jury on whether the defendant had committed a voluntary act and that the defendant was entitled to a fifth trial of the case against him. Said the court:

> That the duties and responsibilities of a person confronted with such a danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is a well-established principle of law. The rule applicable . . . is stated in Moak's Underhill on Torts (page 14), as follows: "The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily." It is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature, and that, where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself. . . . Indeed,

the trial court recognized this doctrine in its charge, but submitted to the jury the question whether the act of the defendant was involuntary, and induced by impending danger, adding that the testimony of the defendant that everything he did, he did intentionally, was sufficient to justify it in finding that he voluntarily moved the plaintiff in the manner claimed by him. . . .

[I]t is extremely difficult, upon a consideration of all the evidence in the record relating to this subject, to see how a jury was justified in finding that the defendant voluntarily interfered with the person of the plaintiff. . . .

It is impossible to consider the plaintiff's injuries without a feeling of profound sympathy. His misfortune was a severe one, but sympathy, although one of the noblest sentiments of our nature, which brings its reward to both the subject and actor, has no proper place in the administration of the law. It is properly based upon moral or charitable considerations alone, and neither courts nor juries are justified in yielding to its influence in the discharge of their important and responsible duties.

Was *Laidlaw v. Sage* correctly decided? Can it be squared with *Polmatier v. Russ*? If not, which case offers a preferable view of the voluntary act requirement?

8. *Horse play*. In Keel v. Hainline, 331 P.2d 397 (Okla. 1958), approximately 40 students at a public middle school in Tulsa went to a classroom for instruction in music. The class met at 10:30 A.M., but for unknown reasons their instructor did not make an appearance until some 30 minutes later. During the instructor's absence several of the male students indulged in what they termed "horse play": they assembled at opposite ends of the classroom and threw chalkboard erasers and chalk back and forth at each other. This went on for about half an hour; it ended when an eraser thrown by one of the defendants struck the plaintiff in the face, shattering her glasses and resulting in her loss of one eye. The plaintiff had been sitting in her chair near the center of the room and studying her lessons when she was struck by the eraser; she had not been participating in the horse play. None of the defendants intended to strike or injure the plaintiff. They were throwing the erasers at each other in sport and apparently without intending to cause injury.

The plaintiff brought a suit for battery against several of the boys: the one who threw the eraser and also several of the others involved in the eraser fight. The jury brought in a verdict in her favor against all of the defendants, and the trial court entered judgment upon it. One of the defendants — the defendant at whom the fateful eraser had been thrown — appealed.

Held, for the plaintiff, that the trial court did not err in entering judgment on the jury's verdict. Said the court:

Defendant strenuously argues that the class had not been called to order by the teacher and that the defendants were merely playing until the teacher arrived, and therefore could not be said to have been engaged in any wrongful or unlawful acts. We do not agree. We do not believe and are not willing to hold that the willful and deliberate throwing of wooden blackboard erasers

> at other persons in a class room containing 35 to 40 students is an innocent and lawful pastime, even though done in sport and without intent to injure. Such conduct is wrongful, and we so hold. Under such circumstances the rule applicable to this case is well stated at 4 Am. Jur. 128, Assault and Battery, sec. 5, as follows: "Where, however, the basis of an action is assault and battery, the intention with which the injury was done is immaterial so far as the maintenance of the action is concerned, provided the act causing the injury was wrongful, for if the act was wrongful, the intent must necessarily have been wrongful. The fact that an act was done with a good intention, or without any unlawful intention, cannot change that which, by reason of its unlawfulness, is essentially an assault and battery into a lawful act, thereby releasing the aggressor from liability."

Keel, the defendant who appealed, also argued that he should not be held liable because everyone agreed that he did not throw the eraser that hit the plaintiff. The trial court had instructed the jury as follows:

> If you find for the plaintiff and against the defendant who actually threw the eraser, then you are instructed that if you should further find and believe from a preponderance of the evidence, that one or more of the remaining defendants, did by their acts, signs, gestures, words or demeanor, either aid, abet, encourage, procure, promote or instigate the assault and battery, then your verdict should be against all of the defendants who participated in the assault and battery, if any, either as the actual assailant or by aiding, abetting, encouraging, procuring, promoting or instigating the throwing of the eraser by the actual assailant.

The Oklahoma Supreme Court rejected Keel's argument and approved the above instruction as a correct statement of the law.

What is the relationship between *Keel v. Hainline* and *Vosburg v. Putney*? What were the intentions of the defendant who threw the eraser? Of the defendant (the appellant here) at whom the eraser was thrown?

9. *Transferred intent.* The basic doctrine that permitted the student who threw the eraser to be held liable is known as "transferred intent": if A attempts to commit a battery against B but mistakenly hits C instead, C can sue A for battery. It is no defense for A to say that he had no intent to cause contact with C. A's intentions toward B are combined with the harmful contact with C to create a battery. Consider what result should follow from this Illustration in Restatement Third, Torts: Intentional Torts to Persons:

> John, a security guard at a nightclub, is angry that Rudy, an intoxicated patron, refuses to leave. John fires a gun at Rudy in order to injure him. The bullet misses Rudy, ricochets across the street, and strikes the bicycle of Nancy a block away. As a result, Nancy falls off her bicycle, suffering a concussion.

Finish the illustration: is the security guard liable to the rider of the bicycle for battery?

10. *"Transferred" transferred intent.* The Oklahoma courts went beyond ordinary transferred intent in also affirming liability for Keel, the boy at whom the eraser was thrown. This amounts to transferred intent in a different sense than was discussed a moment ago; it is a kind of liability imposed upon Keel for a secondary role in the events that produced the plaintiff's injury. What are the implications of such liability? Does it mean that if A shoots at B but mistakenly hits C, B is liable to C for battery? What if B had been goading A?

11. *Collecting the judgment.* *Vosburg v. Putney* and *Keel v. Hainline* both involve litigation against children, raising natural questions about how the defendants proposed to collect the judgments they won. The common law does not hold parents liable for their children's tortious acts, so judgments against children generally cannot be executed against their parents' assets. The plaintiff can collect the judgment from the child if the child has assets; and in some instances the plaintiff may also be able to renew the judgment at intervals prescribed by statute as the child grows older and accumulates property.

The common law rule respecting parents and children has been modified by statute in many jurisdictions. This North Carolina statute, N.C. Gen. Stat. §1-538.1, is typical:

> Any person or other legal entity shall be entitled to recover actual damages suffered in an amount not to exceed a total of two thousand dollars ($2,000) from the parent or parents of any minor who shall maliciously or willfully injure such person or destroy the real or personal property of such person.

To these rules compare the doctrine of respondeat superior, which generally allows employers to be sued for acts of negligence committed by their employees in the course of their employment (and also for intentional torts employees commit in furtherance of their employers' interests). Why might it be that employers routinely are held liable for torts committed by their employees while parents usually are not held liable for torts committed by their children? That question is considered in more detail in the treatment of respondeat superior later in the book.

