Torts:

Cases & Context

CONIC 3.β *(BETA)* EDITION

Volume One

Foundations
Intentional Torts

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The "Pylon" and "Conic" editions correspond to different orderings of material to accommodate different teaching styles.

The Conic Edition is configured for courses that start with intentional torts. CONIC stands for "Commencing Our Navigations with Intentional Claims."

The Pylon Edition is configured for a negligence-first approach. PYLON, as a backronym, stands for "Priming Young Lawyers On Negligence."

About this Conic 3.β (Beta) Edition

This is ***Torts: Cases and Context***, ***Conic 3.β (Beta) Edition, Volume One***. It is the first volume of the author-revised third edition, in the intentional-torts-first configuration, created in 2026. ("Conic" designates the author's own edition in intentional-torts-first configuration, and 3.β (Beta) indicates the third generation of revisions for the book as a whole.)

This edition combines material from Volume One and Volume Two, published in 2024 and 2025, respectively, of the Pylon 2.1 Edition (which is in the negligence-first configuration).

For information relevant to the original version and to obtain the first edition, visit http://elangdell.cali.org/. For subsequent revision history of this casebook and to obtain other revisions, visit https://ericejohnson.com/tcc.

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Prior publication/version history and changes

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Pylon 2.1:	Volume 1: 2024, © 2024 Eric E. Johnson Volume 2: 2025, © 2025 Eric E. Johnson

As compared to the first edition, Pylon 2.0 made many substantive changes, including adding substantial material, deleting substantial material, and re-writing substantial material. Pylon 2.1 made updates (including regarding references to state statutory law and various references to the current status of things) and made some substantive changes.

This Conic 3.β (Beta) Edition incorporates substantial changes and substantial new material. See details below.

For future updates and new versions, visit: ericejohnson.com/tcc

Typography

This book uses three fonts. They're open-licensed and free to download. They are, in order of appearance:

Raleway

Raleway is a sans-serif font used for headings. It was designed by Matt McInerney, Pablo Impallari, and Rodrigo Fuenzalida, and licensed under the SIL Open Font License, Version 1.1. You can download it for free, including from: https://www.theleagueofmoveabletype.com/raleway and https://fonts.google.com/specimen/Raleway

EB Garamond

EB Garamond is a serif font used for body text. It was designed by Georg Duffner and Octavio Pardo as a revival of Claude Garamont's mid-16th century humanist type. It is licensed under the SIL Open Font License, Version 1.1. You can download it for free, including from: https://fonts.google.com/specimen/EB+Garamond

Gelasio

Gelasio is a serif font used for the text of cases and readings. It was designed by Eben Sorkin and inspired by a French Transitional typeface following the Romain Du Roi typeface of 1702. It is licensed under the SIL Open Font License, Version 1.1. You can download it for free, including from: https://github.com/SorkinType/Gelasio and https://fonts.google.com/specimen/Gelasio.

What's New in 3.β (Beta)

This 3.β (Beta) edition features substantial changes, additions, and re-writing. I essentially took the two introductory chapters and the intentional torts chapters from the 2.1 edition and then treated the material as an early rough draft.

Finely granulated section numbering facilitates assignments of only particular portions of chapters without using page numbers. Typography has been re-thought and re-implemented. New in-document coding facilitates use of navigation tools.

Selected new content worth a particular mention:

Newly written sections in Chapter 1: Sections: F ("The Common Law, Precedent, Blackletter Law, and the Surprising Unimportance of Particular Words"); G ("Blackletter Law – Words to Use Warily").

Newly written sections in Chapter 3: Sections: A; B (other than B.4.b & B.4.c); most of F.3.

Newly written sections in Chapter 4: The case of *Garratt v. Dailey* and material related thereto.

Newly written sections in Chapter 5: The case of *He v. Rubio* and material related thereto.

Newly written sections in Chapter 6: Section B.7; most of the notes and exposition regarding *Sousanis v. Northwest Airlines*; section C.2 (review problems)

Newly written sections in Chapter 7: Advance notes before cases; sections: B.5; B.7.

Newly written sections in Chapter 8: The case of *Hannabalson v. Sessions* and material related thereto. The case of *Cleveland Park Club v. Perry*; C.3.d.

Newly written sections in Chapter 9: Section A.4; advance notes for *Intel v. Hamidi* and *Moore v. U.C. Regents*; most of the material concerning *Moore v. U.C. Regents* following the opinion.

Newly written sections in Chapter 10: Advance notes before cases; section F.

Newly written sections in Chapter 11: Advance notes for *Katko v. Briney*; section D.2.d. (Iowa Stubborn! The Remarkable Sequel of *Briney v. Katko*).

Newly written sections in Chapter 12: All sections except D. Within D, new material includes *Ploof v. Putnam* and material relating thereto, as well as advance notes for the other cases.

In the above, what's called new material sometimes contains some words and phrases here and there that were incorporated from the source material, particularly the "advance notes" before cases.

Removed content worth a mention:

Chapter 6: The case of *Montejo v. Martin Memorial* was removed.

Chapter 8: The reading *Trespass by Airplane* was removed.

Chapter 9: *Intel v. Hamidi* and *Moore v. U.C. Regents* were substantially cut down.

Design, format, typography

The manuscript has been substantially reformatted. In response to teacher feedback, I have added fine-grained section numbering to enable teachers to assign any parts they like without referring to page numbers. (Page numbers can shift for those using the DOCX file. This new section numbering is hard-coded and won't shift.) I put a number on any section that I could imagine anyone assigning separately.

Typography has been substantially changed and smartened. In response to student feedback, I've used a different font for case readings (Gelasio). The idea is to readily distinguish judicial text from the expository portions of the book (EB Garamond). In addition, the sans-serif font from the cover (Raleway) has been incorporated throughout the book as the type for headings.

For future updates and new versions, visit: ericejohnson.com/tcc

About the Author

Eric E. Johnson is a professor of law at the University of Oklahoma College of Law.

Professor Johnson archives a large volume of free materials at ericejohnson.com, including dozens of essay exams, banks of multiple-choice questions, free/open-source casebooks, problem sets, how-to guides, tip sheets on exam techniques and student writing, and much more.

He has taught Torts since 2007. Other courses he's taught include Antitrust, Mass Media Law, Entertainment Law, Sports Law, Employment Law, Sales Law, Intellectual Property, Copyright, Patent Law, Trademarks, Science & Law seminar, and writing courses. Johnson's research interests include intellectual property and the intersection of law, science, and risk. Links to publications, more bio info and a CV are at ericejohnson.com.

Before joining academia, Johnson practiced law in Los Angeles. He litigated matters concerning television programming, video games, and real estate. He also worked in-house doing transactional work concerning sports programming on cable television networks.

Before law school, Johnson was a top-40 radio disc jockey in his hometown of Reno, Nevada.

A huge way Eric E. Johnson counts success in his career is how useful his freely distributed materials are. So please consider reaching out via contact info at ericejohnson.com.

Edits and Style Conventions

Unconventional Editing Marks

I've used some unconventional marks in the cases and quotes to indicate edits.

They may look weird, but it's about trying to make the text as readable as possible while preserving useful information about the fidelity of the text.

> The superscript tilde ˜ denotes an ellipsis (deleted/omitted matter).
>
> Curly brackets { } indicate an insertion, which may be accompanied by a deletion.
>
> The superscript pilcrow ¶ denotes an inserted paragraph break.
>
> Superscripted angle brackets < > indicate material moved into the above-the-line text from a footnote.

Rationales: The tilde is meant to be unobtrusive compared to strings of dots or asterisks. I've often opted for the curly variety to differentiate my use of brackets from the court's. Inserting paragraph breaks helps aerate dense text. And a zero-tolerance policy for footnotes helps the text to be more accessible and more easily ported to other formats. (Footnotes are a brilliant device in a manuscript on printed paper matter, but they become a terrible mess for formats like web, e-book, audio, etc.)

Citation Style

This casebook intentionally eschewed the Bluebook and other formalized citation systems in favor of simple conventions.

This book generally embraces the simplest possible way of constructing the court/year parenthetical when citing a case. The state abbreviation alone means that state's highest court. Paired with "App." it designates an intermediate state appeals court. The highest federal court (the U.S. Supreme Court) gets "U.S." Lower state courts that aren't the standard intermediate appellate variety get an abbreviation that's sensible. Lower federal courts get their expected abbreviations.

The court-designating abbreviations are generally used without regard whether they are paired with a reporter cite and what that might be. (Sometimes you can tell a court from the reporter abbreviation. Sometimes you can't. Sometimes it'll mislead you. Regardless, why assume readers have memorized coverage of reporter series?) States get their conventional newspaper-style abbreviations (nix the Bluebook).

Some examples:

Moore v. U.C. Regents (Cal. 1990)

Snow v. City of Columbia, 305 S.C. 544, 552-53 (S.C. App. 1991)

Harrington v. McCarthy, 169 Mass. 492 (Mass. 1897)

Martin v. Reynolds Metals Co., 221 Or. 86 (Ore. 1959)

Anderson v. WROC-TV, 109 Misc.2d 904 (N.Y. App. 1981)

People v. Segal, 78 Misc.2d 944 (N.Y. City Crim. Ct. 1974)

Food Lion v. Capital Cities / ABC (4th Cir. 1999)

New York Times v. Sullivan, 376 U.S. 254 (U.S. 1964)

Unmarked Edits Generally

Key to making a casebook is editing down cases. Many of these edits have been marked as described above. But there are many edits of included case text (and perhaps other readings) that are not marked within the text.

In general, whole citations and portions of citations have been liberally removed from the readings. Parallel citations have been removed generally. In some cases, punctuation was changed to accommodate cites that were eliminated without notation.

Footnote references and footnotes have been removed without notation.

Where a reading's original formatting didn't matter as to substance but could matter as to the reader's convenience, it may have been changed. Sometimes court opinions employ strange or awkward formatting – usually in connection with citations. In many such cases alterations were made to fit conventions and serve readability. In particular, spaces have been added or deleted in cases where the observed style was unconventional and jarring. Typesetting for citations may have been changed, such as from lower-case to small-caps for titles of journals. Formatting of headings has been changed. In cases where case names were printed in roman type, case names have generally been italicized. Where quotation marks around blockquote may have been altered. Lengthy portions of quoted material may have been re-set as blockquotes. Dashes and ellipses have generally been set in a uniform typographical style regardless of how they appeared in the original document.

Official headnote references have been eliminated. In addition, I have sought to remove all indicia of additions to any text made by unofficial publishers.

The author attributions at the beginnings of case readings, in general, are not attributable to the original source. In various places, the spelled-out word “section” may have been replaced with the § symbol.

Case citations may have been changed so that where the court uses a secondary-reference citation style, if it is the first reference in the case as it appears in edited form in this casebook, the secondary-reference cite has been replaced with the full citation as is appropriate for use on first reference.

Idiosyncratic Unmarked Edits in this Volume

The following notes memorialize some particular aspects of unmarked edits in particular readings:

Garratt v. Dailey: Text, obtained from an online database, was re-set with blockquoting and paragraph breaks as appeared appropriate; thus, paragraph breaks and formatting follow convention and may not correspond to the original. Style treatment of numbers modernized. Some citations restyled. (E.g., legal periodical titles set in small caps.) Parallel cites removed without indication. (Case added in 2026.)

Leichtman v. WLW Jacor: Spaces added into citation.

Sousanis v. Northwest Airlines: The word “the” was changed to “she” to reverse what appears to be a transcription error possibly attributable to the reporter rather than the court. The original passage appearing in the reporter volume is “a chronic back condition that worsens if the is forced to sit for too long.” The changed version is “a chronic back condition that worsens if she is forced to sit for too long.”

Hannabalson v. Sessions: One typo misspelling (“opprobious ”) was corrected. (Case added in 2026.)

Cleveland Park Club v. Perry: Footnotes, which contained the court’s citations, were eliminated without notation. Some citation matter – generally cleansed of parallel cites – has been inserted at the point of the footnote reference, set off by enclosure in parentheses. An extended quotation isolated as a paragraph was typeset as a blockquote. An ellipsis, set as three spaced asterisks, was re-set as three adjoining periods. (Case added in 2026.)

Boring v. Google: Section heading removed without notation.

Intel Corp. v. Hamidi: Brackets were changed to parentheses; paragraph breaks were removed without notation.

Acknowledgements

I want to offer my sincere and heartfelt thanks to my colleagues in the faculty, staff, and administration at both OU and UND for their considerable support.

Beyond the walls of my own schools, many others lent me their time and advice to help with this book. That includes those who have generously written me to point out errors in earlier editions. I am in your debt. Thank you.