12. *Wild pitch.* In Manning v. Grimsley, 643 F.2d 20 (1st Cir. 1981), the plaintiff was a spectator at a baseball game between the Boston Red Sox and the Baltimore Orioles at Fenway Park in Boston. He was seated in the right field bleachers, separated from the bullpen by a wire mesh fence. As Ross Grimsley, a pitcher for the Orioles, was warming up, the Red Sox fans continuously heckled him. On several occasions Grimsley gave the hecklers dirty looks. Finally Grimsley wound up as though to throw toward the bullpen plate one last time; but when he threw the ball, it flew at more than 80 miles an hour away from the plate and directly toward the hecklers in the bleachers. The ball went through the wire mesh fence and hit the plaintiff, who may or may not have been a heckler. The district court directed a verdict for the defendants on the plaintiff's battery count. The plaintiff sued Grimsley and the Orioles. The trial court gave a directed verdict to the defendants; the court of appeals reversed and remanded the case for a new trial. Said the court:

> We, unlike the district judge, are of the view that from the evidence that Grimsley was an expert pitcher, that on several occasions immediately following heckling he looked directly at the hecklers, not just into the stands, and that the ball traveled at a right angle to the direction in which he had been pitching and in the direction of the hecklers, the jury could reasonably have inferred that Grimsley intended (1) to throw the ball in the direction of the hecklers, [and] (2) to cause them imminent apprehension of being hit . . . .
>
> The foregoing evidence and inferences would have permitted a jury to conclude that the defendant Grimsley committed a battery against the plaintiff. This case falls within the scope of Restatement Torts 2d §13 which provides, inter alia, that an actor is subject to liability to another for battery if intending to cause a third person to have an imminent apprehension of a harmful bodily contact, the actor causes the other to suffer a harmful contact. Although we have not found any Massachusetts case which directly supports that aspect of §13 which we have just set forth, we have no doubt that it would be followed by the Massachusetts Supreme Judicial Court. . . . The whole rule and especially that aspect of the rule which permits recovery by a person who was not the target of the defendant embody a strong social policy including obedience to the criminal law by imposing an absolute civil liability to anyone who is physically injured as a result of an intentional harmful contact or a threat thereof directed either at him or a third person. It, therefore, was error for the district court to have directed a verdict for defendant Grimsley on the battery count. . . .

What is the relationship between *Grimsley* and *Keel v. Hainline* (the case of the errant eraser)? Does it follow from the appellant's liability in *Keel* that the plaintiff in *Grimsley* also could have brought suit against the hecklers?

13. *When will intent transfer?* It will aid your understanding of *Manning v. Grimsley* to note that Grimsley was found to have intended to cause the hecklers "imminent apprehension of being hit." To intentionally cause someone to have imminent apprehension of being hit is to commit an *assault*, not a battery. Since Grimsley did have a sufficient intent to commit an intentional tort, however, that intent was enough to support liability for battery.

Suppose the *Vosburg* defendant tried to kick one of his friends but missed and instead kicked the plaintiff, causing catastrophic injury to his leg. Would there be liability under the reasoning of *Manning v. Grimsley*? Would there be liability for Vosburg's friend under *Keel v. Hainline*?

2. *Minimum Requirements*

Having considered the intent requirement for battery, we now start our consideration of another aspect of the tort: the requirement that the defendant must commit or cause a harmful or offensive touching of the plaintiff. This element can raise several distinct types of issues that we will consider in turn. The first is how direct

and invasive the contact between the parties must be before it rises to the level of "harmful or offensive."

1. *Smoke gets in your eyes.* In Leichtman v. WLW Jacor Communications, Inc., 634 N.E.2d 697 (Ohio App. 1994), the plaintiff, an antismoking advocate, alleged that he was invited to appear as a guest on a radio talk show to discuss smoking and the effects of secondary smoke. At the urging of one of the show's hosts, a second host lit a cigar and repeatedly blew smoke in the plaintiff's face. The plaintiff sued the two hosts and the radio station for battery, claiming the host blew the smoke in his face "for the purpose of causing physical discomfort, humiliation and distress." The trial court dismissed the claim. The court of appeals reversed, holding that tobacco smoke was "particulate matter" capable of making physical contact and of offending a reasonable sense of personal dignity, and thus that if the defendant intentionally directed the smoke toward the plaintiff he could be held liable for committing a battery.

2. *Liability for buses.* In Madden v. D.C. Transit System, Inc., 307 A.2d 756 (D.C. 1973), the plaintiff sought $70,000 in damages from the defendant for assault and battery. The plaintiff alleged that while standing on the traffic island near the corner of an intersection he was contacted by fumes and offensive oily substances that the defendant permitted to spew from two of its buses. The plaintiff further alleged that the defendant was aware that these regularly were discharged from its buses and that the emissions therefore were intentional. The trial court dismissed the complaint, stating that absent a showing of malice, willfulness, or specific wrongful intent, the defendant could not be held liable for the acts alleged. The plaintiff appealed, and the District of Columbia Court of Appeals affirmed.

What is the distinction between *Madden v. D.C. Transit System, Inc.* and *Leichtman v. WLW Jacor Communications, Inc.*?

3. *Just checking.* In Morgan v. Loyacomo, 1 So. 2d 510 (Miss. 1941), the plaintiff purchased an article of underwear from the defendant's store. The defendant's manager saw the purchase and suspected that the plaintiff had taken two garments but paid for only one. The manager followed the plaintiff out of the store and pursued her for a block; he then called to her in front of several other people and said he was obliged to investigate whether she had taken an article from the store without paying for it. He seized the package from under her arm, opened it, and discovered that he had been incorrect. The plaintiff sued the store for battery (as well as slander and assault). The trial court entered judgment on a verdict for the plaintiff, and the Mississippi Supreme Court affirmed: "The authorities are agreed that, to constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in a rude or insolent manner, is sufficient."

What should the manager have done? The common law originally provided shopkeepers with a privilege to use reasonable force to retake their goods from thieves, but merchants using the privilege were fully liable in tort if they turned out to be mistaken in the way the defendant's manager was here. By the latter half of the twentieth century retailers commonly had moved their wares out from behind counters and onto floors where customers could inspect them, making it harder to be sure

whether a theft was occurring; the privilege was broadened accordingly, sometimes by courts and sometimes by statute. See, e.g., Ariz. Rev. Stat. §13-1805(c): "A merchant, or a merchant's agent or employee, with reasonable cause, may detain on the premises in a reasonable manner and for a reasonable time any person suspected of shoplifting [] for questioning or summoning a law enforcement officer."