Among those who have provided help and support, any list of names is incomplete, but in particular, I wish to thank Nick Datzov, L. Joe Dunman, Natalie Spear, Evan Gamble, Leslee Roybal, Shelby DeGeldere King, Jennifer S. Bard, Michael L. Corrado, Robert M. Linz, Joel V. Wegemer, Murray Tabb, Steven S. Gensler, Peter B Kutner, Patti Alleva, Paul LeBel, Keith Richotte, James Grijalva, Karen Martin, Jan Stone, Joan W. Howarth, Raymond D. Austin, Jennifer L. Schulz, Adam Gutride, Jim Dedman, Brian Schmidt, Devin Rogers, Pete Boll, Susan Carlson, and, especially, my wife, Kit Johnson. I also want to thank the anonymous reviewers who, through the original CALI editing process, provided excellent counsel.

In addition, I want to thank many people who have helped me in indirect but important ways by having illuminating discussions with me about torts – discussions that ultimately helped me frame the explanations that appear in this book. Those people include Paul Gowder, Sanne Knudsen, Sandra Sperino, John L. Watts, Bruce L. Hay, Guido Calabresi, Daniel J. Crothers, T. Joe Johnson, Zane Johnson, Sarah Johnson, and, most especially, my own torts teacher, Jon Hanson.

With regard to producing this book on a free/open-access/open-source basis, special thanks to Deb Quentel and everyone at CALI for supporting the original manuscript, to type designers Georg Duffner, Octavio Pardo, Matt McInerney, Pablo Impallari, Rodrigo Fuenzalida, and Eben Sorkin for their surpassing and exquisite open fonts, and to James Grimmelmann, Terry Fisher, Brian Frye, and Greg R. Vetter, for knowledge, trail blazing, and collateral support.

Most of all, I want to acknowledge and thank my students, particularly my torts students at the University of Oklahoma and the University of North Dakota. Over the years, my students have been genuine partners in helping me grow as a teacher and academic. And with this casebook, in particular, so many students have gone out of their way to give me suggestions, corrections, nudges, observations, and insights. That goes many years back with regard to the early forms of the materials that evolved into this book. And their help continues to today. I have to give a particular shoutout to my 2014-2015 and 2015-2016 torts students, who went above-and-beyond-the-call in helping me ferret out typos and rework unclear passages in the pre-publication draft of the original edition. Needing to err on the side of student privacy, I am making no attempt to list names, but I am truly indebted to my students. Thank you.

Dedication

For my mom, Gretchen Johnson

Table of Contents

Hey!

Hey Students: Actually Read This Short, Helpful Note

Key tips:

- If you're looking at the DOCX file, you'll want to download the three fonts it uses. They are all free. (See "Typography," above.)
- If you are using the DOCX file, your page numbers may shift, depending on your application and its settings (though getting the fonts may help).
- If you are using the PDF file, look for the navigation feature or interactive table-of-contents feature that many PDF readers have. The PDF file of this book should have coding that facilitates such features.
- You can – completely legally – not only copy this book, but also remix it into something new, and then distribute your resulting creation. See "Open, Share-It-Forward Licensing, Etc.," above. (I hope some of you might! Let me know if you do!)

Something you must understand about where this book is coming from: This casebook was written, in all sincerity, to help you as much as possible to learn what will be useful to you as a lawyer in the real world. Undoubtedly, it is not perfect in that regard. But any shortcomings are not for lack of sincere effort to direct this book entirely to the project of moving you toward successful legal practice.

Many law students have been on the receiving end of grim and bitter stories about law school. They've been told that law school doesn't teach you what is useful to practicing law. That it's just something you have to go through.

Some of this sour view originates from law school alumni who had bad experiences in the classroom. Why so? Some well-meaning teachers aim to teach straightforwardly and provide real-world-useful knowledge but just don't succeed with a few (or many) students for some reason. Some well-meaning teachers may feel constrained by tradition or expectations to obfuscate the material or to overindulge in theoretical aspects. (There used to be much more of that than there is these days.) And pretty much every teacher can have a bad year. But nearly all law professors care greatly about their students learning that which is actually important and useful. Could a bitter alumnus have had a teacher who was, in fact, an arrogant humbug who actually delighted in torturing students and placing an arbitrary and pointless hurdle in their path to a law career? It's possible, but having been on both sides of the fence, I can tell you those people are incredibly rare. The fact is, teaching well is hard, and sincere effort doesn't always appear as such to students.

But that's not all of what fuels a grim, bitter outlook on law school. Quite a bit originates from – and I don't want to belabor this, but it's true – folks who profit from sowing suspicion and fear. Sometimes it's indirectly, in the form of clicks and follows. Sometimes it's directly, in the form of fee-paid services.

At any rate, many – perhaps most – law students would be shocked as to how useful and on-point their legal education turns out to be in practice.

Recently, someone I know was accused of violating a city ordinance. They wrote up a letter to the city making numerous legal arguments, and they showed me what they got back. The letter they received from the city attorney was courteous and even kind as it went through the legal issues. And that was nice. But what I couldn't get over was how the city attorney's response read exactly like a top-of-the-class essay answer to a law-school issue-spotter exam question. It was so on-point for what I'd been recently trying to communicate to students that I wanted to copy it and wave it around in class as proof to my students of the usefulness of what they are learning. "See! Here it is!" I wanted to shout. But, of course, it wasn't mine to do that with.

All this is to earnestly urge you to please take this book, your Torts course, and all of your law teachers with a presumption of good faith. Doing so will serve you best as a budding lawyer. And, as a bonus, it will likely make all of law school a good deal more pleasant.

One more thing: This casebook is free. I do not make any money from it. But I do like to keep score. So if you find this casebook is helpful to you, please consider dropping me a quick note. I also greatly appreciate suggestions for improvement.

Often, a note from a student is the only way I know my casebook is being used at a particular school. And, the book's adoption, as well as anything nice said about it, is useful in the sorts of reports that all faculty have to write for reviewing committees, the dean, the provost, etc.

Here's wishing you all the best!

– EEJ (Contact me via ericejohnson.com.)

Teachers/Faculty: Please Read This Short, Helpful Note

Please let me know if you adopt this book! It's wonderfully fulfilling to know the book's getting used, and, as I'm sure you can imagine, it's useful to have the data point for doing that paperwork we all do for committees and the administration.

Also, I'm happy to share what resources I have with you. And I'd be happy to chat with you about teaching Torts. Maybe you can benefit from hearing about missteps I've made over about 20 years of teaching this subject. Or whatever else! Please reach out!

– EEJ (Contact me via ericejohnson.com.)

Foundations

1. Basic Concepts: Torts and Law

"Shoot! I'll do it!"

— Tow Mater in *Cars* (2005),
responding to the question,
"Anyone want to be his lawyer?!"

A. Lead-in

To start, it's helpful to get some context for what you will be studying: what torts is, where it comes from, and how it fits into the general scheme of law and the law school curriculum. In other words, before diving into the deep end of your one-L studies, it can be useful to gather some zero-L reconnaissance.

B. What is Torts?

Torts is traditionally one of the core, basic, required courses in law school. The subject of torts is civil lawsuits in which one person alleges that another person perpetrated some harm. Personal injury, medical malpractice, and defamation are all subjects of torts.

The subject matter of torts is broad and fundamental. If you asked someone off the street to write a list of 10 things someone could sue over, most of them would probably be torts. Not everything, mind you. Breach of contract is a matter for your contracts course. Suing to settle a title dispute about who owns a plot of land is something for your property course. And many modern lawsuit claims are based on specific federal statutes that aren't considered "torts." Examples include actions for copyright infringement, monopolization, and unlawful employment discrimination. Nevertheless, most of the traditional, frequently invoked claims that can serve as a basis for a lawsuit can be categorized as torts.

Someone punches you? That's a tort. It's called *battery*. A careless driver loses control and drives over your lovingly hewn shrubbery? That's a tort. You're looking at *negligence*. An enraged neighbor intentionally drives over your shrubbery? That's the tort of *trespass to land.* The neighbor does it over and over and over again? Well, depending on how lovingly hewn the shrubbery was and how your mental state has been affected, that could be the tort of *intentional infliction of emotional distress.*

Yet other torts include *slander*, *invasion of privacy, products liability,* and *fraud.*

The word "tort" dates back to Middle English, where it meant *a wrong* or *an injury*. The word, with its meaning, came to Middle English by way of Old French, where it derived from the medieval Latin "tortum." And that word was produced as the past participle of "torquere," which means *to twist.* Etymologically, the word "tort" is related to "torque," "tortuous," "torture," and even "tornado."

C. How Torts Fits In

Let's take a look at law school as a whole and see where torts fits in.

Law schools commonly have a first-year curriculum comprising subjects that are essential and foundational. That is to say: The subject matter is essential because lawyers need to understand the material for their work. And it's foundational because law students build on these subjects in classes taken as two-Ls and three-Ls.

Different law schools have slightly different variations, but the one-L curriculum typically features these six courses: Torts, Contracts, Property, Civil Procedure, Criminal Law, and a course in foundational lawyering skills of legal writing, researching, and analysis. This might be called Legal Research and Writing or something similar.

Torts can be described as a **doctrinal** course teaching **substantive, private** law. Explaining what is meant by those labels will help you see how Torts relates to and is distinguished from your other courses.

C.1. Doctrine vs. Skills

Roughly speaking, there are two sets of subject matter taught in law school: skills and doctrine. Sometimes both are taught in the same course, but often a course tends to be either a skills course or a doctrinal course. Generally, one-Ls will have one introductory course to teach you how to do the things a lawyer does. This may be called "Legal Methods," "Lawyering Skills," "Legal Reasoning and Argument," or something similar. You are taught how to do legal research, how to write a brief, and maybe how to present an oral argument in court. Advanced skills courses might be Trial Techniques, Negotiation Techniques, Business Transactions Drafting, Estate Planning, and the like. In contrast with skills courses, courses that teach the law itself are called doctrinal courses. Torts is a doctrinal course. Although a Torts course might include some skills exercises, the primary mission is to teach you what tort law is.

Now, that's all true. It's not erroneous. But to be fully candid, it does gloss over a rather important underlying reality. If we start thinking very deeply about the law and lawyering, we would find a lot of problems with trying to fully separate "doctrine" from "skills." At the end of the day, lawyers are paid to represent clients. And the actual practice of law tends to have little to do with being able to spit out answers coming from a large body of memorized information. Instead, lawyers generally are employed to represent clients in court, represent clients in negotiations over transactions, and to counsel clients about how to make decisions in circumstances where the law affects the opportunities they have and the risks they face. The essence of the lawyer's work is evaluating conflicting information and being able to see the arguments that can be made on both sides. So, at some level, all of law school is about skills.

But for now, you can put all that aside.

Torts is a doctrinal course where you'll learn tort law doctrine.

C.2. Substantive vs. Procedural

Doctrinal subject matter can be divided into two camps: procedural and substantive.

Procedural law is law that governs the function of legal institutions. Most first-year law students take a course called Civil Procedure in which they learn the law that governs civil lawsuits. This includes how to start a lawsuit by serving a summons and a copy of the complaint on the defendant, which court to file the lawsuit in, and other essentials. Other procedural courses include Evidence, which largely concerns when you can say "Objection!" at trial, and Federal Courts, which covers some fascinating questions about the power of the federal courts in relation to Congress, the president, and the states.

Substantive law, by contrast, directly governs what people can and cannot do, or to whom they will be liable if they do certain things. In many schools, a course called "Criminal Law" is about half procedural law (such as what constitutes probable cause) and half substantive law (such as the difference between murder and manslaughter). Torts is a body of substantive law. Contracts and Property are substantive courses as well.

Now if we think very deeply about the law, we will – surprise, surprise – find a lot of problems with the substance/procedure distinction. At some point in Civil Procedure, your teacher might excitedly declare, "Procedure is substance!"

But, again, you can put that aside for now. Torts is substantive law. And that means using tort law in court will involve applying a lot of procedural law you can learn elsewhere – including, very notably, what you'll learn in Civil Procedure and in Evidence.

C.3. Private Law vs. Public Law

Law can also be divided into "private law" and "public law."

"Public law" refers to direct regulation by the government of individual conduct. If you run afoul of public law, then you are in trouble with the government. Substantive criminal law fits within this category, as does constitutional law, immigration law, environmental regulation, zoning ordinances, and the motor vehicle code.

"Private law," on the other hand, refers to substantive law that gives one private party a claim on which to sue another private party. Torts is this kind of law. If you commit a tort, you are not in trouble with the government, but you might get sued by some private person. Another way to refer to private law is "the law of obligations," meaning that it is the law that recognizes obligations between private parties that are enforceable in court.

It is of course possible for the same action to create liability under both private and public law. Many actions that constitute a tort will also constitute a crime. If you intentionally kill someone, that's actionable in tort as wrongful death, and it is prosecutable under criminal law as murder.