4. *Crowded world.* In Wallace v. Rosen, 765 N.E.2d 192 (Ind. App. 2002), the plaintiff, Mable Wallace, was delivering homework to her daughter at a public high school in Indianapolis. Wallace and her daughter were standing on the second floor landing of a stairwell when the school initiated a fire drill. An alarm sounded. One of the school's teachers, Rosen, led her class to the stairway where Wallace was standing. Rosen told Wallace to "move it" because a fire drill was in progress. Wallace's testimony was that Rosen put her fingers on Wallace's shoulders and turned her 90 degrees toward the open stairs. At that point Wallace slipped and fell down the stairs (she was recovering from foot surgery, and so was less stable than usual) and sustained various injuries. She sued Rosen and the school system. The trial court refused to instruct the jury that it could find the defendants liable for battery if Wallace's testimony was believed. The case proceeded on other counts, and the jury brought in a verdict for the defendants. The plaintiff appealed, claiming the trial court was mistaken in refusing to instruct the jury on battery. The court of appeals affirmed:

> Professors Prosser and Keeton [] made the following observations about the intentional tort of battery and the character of the defendant's action:
>
> "[I]n a crowded world, a certain amount of personal contact is inevitable and must be accepted. Absent expression to the contrary, consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage. . . .
>
> "The time and place, and the circumstances under which the act is done, will necessarily affect its unpermitted character, and so will the relations between the parties. A stranger is not to be expected to tolerate liberties which would be allowed by an intimate friend. But unless the defendant has special reason to believe that more or less will be permitted by the individual plaintiff, the test is what would be offensive to an ordinary person not unduly sensitive as to personal dignity."
>
> Prosser and Keeton on Torts §9. . . . The conditions on the stairway of Northwest High School during the fire drill were an example of Professors Prosser and Keeton's "crowded world." Individuals standing in the middle of a stairway during the fire drill could expect that a certain amount of personal contact would be inevitable. Rosen had a responsibility to her students to keep them moving in an orderly fashion down the stairs and out the door. Under these circumstances, Rosen's touching of Wallace's shoulder or back with her fingertips to get her attention over the noise of the alarm cannot be said to be a rude, insolent, or angry touching.

What is the distinction between *Wallace v. Rosen* and *Morgan v. Loyacomo*? What is the distinction between *Wallace* and *White v. University of Idaho* (the L case of the piano teacher's unwelcome demonstration of technique)?

3. *Consent and Its Limits*

A second and more complex question concerning battery, to which we now will devote more time, involves whether and when a plaintiff's consent to such contact may free the defendant from liability. Sometimes a defendant will offer a plaintiff's consent as an affirmative defense, or a "privilege," to a battery claim; in other cases the consent may simply render an otherwise offensive contact inoffensive, negating an essential aspect of the plaintiff's case. We discuss consent in this section rather than in Chapter 2 on privileges because it is closely connected to the question of whether a touching is harmful or offensive in the first place.

Mohr v. Williams
104 N.W. 818 (Minn. 1906)

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 anaesthetics; 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. . . .

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. This particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. 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. It was said in the case of Pratt v. Davis, 37 Chicago Leg. News, 213, referred to and commented on in Cent. Law J. 452: "Under a free government, at least, the free citizen's first and greatest right, which underlies all others — the right to the inviolability of his person; in other words, the right to himself — is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operating upon him without his consent or knowledge." 1 Kinkead on Torts, §375, states the general rule on this subject as follows: "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." There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. 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 performance, 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 medical profession has made signal progress in solving the problems of health and disease, and they may justly point with pride to the advancements made in supplementing nature and correcting deformities, and relieving pain and suffering. 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.

[Affirmed.]

NOTES

1. *Ghost surgery.* In Grabowski v. Quigley, 684 A.2d 610 (Pa. Super. 1996), the plaintiff, Grabowski, injured his back when he slipped and fell on a patch of ice. He sought treatment from defendant Quigley. As a result of their consultation Grabowski agreed that he would undergo surgery and that Quigley would perform it. Some days later Grabowski was put under anesthesia and the surgery was performed. Afterwards Grabowski encountered problems with his left foot; it dragged when he walked. Quigley recommended more surgery. Grabowski decided to seek a second opinion and requested copies of his medical records. Upon inspecting them he discovered that his first surgery largely had been performed not by Quigley, who had been in the next county during most of the operation, but by a colleague of Quigley's named Bailes. Quigley later wrote a letter about the incident to one of his superiors describing what happened when he received a telephone call informing him that Grabowski was ready for surgery:

> [Y]ou can imagine my chagrin when [approximately one hour after anesthesia had been introduced] I received a phone call that my first case was on the table already asleep. At this point we faced two options, one of reawakening [Grabowski] and informing him of the mishap or having another physician starting the case and allowing time to return and finish it. We elected to do the latter.

Grabowski's suit alleged that Quigley and Bailes were liable for battery because the surgery was not performed by the doctor to whom Grabowski gave his consent — a phenomenon known as "ghost surgery." The trial court gave summary judgment to the defendants. The court of appeals reversed:

> Over thirty years ago our Supreme Court stated that "where a patient is mentally and physically able to consult about his condition, in the absence of an emergency, the consent of the patient is 'a prerequisite to a surgical operation by his physician' and an operation without the patient's consent is a technical assault." *Smith v. Yohe*, 194 A.2d 167 (Pa. 1963). . . . Since Appellant has alleged facts which, if true, established that consent was not given to Bailes and/or Quigley to perform the surgery in the manner in which it occurred, he has thereby alleged sufficient facts to establish a cause of action for battery against them.

What were Grabowski's damages? Compare this item from the Restatement (Second) of Torts:

> §52. CONSENT: TO WHOM GIVEN
>
> *Comment b.* It should be noted that there will be many cases, as where a patient goes to a hospital and is assigned a particular doctor, but is dealing with

and relying upon the hospital rather than the individual, in which the consent given to one may reasonably be interpreted to include the acts of another, or of assistants or subordinates.

2. *Objective norms.* In Brzoska v. Olson, 668 A.2d 1355 (Del. 1995), Raymond Owens, a dentist in Wilmington, tested positive in early 1989 for the Human Immunodeficiency Virus (HIV). By the summer of 1990 Owens had AIDS, and he soon exhibited open lesions, weakness, and memory loss. In February of 1991 Owens discontinued his dental practice and was hospitalized. He died a month later. A group of his patients who had not known that Owens was so afflicted brought suit against Owens's estate alleging liability for battery and other torts. None of the patients tested positive for HIV, but they sought damages for mental anguish and reimbursement of payments they made to Owens for dental treatment. The trial court gave summary judgment to the defendant. The Delaware Supreme Court affirmed. The court found, first, that Owens had not committed an offensive touching of any of the plaintiffs:

> The offensive character of a contact in a battery case is assessed by a "reasonableness" standard. In a "fear of AIDS" case in which battery is alleged, therefore, we examine the overall reasonableness of the plaintiffs' fear in contracting the disease to determine whether the contact or touching was offensive. Since HIV causes AIDS, any assessment of the fear of contracting AIDS must, *ipso facto*, relate to the exposure to HIV. Moreover, because HIV is transmitted only through fluid-to-fluid contact or exposure, the reasonableness of a plaintiff's fear of AIDS should be measured by whether or not there was a channel of infection or actual exposure of the plaintiff to the virus. . . .
>
> [T]he record fails to establish actual exposure to HIV. Plaintiffs argue to the contrary, noting that Dr. Owens exhibited lesions on his arms, legs, and elbow, and that he was known to have cut himself on at least one occasion while working on a patient. They have not, however, averred that the wound or lesions of Dr. Owens ever came into contact with the person of any of the plaintiffs, nor have they identified which patient was present during Dr. Owens' injury or even whether that patient was a plaintiff in this action. In fact, nothing in this record suggests any bleeding from Dr. Owens or that any wound or lesions ever came into contact with a break in the skin or mucous membrane of any of the plaintiffs. Plaintiffs have failed to demonstrate any evidence of actual exposure to potential HIV transmission beyond mere unsupported supposition. . . .
>
> Were we to authorize recovery for battery for this type of subjective, offensive touching, we would permit a common law civil tort to form the basis for recovery in an area which requires the application of medical standards and probabilities. We would thus substitute the most fragile sensibilities of the patient for the objective norms which govern the rendering of medical/dental care in the community.

The plaintiffs further alleged that Owens had misrepresented his health to many of them, denying that he had AIDS when he was asked; they alleged that they would

not have consented to the dental procedures he performed if they had known that he had AIDS. The court rejected this theory of battery as well:

> In our view, the tort of battery is properly limited in the medical/dental setting to those circumstances in which a health care provider performs a procedure to which the patient has not consented. In other words, "a battery consists of a touching of a substantially different nature and character than that which the patient consented." K.A.C. v. Benson, 527 N.W.2d 553 (Minn. 1995). A physician may be held liable for battery when he or she obtains the consent of the patient to perform one procedure and the physician instead performs a substantially different procedure for which consent was not obtained. A patient's consent is not vitiated, however, when the patient is touched in exactly the way he or she consented. . . .

Is *Brzoska v. Olson* consistent with *Grabowski v. Quigley* (the L case where the plaintiff's surgery was performed by a doctor he did not expect)? How might the cases be distinguished?

3. *Idiosyncratic objections.* In Cohen v. Smith, 648 N.E.2d 329 (Ill. App. 1995), the plaintiff was admitted to a hospital to deliver her baby. It was determined that she would need to deliver by caesarian section. She informed her doctor, who in turn informed the hospital, that her religious beliefs forbade her to be seen unclothed by a man other than her husband. The plaintiff's complaint alleged that during the ensuing procedure a male nurse employed by the hospital nevertheless saw and touched her while her clothes were off. She sued the nurse and the hospital for battery and intentional infliction of emotional distress. The trial court dismissed her complaint; the court of appeals reversed:

> Although most people in modern society have come to accept the necessity of being seen unclothed and being touched by members of the opposite sex during medical treatment, the plaintiffs had not accepted these procedures and, according to their complaint, had informed defendants of their convictions. This case is similar to cases involving Jehovah's Witnesses who were unwilling to accept blood transfusions because of religious convictions. Although most people do not share the Jehovah's Witnesses' beliefs about blood transfusions, our society, and our courts, accept their right to have that belief. Similarly, the courts have consistently recognized individuals' rights to refuse medical treatment even if such a refusal would result in an increased likelihood of the individual's death. . . .
>
> Accepting as true the plaintiffs' allegations that they informed defendants of their religious beliefs and that defendants persisted in treating Patricia Cohen as they would have treated a patient without those beliefs, we conclude that the trial court erred in dismissing both the battery and the intentional infliction of emotional distress counts.

What is the distinction between *Cohen v. Smith* and *Brzoska v. Olson* (the NL case of the dentist who had AIDS)?

4. *Implied consent.* In Werth v. Taylor, 475 N.W.2d 426 (Mich. App. 1991), the plaintiff, Cindy Werth, was a Jehovah's Witness. Her faith regarded it as a sin to receive a blood transfusion. Werth began to experience considerable bleeding from her uterus after giving birth to twins at the defendant hospital. Her doctor, Parsons, recommended dilation of her cervix and curettage of the uterine lining (a "D & C" procedure). Werth soon was placed under general anesthesia. The bleeding continued along with a rise in Werth's blood pressure and other alarming symptoms, causing Parsons to conclude that without a blood transfusion Werth would die. One of the other doctors present, Taylor, ordered the transfusion. Parsons informed Taylor that Werth was a Jehovah's witness; Taylor replied, "that may be, but she needs the blood."

Werth recovered fully from the procedure; she then sued Parsons, Taylor, and the hospital for battery. Her evidence was that when she had preregistered at the hospital she had filled out a form titled "Refusal to Permit Blood Transfusion." After the delivery of the twins, Parsons had talked with Werth and her husband about their view regarding transfusions. Werth recalled the conversation as follows:

> [Parsons] said, "I understand that you're one of Jehovah's Witnesses and that you won't take blood," and Don and I both said, "That's correct." And she said, "You mean to tell me if your wife's dying on the table that you're not going to give her blood?" And we said — Don said, "That's — well, I don't want her to have blood, but I don't want her to die. We want the alternative treatment."

Werth's husband recalled the two of them telling Parsons that Werth did not want a transfusion under any circumstances, though he also said that he was not focused on the possibility of her death at that time because he was not under the impression that her life was at risk.

The trial court gave summary judgment to the defendants. The court of appeals affirmed:

> [T]he law implies the consent of an unconscious patient to medical procedures needed to preserve the patient's life. If a physician treats or operates on a patient without consent, he has committed an assault and battery and may be required to respond in damages. Consent may be expressed or implied. It has been held that consent is implied where an emergency procedure is required and there is no opportunity to obtain actual consent or where the patient seeks treatment or otherwise manifests a willingness to submit to a particular treatment.
>
> It is undisputed that Cindy was unconscious when the critical decision regarding the blood transfusion to avoid her death was being made. Her prior refusals had not been made when her life was hanging in the balance or when it appeared that death might be a possibility if a transfusion were not given. Clearly, her refusals were, therefore, not contemporaneous or informed. Thus, a record could not be developed regarding Cindy's refusal which would leave open an issue upon which reasonable minds could differ.

What could Werth's damages have been? What is the distinction between *Werth v. Taylor* and *Cohen v. Smith*? Between *Werth v. Taylor* and *Grabowski v. Quigley* (the L case of "ghost surgery")? Between *Werth v. Taylor* and *Mohr v. Williams*?

Was there anything Werth could have done to prevent the transfusion? Did the court mean to suggest that Werth's acts suggested actual consent to a transfusion if her life was at stake? Or was the court prepared to infer consent in these circumstances for reasons apart from Werth's actual wishes? The former variety of consent is known as consent implied in fact; the latter is known as consent implied in law.

5. *Consent and its consequences.* From the Restatement (Second) of Torts:

§892. MEANING OF CONSENT

(1) Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.