Technically speaking, the government could – if they really wanted to – sue you as a private party in tort. But that almost never happens. If the government comes after you, they have more potent means in the public law than they have under private law. If you break into a secret Air Force installation, for instance, the federal government is not going to noodle around with a tort suit for trespass. The U.S. Attorney will go to a grand jury and come back with an indictment heavy with charges based on federal criminal statutes. Getting sued in tort would be delightful by comparison.

And if your mind is racing ahead to think of more ways in which the private/public distinction could get blurry, that's fine. This casebook won't try to stop you.

C.4. The Fundamental Concepts of Private Law

In most law schools there are three foundational first-year doctrinal courses that each revolve around an elemental concept in private law. Those courses are Torts, Contracts, and Property. Each of these represents an essential idea that can give one person a claim against another person in court. If one person injures another, that's actionable under **tort** law. If one person breaches a binding promise to another, that's actionable under **contract** law. If two people both claim to own the same thing, a court can resolve the dispute using **property** law.

These concepts are not just important as themes for first-year courses. They are fundamental ideas that animate law as a whole, and thus the concepts from them will reappear over and over again throughout law school.

Take misappropriation of trade secrets, for instance. If an employee takes a secret recipe from a baker and sells it to a competitor, that is actionable under trade secret law. Trade secret law is usually thought of as a separate body of law, not as a species of torts, contracts, or property. But at a fundamental conceptual level, when we ask why we have trade secret law, we find ourselves using the basic theories of tort, contract, and property to explain it. For instance, you could say trade secret misappropriation should be actionable because it constitutes a harm suffered by the originator of the secret. That's a *tort* way of thinking about it. Or, you could say the misappropriation should be actionable because it represents a broken promise, perhaps implicit, made by the misappropriator to safeguard the secret. That's a *contract* way of thinking about it. Or you could say that the misappropriation is wrong because the trade secret was owned by the originating party and thus the misappropriator had no right to transfer or dispose of it. That's a *property* way of thinking about it.

You can think of torts, contracts, and property as the great common-law triumvirate in the first-year curriculum.

There is a fourth elemental concept, although it does not get its own course in the core curriculum. That fourth concept can be called **unjust enrichment**. The same concept also goes by labels such as "quantum meruit," and "restitution." The idea here is that a court should transfer some wealth from one person to another because the other person deserves it more. This is a very broad idea, but it usually is only applied in rare situations where no other theory would reach a just result. For instance, when an unconscious person – incapable of assenting to a contract – receives emergency treatment in a hospital, a theory of unjust enrichment gives the hospital a legal right to get paid. You might cover this doctrine in your contracts course.

So, that's about it – four fundamental theories of the common law: tort, contract, property, and unjust enrichment. Most of the private law is built out of these four conceptions. So keep in mind that torts has a conceptual importance well beyond this single course. You can expect tort theories to come up in courses concerning constitutional law, intellectual property, civil rights, federal courts, securities regulation, and many others.

D. Where Tort Law Comes From

D.1. States vs. the Federal Government

In the United States, for reasons having to do with federalism and the dictates of the U.S. Constitution, tort law is almost entirely a creature of state law. Contracts, property, and unjust enrichment are, similarly, matters of state law.

This has a very important implication for this casebook: You are going to learn a generalized conception of tort law, not the law of some particular state. There are many different versions of tort law in the United States – including each state, plus the District of Columbia and various territories. Happily, tort law is mostly the same everywhere. But, unfortunately, you never know for sure what a particular doctrine of tort law is in any given jurisdiction until you check it out. And what may be a minor difference in the grand scheme of things could make all the difference in a particular lawsuit.

For you, as a law student, this is both annoying and liberating. It is annoying for obvious reasons: You could learn tort law extremely well, but yet not be able to answer any particularized question about it with certainty. It is liberating for the same reason – you are off the hook from knowing with certainty how the law will apply to any given situation. (This can make it a lot easier to dodge legal questions posed by members of your extended family when you are home for the holidays.)

By the way, when it is time for you to take the bar exam, you will find that most state bars require you to know the generalized conception of tort law, rather than your state's particular law. When it comes to torts, you could even get a multiple-choice question on the bar exam marked wrong by answering it accurately based on your state's idiosyncratic law.

Every once in a while, federal law has a say in a torts lawsuit, even in state court. But such circumstances are rare. And you may not even encounter such things in your Torts course, depending on what choices your teacher makes for the syllabus. Nevertheless, here are some examples: The federal Employee Retirement Income Security Act – better known as "ERISA" – can preempt tort lawsuits against health insurers. The Due Process Clause of the 14th Amendment to the U.S. Constitution has been held to put limits on the amount of money recoverable as punitive damages in torts lawsuits. And the Westfall Act prohibits most lawsuits against federal employees for on-the-job actions – even while the Federal Tort Claims Act allows many torts suits against the federal government to proceed.

D.2. Common Law vs. Civil Law

In American elementary schools, maybe even in middle schools and high schools, it is common to teach that the three branches of government – the legislative, the executive, and the judicial – each have three separate, distinct jobs: The legislative branch makes the law; the executive branch enforces the law; and the judicial branch interprets the law.

Unfortunately, this is wrong. It is not just slightly inaccurate. It is fundamentally wrong. Most of the private, substantive law that is on the books in the United States has been created by the courts, not legislatures. This kind of court-created law is called the "common law."

For the most part, what you will study in Torts, Contracts, and Property are doctrines of common law. In creating, fine-tuning, and revising these doctrines, the courts are not being "judicially activist." Under the common-law system, it is the job of the courts to do this. It has been this way for centuries.

The tort of battery, for instance, allows one person to sue another for a harmful or offensive touching. If someone kicks you, that's a battery. Battery is actionable as a tort not because a legislature passed a statute, but because, long ago, a court said so. Then later courts followed that court.

If you want to find the "law of battery," you will have to look in the reported opinions of the courts – not in the enactments of the legislature. This makes looking up the law complicated. And that is a large part of what people pay lawyers for: Reading through lots of cases to figure out what the law is – or could be argued to be – on any given matter.

You could criticize the common-law method as abstruse, wasteful, arcane, and undemocratic. And these criticisms would not be groundless.

On the other hand, the common law is widely admired, and, by many, it is beloved. The common law can be celebrated as an elegant and resilient institution that is nourishing of human flourishing, resistant to tyranny and irrationality, doggedly transparent, rigorously accountable, and forever answerable both to reason and to the will of the people and their elected legislature.

Regardless of what you think of it, the common-law method is the reality of how the law works in the "common-law countries," a group which includes the United States, the United Kingdom, Canada, Jamaica, Ireland, Tanzania, Australia, and New Zealand, among others. Looking at this list of common-law countries, you probably will not be surprised to learn that the common-law way of doing things derives ultimately from England.