(2) If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.

Comment c. Apparent consent. Even when the person concerned does not in fact agree to the conduct of the other, his words or acts or even his inaction may manifest a consent that will justify the other in acting in reliance upon them. This is true when the words or acts or silence and inaction, would be understood by a reasonable person as intended to indicate consent and they are in fact so understood by the other. . . .

Illustration 4. In the course of a quarrel, A threatens to punch B in the nose. B says nothing but stands his ground. A punches B in the nose. A is not justified upon the basis of apparent consent.

§892A. EFFECT OF CONSENT

Illustration 5. In a friendly test of strength, A permits B to punch him in the chest as hard as he can. B does so. Unknown to either A or B, A has a defective heart and as a result of the blow he drops dead. A's consent is effective to bar recovery for his death.

Illustration 6. The same facts as in Illustration 5 except that, without any intent or negligence on the part of B, A is knocked over against his valuable vase, which is shattered. The same result.

Illustration 9. A consents to a fight with B. Unknown to A, B uses a set of brass knuckles. B hits A in the nose, inflicting exactly the same harm as if he had used his fist. A's consent is not effective to bar his recovery.

6. *Frontiers of liability (problem).* In Neal v. Neal, 873 P.2d 871 (Idaho 1994), the plaintiff, Mary Neal, discovered that her husband, Thomas, was having an affair with a woman named LaGasse. In addition to filing for divorce she sued her husband for battery. Her theory was that she would not have had sexual intercourse with her husband during the time the affair was occurring if she had known about

it; thus the consent she granted to her husband was fraudulently induced and her sexual relations with him amounted to a battery. What result?

7. *Fraud and mistake.* From the Restatement (Second) of Torts:

> §892B. CONSENT UNDER MISTAKE, MISREPRESENTATION, OR DURESS
>
> *Illustration 6.* A consents to a friendly boxing match with B. B knows that A is unaware of the fact that A has a defective heart. B punches A in the chest and A suffers a heart attack. B is subject to liability to A for battery.
>
> *Illustration 8.* A permits B to stain A's face with walnut juice, for purposes of masquerade. A is ignorant of the fact that walnut juice leaves a permanent stain and B knows that A does not know it. B is subject to liability to A for battery.
>
> §57. FRAUD OR MISTAKE AS TO COLLATERAL MATTER
>
> *Illustration 1.* A, to induce B to submit to intimate familiarities, offers her a paper which A represents to be a twenty dollar bill but which he knows to be counterfeit. B, believing the paper to be a genuine bill, submits. A is not liable to B for battery.
>
> *Illustration 2.* The same facts as in Illustration 1, except that the paper is offered if B will submit to a blood transfusion. A is subject to liability to B for the harm done by the operation to which A has fraudulently induced him to submit.

Are these illustrations consistent with each other? Are they consistent with the cases we have considered?

8. *Consent to illegal acts.* In Hart v. Geysel, 294 P. 570 (Wash. 1930), two men, Cartwright and Geysel, engaged in an illegal prize fight in Seattle. Cartwright died from injuries he received in the fight, and the administrator of his estate sued Geysel for damages. Geysel defended on the ground that Cartwright had consented to the fight. The trial court dismissed the complaint, and the Washington Supreme Court affirmed:

> [I]n our opinion one who engages in prize fighting, even though prohibited by positive law, and sustains an injury, should not have a right to recover any damages that he may sustain as the result of the combat, which he expressly consented to and engaged in as a matter of business or sport. To enforce the criminal statute against prize fighting, it is not necessary to reward the one that got the worst of the encounter at the expense of his more fortunate opponent.

The majority cited this discussion from the American Law Institute:

> [O]ne who has sufficiently expressed his willingness to suffer a particular invasion has no right to complaint if another acts upon his consent so given. The very nature of rights of personality, which are in freedom to dispose of one's

> interests of personality as one pleases, fundamentally requires this to be so. There is a further principle, applicable not only in tort law but throughout the whole field of law, and perhaps more conspicuously in other subjects, to the effect that no man shall profit by his own wrongdoing. . . .
>
> Clearly if a plaintiff has consented to being struck by another in the course of a brawl, his right to the control of his person and to determine by whom and how it shall be touched has not been invaded. And it is equally clear that if he has so expressed his consent to the blow that, were he not party to a breach of the peace, his assent would be an operative consent and so bar his liability, he is profiting by the illegality of his conduct if because he is party to the breach of the peace he gains a right of action which but for his criminal joinder therein he would not have had.

9. *Road rage.* In McNeil v. Mullin, 79 P. 168 (Kan. 1905), the plaintiff and the defendant, both driving horse-drawn buggies, exchanged various hostile words. Each dismounted and removed his hat and coat. A fight ensued. The plaintiff sued the defendant to recover for injuries he suffered in the brawl. The defendant responded that the plaintiff should be barred from recovery by his consent to the fight. The trial court entered judgment on a verdict for the defendant. The Kansas Supreme Court reversed and remanded for a new trial. It held that in view of the parties' consent, neither party could claim to have acted in self-defense; but nor was the plaintiff's consent to fight a good defense against his claim against the defendant for battery:

> There is some natural repugnancy to allowing damages to be recovered by a bullying blackguard who has courted a fight and has been soundly thrashed, but the law can indulge in no sentiment regarding the matter. It can concede no legal effect to his vicious purpose. His consent to fight must be treated as utterly void, and each party must be left to suffer all consequences, civil and criminal, of his reprehensible conduct.

The court cited this passage from *Cooley on Torts* in support of its holding:

> Consent is generally a full and perfect shield, when that is complained of as a civil injury which was consented to. A man cannot complain of a nuisance, the erection of which he concurred in or countenanced. He is not injured by a negligence which is partly chargeable to his own fault. A man may not even complain of the adultery of his wife, which he connived at or assented to. If he concurs in the dishonor of his bed, the law will not give him redress, because he is not wronged. These cases are plain enough, because they are cases in which the questions arise between the parties alone. But in case of a breach of the peace it is different. The state is wronged by this, and forbids it on public grounds. If men fight, the state will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law. There are three parties here; one being the state, which, for its own good, does not suffer the others to

deal on a basis of contract with the public peace. The rule of law is therefore clear and unquestionable that consent to an assault is no justification.

Does the opinion in *McNeil* imply that professional boxers generally should be able to sue each other for injuries they inflict on one another? How might that case be distinguished from *McNeil*?

10. *Dueling and deterrence.* The second of the two cases just presented — *McNeil* — represents the rule followed by courts in the majority of jurisdictions: consent to an unlawful act is no defense to a claim of battery. Either participant in mutual combat can collect damages from the other. Distinguish this situation from that of self-defense, where A attacks B and B fights back. There is no consent involved in such a case. As we will see when we consider defenses to intentional tort claims, B's battery against A may then be privileged by a plea of self-defense so long as it was not an excessive response to A's initial attack. The problem of consent considered in *Hart* and *McNeil*, by contrast, arises when two parties agree to fight — with the result sometimes referred to as a "mutual affray," akin to a duel.