There is another way of creating a system of private law that is much closer to the government/law model you may have learned in elementary school – that is, where the legislature makes the law and the courts interpret the law. In this other way of doing things, the legislature passes statutes that govern private legal causes of action. This method is sometimes called a "code system," since the essential doctrines are arranged in the form of a written code, an organized set of laws. This system is also called a "civil-law system." Countries that follow such a system are often referred to as "civil-law countries." Examples include France, Mexico, Germany, Japan, Guatemala, Switzerland, Thailand, Brazil, and many others. The phrase "civil law" can be confusing, because in the United States, the word "civil" is often used in contradistinction to "criminal." For instance, at a U.S. law school, the Civil Procedure course will cover the procedural law of "civil" lawsuits – meaning litigation that is not criminal litigation. In this sense, a tort lawsuit is a civil lawsuit, even though torts is a common-law subject. But to say that a country is a civil-law jurisdiction is to say that it follows a code system, in which the legislature creates the law of private obligations.

France is an archetypal civil-law jurisdiction. In France, the law that allows one person to sue another comes from the Napoleonic Code. The French civil-law heritage actually gives rise to two important exceptions to the common-law nature of torts in the United States and Canada. One state and one province have a code-based "law of obligations" rather than a common law of torts. Those two jurisdictions are, naturally, Louisiana and Quebec. Owing to their French colonial history, each has a legal system that is a descendant of the Napoleonic Code.

While the code system has advantages, many of which are immediately apparent – including organization and accessibility – you hopefully will come to believe from your one-L studies that the common law has a wealth of subtly attractive features.

In truth, both the common-law and civil-law systems have much to admire. That is perhaps why many countries – including Botswana, South

Korea, Cameroon, Kuwait, and Norway – have been described as having adopted a mix of the two.

D.3. The Place of Statutes with the Common Law

Even in a common-law jurisdiction, the legislature has a role to play in shaping tort law. While, for the most part, legislatures do not create tort law, they can if they want to. And when a legislature passes a statute on a point of tort law, then that statute trumps any contrary judge-made common law.

For instance, the courts decided long ago that killing another person is not actionable as a tort. If this sounds ridiculous to you, you are in good company. Legislatures have found it ridiculous as well. That's why state legislatures everywhere have passed statutes that create a "wrongful death" cause of action and allow "survivorship" claims. Thus, it is indeed true that some aspects of tort law are statutory in origin.

Nevertheless, tort law remains, in its essential character, a body of judge-made common law. And that has important ramifications for the typical Torts course: What you will study will generally not be statutes but a collection of "cases" – i.e., judicial opinions – through which judges have announced and sharpened common-law doctrines.

E. The Structure of a Tort Lawsuit

To proceed methodically through tort law, this casebook will follow what you might call the internal structure of a tort. Understanding this structure requires separating out the roles of the plaintiff and defendant, and then distilling causes of action, elements, and affirmative defenses.

E.1. The Parties

A **plaintiff** is someone who sues. A **defendant** is a person whom the plaintiff sues. In the torts context, this typically means that the plaintiff got hurt and the defendant is alleged to be responsible.

E.2. Causes of Action, Elements, Affirmative Defenses, and Burdens of Proof

A **cause of action**, also called a "claim," is a basis upon which a plaintiff can sue. Torts has several causes of action. Some examples are battery, negligence, false imprisonment, fraud, and assault. In order to have a meritorious lawsuit, a plaintiff will need to properly allege at least one cause of action. Plaintiffs can, and frequently do, sue on multiple causes of action in the same lawsuit.

Each cause of action can be broken down into a number of **elements**. For instance, the cause of action for battery can be divided into the following four elements: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. It is the plaintiff's **burden of proof** to establish each of these elements. The plaintiff must establish all of the elements of the cause of action in order to win. It is not enough for the plaintiff to establish one or even most of the elements. The plaintiff must establish every single one in order to win. If the plaintiff establishes each of these elements, then the plaintiff is said to have made out a **prima facie case**. "Prima facie" is Latin for "first face." You can pronounce it "PREE-muh FACE-shuh." If a plaintiff has established a prima facie case, then the plaintiff has presumptively won.

You can understand the requirement that a plaintiff must establish every single element just by thinking about it. Suppose you tap a stranger on the shoulder and ask her what time it is – after which she promptly sues you for battery. She can prove you undertook an (1) action, which was (2) intentional, and which resulted in (4) a touching. But the lawsuit must fail because there is nothing *harmful or offensive* about tapping someone on the shoulder. Because that element has not been established, the prima facie case for battery has not been made out. If you change the facts to replace the tap on the shoulder with a shove, then you have something harmful or offensive. And in that case there would then be a prima facie case for battery.

What does the defendant need to do to win a tort lawsuit? Absolutely nothing. At trial, the defendant can just sit back and see how things go, and if the plaintiff comes up short, failing to establish every element, then the defendant will win.

Now, even if the plaintiff establishes all the elements, and therefore has a prima facie case, the defendant still has two more ways to win. First, the defendant can undermine the plaintiff's prima facie case by putting on additional evidence to refute the proof offered by the plaintiff on at least one of the elements of the cause of action. This is called a **rebuttal defense**. If the defendant can disprove just one element, the defendant wins on that cause of action.

There is a second way for the defendant to win as well: an **affirmative defense**. If the defendant can establish an affirmative defense, then the defendant can actually stipulate to the plaintiff's entire case and yet still win. An affirmative defense defeats the entirety of the plaintiff's successful prima facie case.

Different tort causes of action have different defenses. For the tort of battery, two principal defenses are consent and self-defense. Let's say you punch someone in the face. That's a battery. But suppose you punch the person in the face in the context of a boxing match. In that case, you can establish the affirmative defense of consent. Consent is a complete defense to battery. Alternatively, if the punch in the face was in the context of defending yourself against someone physically attacking you, then you can establish the affirmative defense of self-defense.

It's a little strange how this works: If you punch someone in the context of a boxing match, you have committed a battery. That means that a prima facie case can be established against you. It does not mean the plaintiff will win when all is said and done, but it does mean the burden is on you, as the defendant, to establish that the punch was consented to in order to avoid liability. That's not to say that this will be difficult. Just provide credible testimony that the plaintiff stepped into a boxing ring and took a fighting stance while wearing boxing gloves – that will suffice to show implied consent.

The general standard of proof in a torts lawsuit is **preponderance of the evidence**. This means that it counts as "proof" to show that something is more likely than not. If a jury, after hearing conflicting evidence, determines it was 50.000000000000001% likely that a defendant acted with consent when punching someone, then that counts as proof. The preponderance standard works for whomever has the burden of proof in a torts case on a given issue. That is, the preponderance standard is the standard by which the plaintiff must prove every element of a cause of action, and it is the standard applied to defendants seeking to establish an affirmative defense.

One way of thinking about the burden of proof and the preponderance standard together is that it constitutes a tie-breaker. If the question is whether a prima facie case has been established for a given cause of action, then the burden is on the plaintiff; that means that any tie will go to the defendant. If the issue is whether an affirmative defense is established, the burden is the defendant's – so a tie on that issue will go to the plaintiff. (Just remember, a defendant is not required to prove an affirmative defense to win. If the plaintiff fails to prove any element of a given cause of action, then the defendant wins without doing anything.)

The preponderance standard can be compared to the well-known standard for criminal prosecutions: proof beyond a reasonable doubt. The reasonable-doubt standard in criminal law is a high bar. By comparison, the preponderance of the evidence standard in a tort suit is easy to meet. Suppose, after a trial, a jury collectively thought, "We aren't completely sure about what happened. But we think it's slightly more likely than not that the defendant intentionally killed the victim." That's enough for a wrongful-death verdict, so it's enough for torts. But it would lead to an acquittal for a murder charge – meaning it's not enough for a criminal action to succeed.

This brings up a related tip: When talking about tort law and tort cases, it's good practice to cleanse the word "guilt" from your vocabulary. Lawyers and courts pretty much never speak of anyone being "guilty" of a tort. Instead, the phrasing is that someone is "liable in tort" or "liable for the tort of" some specific tort – or just plain "liable."

One more note about causes of action and affirmative defenses: Remember that it is possible for a plaintiff to allege more than one cause of action in a lawsuit. In fact, it's typical. Similarly, a defendant may raise multiple affirmative defenses. A single altercation between two people could give rise to claims for battery, negligence, false imprisonment, fraud, defamation, and more. And each of those claims could give rise to multiple affirmative defenses, and all would ordinarily be dealt with in the same lawsuit.

Why allege more than one cause of action? Well, some causes of action entitle a plaintiff to more in monetary damages than others. Some are easier to prove than others. And sometimes, at the beginning of a lawsuit, you can't be sure of which claims might succeed.

The bottom line is that to get some relief, a plaintiff needs only to prevail with one cause of action. Similarly, for any given cause of action, a defendant can raise multiple affirmative defenses. But the defendant needs only to prove one affirmative defense to prevail with regard to any given cause of action.

E.3. Check-Your-Understanding Questions About Elements and Defenses

1. Preponderance of the elements?

A cause of action for negligence in a given jurisdiction has five elements: (1) the existence of a duty of care owed by the defendant to the plaintiff, (2) the defendant's breach of that duty of care, (3) an injury suffered by the plaintiff, that is (4) actually caused and (5) proximately caused by the defendant's breach.

A plaintiff is able to establish a preponderance of the elements, including duty of care, actual causation, and injury. Based on this showing, will the plaintiff be able to prevail?

2. How lazy can a victorious defendant be?

Let's suppose a person has been named in a lawsuit, and, consulting their attorney, expresses a strong desire to keep their personal time commitment and billable hours as low as possible. In this vein, the client asks their lawyer: "Is there any way I could win this lawsuit at trial without presenting any evidence, without your calling any witnesses, without your asking any questions at all of any witnesses, and without you making any arguments to the jury?"

If you were the lawyer, besides saying that might be a bad strategy, how would you answer the question?

F. The Common Law, Precedent, Blackletter Law, and the Surprising Unimportance of Particular Words

F.1. The Common Law Way: Cases and Precedent

Above, it was noted that the tort of battery allows one person to sue another for the intentional act of a harmful or offensive touching, and that this is actionable as a tort not because of a statute passed by a legislature but because of court decisions.

Here, more will be said about how this process – common law doctrine being created by cases – actually works.

When a court first creates a cause of action and first recognizes the elements of that cause of action, the court may not explicitly say that it is doing this. Take the establishment of the tort of battery, for instance. What's important is not that the court said it was declaring new law. Rather, what is important is that in some case a plaintiff sued a defendant over some intentionally inflicted harmful or offensive touching, and that the court awarded a judgment to the plaintiff on that basis.

Let's indulge in some historical fiction. That is to say, let's consider a narrative written to be faithful, as a general matter, to historical substance, but with fictional characters and details.

Ricksworth v. Bramthorpe
(fictional)

> Someone named Bramthorpe punched someone named Ricksworth in the nose. And then Ricksworth sued and won. The court explained its decision this way:
>
> > "When Bramthorpe punched Ricksworth in the face, Bramthorpe invaded Ricksworth's rights to be let alone and to be free from such physical menace. While Bramthorpe urges that he had good reason for the fisticuffs, as Ricksworth was nonchalant and insouciant after an accidental fire spread from Ricksworth's property to Bramthorpe's dwelling, and moreover that Ricksworth had "a punchable face," it does not matter. A civilized

> society does not indulge such tempestuous barbarity and neither shall this court. Therefore, it is ordered that Bramthorpe shall pay Ricksworth half a pound sterling."
>
> When this decision comes out, we've learned something new about the law – something new about when people are liable. And that guidance is valuable to lawyers and courts. Later courts now will be able to follow this case, reaching like decisions in like cases. And lawyers can expect that courts will do so.

Precedent, stare decisis

From the perspective of lawyers and courts that come along afterward and look back at a case for guidance on how future cases can and should be resolved, that previously decided case is called **precedent** (said like "PRESS a dent").

The common law works on precedent. A related phrase is **stare decisis**, which you can pronounce "starry dee-SCI-siss." It's Latin for "stand by things decided." The doctrine of stare decisis teaches that courts should determine current cases according to precedent.

The fact that later courts follow prior cases, and that society can expect courts to reach like outcomes in like cases is considered to be a good thing. It's regarded as a good thing because it furthers such desirable things as predictability, efficiency, and justice. (Why *justice*? Because treating like cases alike despite their involving different people is foundational to the concept of justice.)

But new cases aren't necessarily the same as old cases. With new facts, how should old precedent be applied? That's a good question. Actually it's *the* question at the root of the lawyer's profession in the common law system. How old precedent should be applied is for the lawyers to argue about and for the court to decide.