Which rule — the majority or the minority (represented by *Hart*, in which neither party can collect damages) — seems more likely to discourage fights? Consider whether the legal rule is likely to have any effect on the behavior of the average person deciding whether to fight; but consider, too, whether the response of the average person is the important question from the standpoint of public policy. Note that for the law to have such consequences, it need not influence the behavior of the average person. It need only affect the behavior of some people (those "at the margin," as economists say). And some potential combatants may be more likely than others to know the legal rule or to have it transmitted to them indirectly (in which of the two cases just considered is this more likely?). In any event, it is valuable to begin thinking carefully about the possible ways that legal rules *could* influence behavior — about the "ex ante" effects of rules. In this case it may help to break the problem down by thinking it through one character at a time. Start with the winner of a fight. Which rule would he prefer: the majority's or the minority's? How might the behavior of someone who expected to be a winner be affected by the majority rule? Then ask the same questions about the loser and his behavior. Whom is it more important to deter: winners or losers? Before fights begin, of course, the participants may not know who will be the winner. What does the typical participant in a fight probably expect?

11. *Consent to crime.* From the Restatement (Second) of Torts:

§892C. CONSENT TO CRIME

(1) Except as stated in Subsection (2), consent is effective to bar recovery in a tort action although the conduct consented to is a crime.

(2) If conduct is made criminal in order to protect a certain class of persons irrespective of their consent, the consent of members of that class to the conduct is not effective to bar a tort action.

Illustration 3. A and B agree to fight a duel with pistols. A fires at B and his bullet strikes and breaks B's arm. A is not liable to B.

Illustration 7. A statute makes it rape to have sexual intercourse with a girl under the age of sixteen even with her consent. At the solicitation of A, a girl of fourteen, B has intercourse with her. A's consent does not bar her action for battery.

Illustration 10. A statute makes adultery a crime. A, a married woman, commits adultery with B. Neither is liable to the other for the contacts inseparable from their crime.

12. *Arm wrestling.* In Hollerud v. Malamis, 174 N.W.2d 626 (Mich. App. 1969), the plaintiff, Hollerud, concluded an evening of drinking with several rounds of alcoholic beverages at the defendant's establishment, the Rainbow bar. Hollerud engaged there in what he called an "Indian wrestling" match with the bartender, in the course of which he sustained injuries to his fingers that caused him lasting difficulties in his work as a bricklayer. The trial court gave summary judgment to the defendants; the court of appeals reversed:

> The trial judge concluded that Edward Hollerud willingly and knowingly participated in a friendly Indian wrestling match. Although in the ordinary case a plaintiff's consent to an assault and battery is a defense precluding a civil action, if the plaintiff, owing to his state of intoxication, was incapable of expressing a rational will and the defendant had knowledge of this state, the consent was ineffective.
>
> The separate count for assault and battery alleged that Edward Hollerud was in a drunken condition when he entered the Rainbow Bar and that the bartender knew or should have known that he was intoxicated and that Hollerud did not freely and voluntarily enter into the Indian wrestling contest. Hollerud should have been allowed to prove the effect of this alleged intoxication on his mental faculties and the trier of fact should have been allowed to determine whether he was capable of consenting to engage in an Indian wrestling contest.

Suppose the bartender had been intoxicated, too. Would this have provided him with a defense against Hollerud's claim of battery? Which of the cases considered so far would be most helpful in answering that question? If the answer is "no," why might a court be more inclined to treat intoxication as undercutting Hollerud's consent than to treat it as undercutting the bartender's intent?

13. *A demonstration of karate (problem).* In Miller v. Couvillion, 676 So. 2d 668 (La. App. 1996), the plaintiff, Ray Miller, was a sales clerk at an establishment known as Chuck's Ace Hardware. Miller was injured while attempting to assist the store's manager; Rick Savage, in performing an informal demonstration of karate in the warehouse section of the store. The men placed a cinder block pad on a forklift; Miller climbed onto the forklift and braced the pad by standing on it. Savage tried twice to break the pad with a karate chop, but was unsuccessful. An announcement then came over the public address system requesting customer assistance elsewhere

in the store. As Miller began to climb down from the forklift, Savage took one last kick at the cinder block pad; the contact caused Miller to fall and injure his arm. Miller sued his employer, his insurer, and Savage, claiming that his injury was the result of an intentional tort — a battery by Savage — for which Chuck's was vicariously responsible.

Did Miller have a good claim for battery? Support your conclusion with arguments from any of the cases considered in this chapter; consider, too, how variations on these facts would lead to different legal conclusions.

B. TRESPASS

Trespass to land traditionally is known to the common law by the more formal name of trespass *quare clausum fregit* ("wherefore he broke the close"; in other words, the writ called upon the defendant to explain whether and why he entered the plaintiff's property), or "qcf" for short. It is distinct from trespass *de bonis asportatis* ("of goods carried away," referring to interference with, or damage inflicted upon, chattels, i.e., personal property). Trespass to land is distinct as well from the tort of nuisance, though the two types of claim occasionally overlap. Whereas trespass protects the right to exclusive possession of the land, nuisance law protects the right to its use and enjoyment and tends to be reserved for less tangible and direct interferences. A stranger running across your property without authorization commits a trespass but not a nuisance; a neighbor who plays unreasonably loud music may be liable for causing a nuisance but not a trespass. The law of nuisance is covered in a later chapter.

Desnick v. American Broadcasting Companies, Inc.
44 F.3d 1345 (7th Cir. 1995)

[The Desnick Eye Center and two of its surgeons sued ABC, the producer of the ABC program *Prime Time Live*, and reporter Sam Donaldson for trespass and other torts. ABC's producer had dispatched employees equipped with concealed cameras to offices of the Desnick Eye Center in Wisconsin and Indiana. Posing as patients, these persons — seven in all — requested eye examinations, and employees of the Desnick Eye Center were secretly videotaped examining them. ABC used the videotapes on an episode of *Prime Time Live* that was highly critical of Dr. Desnick and his ophthalmic clinics. Desnick sued ABC, claiming among other things that the defendants committed a trespass in insinuating the test patients into the Wisconsin and Indiana offices of the Desnick Eye Center; he claimed that he would not have consented to their presence if their true identities and motives had been known. The district court dismissed the trespass counts in the complaint, and the plaintiffs appealed.]

POSNER, *Chief Judge* — [After stating the facts:] To enter upon another's land without consent is a trespass. The force of this rule has, it is true, been diluted somewhat by concepts of privilege and of implied consent. But there is no journalists' privilege to trespass. And there can be no implied consent in any nonfictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission. The Desnick Eye Center would not have agreed to the entry of the test patients into its offices had it known they wanted eye examinations only in order to gather material for a television expose of the Center and that they were going to make secret videotapes of the examinations. Yet some cases, illustrated by *Martin v. Fidelity & Casualty Co.*, 421 So. 2d 109, 111 (Ala. 1982), deem consent effective even though it was procured by fraud.

There must be something to this surprising result. Without it a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom. Some of these might be classified as privileged trespasses, designed to promote competition. Others might be thought justified by some kind of implied consent — the restaurant critic for example might point by way of analogy to the use of the "fair use" defense by book reviewers charged with copyright infringement and argue that the restaurant industry as a whole would be injured if restaurants could exclude critics. But most such efforts at rationalization would be little better than evasions. The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.

The law's willingness to give effect to consent procured by fraud is not limited to the tort of trespass. The Restatement gives the example of a man who obtains consent to sexual intercourse by promising a woman $100, yet (unbeknownst to her, of course) he pays her with a counterfeit bill and intended to do so from the start. The man is not guilty of battery, even though unconsented-to sexual intercourse is a battery. Restatement (Second) of Torts sec. 892B, illustration 9, pp. 373-74 (1979). Yet we know that to conceal the fact that one has a venereal disease transforms "consensual" intercourse into battery. *Crowell v. Crowell*, 180 N.C. 516 (1920). Seduction, standardly effected by false promises of love, is not rape; intercourse under the pretense of rendering medical or psychiatric treatment is, at least in most states. It certainly is battery. Trespass presents close parallels. If a homeowner opens his door to a purported meter reader who is in fact nothing of the sort — just a busybody curious about the interior of the home — the homeowner's consent to his entry is not a defense to a suit for trespass. *Bouillon v. Laclede Gaslight Co.*, 148 Mo. App. 462 (1910). And likewise if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets. *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc.*, 925 F.2d 174, 178 (7th Cir. 1991).

How to distinguish the two classes of case — the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property. The woman who is seduced wants to have sex with her seducer, and the restaurant owner wants to have customers. The woman who is victimized by the medical impersonator has no desire to have sex with her doctor; she wants medical treatment. And the homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. The lines are not bright — they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.

There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted, as in *People v. Segal*, 358 N.Y.S.2d 866 (Crim. Ct. 1974), another case of gaining entry by false pretenses. Nor was there any "inva[sion of] a person's private space," *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d at 1229, as in our hypothetical meter-reader case, as in the famous case of *De May v. Roberts*, 46 Mich. 160 (1881) (where a doctor, called to the plaintiff's home to deliver her baby, brought along with him a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant), as in one of its numerous modern counterparts, *Miller v. National Broadcasting Co.*, 232 Cal. Rptr. 668, 679 (1986), and as in *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), on which the plaintiffs in our case rely. *Dietemann* involved a home. True, the portion invaded was an office, where the plaintiff performed quack healing of nonexistent ailments. The parallel to this case is plain enough, but there is a difference. Dietemann was not in business, and did not advertise his services or charge for them. His quackery was private.

No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. . . . "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. The situation of the defendants' "testers" is analogous. Like testers seeking evidence of violation of anti-discrimination laws, the defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their

purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land. We need not consider what if any difference it would make if the plaintiffs had festooned the premises with signs forbidding the entry of testers or other snoops. Perhaps none, *see United States v. Centennial Builders, Inc.*, 747 F.2d 678, 683 (11th Cir. 1984), but that is an issue for another day.

[The court affirmed dismissal of the trespass counts of the complaint, and remanded for further proceedings on other issues.]

NOTES

1. *Battery and trespass.* The *Desnick* opinion illustrates the parallels between trespass and battery; notice that the court is comfortable wandering back and forth between the two torts as it discusses the significance of fraudulently induced consent. One reason for the parallels, as noted in the introduction to this book, is that during much of the history of the common law, the tort of trespass covered a broad gamut of wrongs now known by other names, including both battery and trespass to land (as well as assault, false imprisonment, and other harms inflicted more or less directly). To which case in the section on battery is *Desnick* most analogous? Can *Desnick* be distinguished (need it be distinguished?) from *Neal v. Neal*, the case where the plaintiff said that her husband's extramarital affair vitiated her consent to sexual relations with him?

2. *Conditional consent.* From the Restatement (Second) of Torts (1965):

> §168. CONDITIONAL OR RESTRICTED CONSENT
>
> A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with.
>
> *Illustration 1.* A, the owner of Blackacre, licenses B to drive his cow through Blackacre to B's pasture, lot X. B enters Blackacre to draw gravel from lot X, or to go to lot Y. In either case B's entry is a trespass.
>
> *Illustration 4.* The A Gas Company, having mistakenly concluded that B has not paid his bill for gas, sends its servant, C, to B's house to remove the meter. C is given permission to enter to read the meter. He removes the meter. The A Company is subject to liability for a trespass.
>
> *Illustration 6.* A grants to B, a contractor, a license to store his trucks in A's barn. B not only stores his trucks in A's barn, but also makes extensive repairs on such trucks while they are in the barn. While using an acetylene torch in repairing a truck, B sets fire to and burns down the barn. B is a trespasser.

Are these illustrations consistent with *Desnick v. American Broadcasting Companies*?

3. *Trespass generally.* From the Restatement (Second) of Torts:

> §158. LIABILITY FOR INTENTIONAL INTRUSIONS ON LAND
>
> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) fails to remove from the land a thing which he is under a duty to remove.
>
> *Illustration 1.* A, against B's will, forcibly carries B upon the land of C. A is a trespasser; B is not.
>
> *Illustration* 2. A tornado lifts A's properly constructed house from A's land and deposits it on B's land. This is not a trespass.
>
> *Comment i. Causing entry of a thing.* The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it.

4. *Tally-ho!* In Pegg v. Gray, 82 S.E.2d 757 (N.C. 1954), the plaintiff owned a farm that included a herd of about 70 cattle kept in areas partitioned with barbed wire. The defendant, who lived on an adjoining farm, kept a team of hounds he used to hunt foxes. During the hunting season the defendant would loose the dogs and they often would chase foxes onto the plaintiff's property; the foxes would run in and through the plaintiffs' herds, sometimes inciting the cattle to stampede and break down the fences that enclosed them. The plaintiff sued the defendant for trespass. The trial court nonsuited the plaintiff; the North Carolina Supreme Court reversed:

> [B]y natural instinct and habit an ordinary dog of most breeds is inclined to roam around and stray at times from its immediate habitat without causing injury or doing damage to persons or property. . . . And so, since early times the law has been and still is that the owner of a reputable dog is not answerable in damages for its entry upon the lands of another upon its own volition under circumstances amounting to an unprovoked trespass.
>
> However, the rule is different where a dog owner or keeper for the purpose of sport intentionally sends a dog on the lands of another or releases a dog or pack of dogs with knowledge, actual or constructive, that it or they likely will go on the lands of another or others in pursuit of game. In such cases the true rule would seem to be that the owner or keeper, in the absence of permission to hunt previously obtained, is liable for trespass, and this is so although the

master does not himself go upon the lands, but instead sends or so allows his dog or dogs to go thereon in pursuit of game. . . .

It may be conceded that since Samson, according to the folk tale of biblical lore, tied the firebrands to the tails of 300 foxes and sent them into the grain fields of the Philistines (Judges 15:4, 5) the fox has been looked upon by many persons as a noxious animal, to be exterminated. Nevertheless, to countless thousands of devotees of the chase the death of a fox, unless it be in front of hounds, is regarded as a social crime. We embrace the view [that] fox hunting as ordinarily pursued — certainly as shown by the record in this case — is pure sport to be followed in subordination to established property rights and subject to the principles governing the law of trespass.

5. *Fore!* In Malouf v. Dallas Athletic Country Club, 837 S.W.2d 674 (Tex. App. 1992), the plaintiffs lived next to the defendant's golf course in the town of Mesquite. The plaintiffs' evidence was that their automobiles were damaged on three separate occasions when balls struck by golfers on the sixth hole went astray. They brought suit against the defendant for trespass. The defendant won judgment after a bench trial. The court of appeals affirmed:

> [T]he record reflects neither legal nor factual evidence that either [the defendant] or the individual golfers intended to commit an act which violated a property right. During a game of golf, on the [defendant's] course, the individual golfers intend to hit golf balls toward hole number six. This does not violate a property right. The fact that the ball may "slice" or "hook" onto appellants' properties is an unintended consequence. . . . Because appellants failed to demonstrate that [the defendant country club] or the individual golfers intentionally caused the golf balls to damage appellants' personal property, we cannot say that the trial court's conclusion of law that the [club] did not trespass is erroneous.

What is the distinction between *Pegg v. Gray* (L for defendant whose dogs strayed onto plaintiff's property) and *Malouf v. Dallas Athletic Country Club* (NL for defendant whose golfers hit stray balls onto plaintiff's property)? In view of the procedural posture of the two cases, how should their facts be stylized (in other words, what assumptions about the facts should be made) if *Malouf* is to be viewed as a case of no liability and *Pegg* described as a case of liability?

6. *Trespass vs. negligence.* It might seem odd that a golfer's errant shot could break a car's windshield without resulting in liability. But the holding just considered from *Malouf* does not necessarily imply that the plaintiffs can collect nothing; it just establishes that they were not the victims of a trespass. The plaintiffs here also would be free to press claims that the country club or the golfers were *negligent*, a different theory of liability. In fact the plaintiffs in *Malouf* did claim that the club had negligently designed its golf course — but this claim failed as well. The plaintiffs brought no claims against the individual golfers, apparently because they could

not be identified. Why else might the plaintiffs be more interested in prevailing against the club?

7. *Trespass vs. battery.* What is the relationship between the standard for judging intent used in the *Pegg* and *Malouf* cases and the meaning of intent in the law of battery — e.g., in cases like *Vosburg v. Putney* or *White v. University of Idaho*? Consider these excerpts from the Second Restatement:

> §164. INTRUSIONS UNDER MISTAKE
>
> One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he
>
> (a) is in possession of the land or entitled to it, or
>
> (b) has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf, or
>
> (c) has some other privilege to enter or remain on the land.
>
> *Illustration 3.* A employs a surveyor of recognized ability to make a survey of his land. The survey shows that a particular strip of land is within his boundaries. In consequence, A clears this land of timber and prepares it for cultivation. In fact, the survey is mistaken and the strip in question is part of the tract owned by his neighbor, B. A is subject to liability to B.
>
> §166. NON-LIABILITY FOR ACCIDENTAL INTRUSIONS
>
> Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.
>
> *Illustration 1.* A is walking along the sidewalk of a public highway close to the border of B's land. Without fault on his part, A slips on a piece of ice, and falls against and breaks a plate glass window in B's store adjoining the sidewalk. A is not liable to B.
>
> *Illustration 4.* A is carefully driving his well-broken horses on a highway. Frightened by a locomotive, they become unmanageable and run away, striking and damaging an iron lamp post on B's land. A is not liable to B.

Are these Restatement provisions consistent? Are they consistent with the cases just considered?

8. *A dog's breakfast.* In Van Alstyne v. Rochester Telephone Corp., 296 N.Y.S. 726 (City Ct. 1937), the plaintiff was the owner of a pair of valuable hunting dogs, Nancy and Pooch. The defendant telephone company maintained a cable that ran over the area of the plaintiff's lot where the dogs were kept. In May of 1936 the

defendant's agents, present on the plaintiff's land by permit or easement, performed work on the cable. They removed the cable's insulation, which was made of lead. After performing their operations they used molten lead to seal the cable again. Nancy died of lead poisoning in June; Pooch died from the same cause another month later. The plaintiff inspected his property and found lead that appeared to have dripped when the defendant's men were sealing the cable. His theory, which the court accepted, was that the dogs died when they ate similar drops left behind by the defendant's agents.

The plaintiff sued the defendant on theories of both negligence and trespass. The court dismissed the negligence claim on the ground that the possibility of harm to the dogs — the chance that the dogs would eat the lead, and that it would prove fatal — was unforeseeable to the defendant's workers. The court nevertheless gave judgment to the plaintiff, finding that the workers trespassed when they left the lead drippings behind and that they therefore were responsible for the consequences regardless of fault:

> True, the defendant had an easement for the maintenance of its line, and presumably this expressly conferred the right of access to the plaintiff's land for purposes of repairs or extensions. But it is not to be presumed, nor is it shown, that the defendant had an express right to cast unnecessarily, or to leave in any event, articles or substances upon the premises. Lacking such an express right, the law gives him none.
>
> Such an invasion of the premises of another renders the invader liable whether it be intentional or not, or whether the loss resulting to the owner be direct or consequential. He is liable regardless of the existence or nonexistence of negligence. . . . It does not matter that the plaintiff here seeks recovery, not for direct damage to his soil or to vegetation or structures, but for consequential damages. Recovery does not depend upon directness of the damage. The test is whether there was a direct invasion. Given that, responsibility follows. . . .
>
> It follows that the defendant, by depositing lead on the plaintiff's premises, became an intruder, and is liable for the consequences regardless of whether the results could or should reasonably have been foreseen, or whether the acts constituted negligence. . . .
>
> It requires no finespun reasoning to hold one responsible for a wrong done another who is without fault. But in a practical world, there must be practical limits. The law says a man in an ordinary situation should not, although in the wrong, be held for consequences which a reasonably attentive and careful man would not foresee. That rule found expression, and it endures, because it accords with the opinion of the average man.
>
> It is a rule of action in the world at large. The immunity which it grants does not accompany the actor when he intrudes upon the property of another. There the owner is supreme. His house is his castle, and his estate his exclusive domain. There, not all the rules which govern in the world at large apply. No intrusion is so trifling as to be overlooked, and no result of the intrusion is to be without remedy because it was unusual or unexpected.