Standridge v. Chatsworth
(fictional)

> Some years after *Ricksworth v. Bramthorpe,* a woeful incident occurred in which Chatsworth yelled at Standridge, right in his face, "You are a loathsome pig! Go choke on a wad of roof thatching, you

cretin!" Standridge subsequently sued Chatsworth and lost. The court explained its decision as follows:

> "Plaintiff Standridge is not entitled to recover. All Chatsworth did was yell at him. The plaintiff's counsel argues the precedent of *Ricksworth v. Bramthorpe* requires allowing Standridge to recover in this case. Plaintiff's counsel urges we must allow the plaintiff's claim because *Ricksworth* stands for the proposition that all persons have a right 'to be let alone' and 'free from ... physical menace.' We disagree, however. The defendant in *Ricksworth v. Bramthorpe* actually contacted the plaintiff. In the case at bar, while the defendant was indeed menacing and in the plaintiff's face, there was no physical contact. We read *Ricksworth* as requiring physical contact for its result. Because Chatsworth did not physically contact Standridge, no legal action can be sustained on the basis of *Ricksworth*. Judgment is for the defendant Chatsworth."

With this new case of *Standridge v. Chatsworth*, we know more about the law than we did before. We now know that for the type of cause of action used in *Ricksworth v. Bramthorpe*, the defendant must physically contact the plaintiff. That's what *Standridge v. Chatsworth* teaches us, that mere insulting words are not enough for a legally redressable claim.

F.2. Bench Talk: Law Teaches. Judges Reveal.

The above discussion hopefully provided a sense of how the common law system works. But here are two more takeaways – specific things that are very helpful to notice.

First extra takeaway: You may have noticed the use of the words "teaches" and "doctrine" in that discussion. Those words are worth pausing over. Now, it's not wrong to say that a prior case "requires" or "mandates" something. But it's also quite normal to speak of prior cases "teaching" such-and-such about the law. What's up with that?

Well, that sort of phrasing is part of the centuries-old common law tradition. And, in fact, the phrasing of prior cases as having "taught" something is bound up with the word "doctrine."

The word “doctrine” tends to be a confusing one for zero-Ls and new one-Ls. In law, a **doctrine** is a unit of common law broken off for our analysis. We can speak of “the doctrine of” such-and-such requiring such-and-such. It can generally be replaced with the words “principle,” “rule,” or “provision.” But what it really means is “teaching” – as in the noun, i.e., “a thing taught.” Our English word “doctrine” comes ultimately from the Latin word *doctrina*, which means teaching. And that’s related to the Latin word *doctor*, which means teacher.

Second extra takeaway: You may have noticed in the above discussion that things were phrased as if each new case *reveals* something about the law, rather than *makes up* something new about the law. That’s common for the common law. In introducing something utterly new to the case law, a panel for an appeals court is very unlikely to say something like, “We’ve decided that the law will be … .” An appeals court is much more likely to say something along the lines of, “We believe that the law requires … .”

Taken to the extreme, a judge may view their role in the common law not as “making” law or even “interpreting” it, but rather “discovering” it. As if the law is out there in the universe, waiting for someone with a legal telescope to look in the right place and fiddle with the focus knob so as to gaze upon it with clarity for the first time. Judges aren’t producing legal doctrine – according to this perspective – rather, judges are using their intellect, diligence, and book learning to *find* it.

You can regard this, uncharitably, as a delusion. Or you can view it, charitably, as an admirable way judges have of disassociating their personal wants from their job as a judge. Or you can even view it as a pragmatic way to help maintain perception of judicial integrity. Or you can view it as mindless adherence to tradition. Or an affectation. To be honest, probably all of those views are accurate to one extent or the other.

F.3. The Common Law vs. Statutes – When Particular Words Matter and When They Don’t

F.3.a. Words and the Common Law

Now here’s yet another takeaway – and this may be the most important one for you to understand. And that’s especially so if you are about to read the succeeding chapters concerning actual torts and various details of tort doctrine. It is this: In the common law system, words are not very important.

What?!? Yes, it's true. What matters most in terms of precedent is the stories and the outcomes, i.e., the facts of the cases and who won. Also important is what the court said about why it decided the matter the way that it did. But the particular words that the prior cases used are not really crucial to the law itself.

Look again at the imaginary examples, above, of the first-ever battery cases, *Ricksworth v. Bramthorpe* and *Standridge v. Chatsworth.* Neither case used any of the words "act," "intent," "touching," "harmful," or "offensive." In fact, there was no mention of the word "battery." And yet those cases, if they were real, would unquestionably have established and developed the law of battery.

Suppose we are writing a brief to a court with the goal of persuading the court that, in this court's jurisdiction, there is a tort cause of action for battery. For us to demonstrate that the law provides a cause of action for battery, we need a case to cite. But it's entirely non-crucial that the court in that prior case used any of the words "act," "intent," "touching," "harmful," or "offensive." Or even the word "battery."

Admittedly, the lack of those words might make the case hard to find if we're doing a word search in a digital database of cases. So we can score that as annoying. What's more, the lack of the particular words we tend to associate with battery ("act," "intent," "touching," "harmful," "offensive," "battery") might make the case very cumbersome to explain to the court – whether in writing in our brief or in oral argument. We can score that as extra annoying. But the case will still be perfectly good precedent for battery doctrine.

That's not only illustrative of how precedent works, it's representative. Even typical. Common law courts are supposed to avoid breaking new ground in legal doctrine if they can at all help it. Even when a judge feels compelled to make/reveal/declare new law – believing it is the only way to resolve the dispute in front of them – it's typical for the judge, in writing for the court, to be very bashful about it, pretending there's nothing new afoot. It may take some later court, law review article, or treatise to use plain language to point out the reality that a particular case made new law.

By the way, while lawyers and courts speak of "cases" being precedent, the more technical term for the actual document – the court's written words that are recorded for posterity to be used as precedent – is "**judicial opinion**."

Opinion?!? Why would they call something an "opinion" if it contains actual law that is binding on later courts and lawsuit parties? Without worrying about the actual history of the usage of the word, we can chalk it up as having to do with that same cultural basket that includes the use of words like "teaching" and "doctrine" and the phraseology implying that courts discover law rather than produce it.

F.3.b. Words and Statutes

The situation is entirely the opposite with statutes. When a legislature passes a statute, the exact words they say are all-important.

Along those lines, legislatures don't mess about with phraseology implying they find law like a shiny penny under a shrub. Legislatures don't start a bill with, "We believe that the law requires … ." No. Your ordinary, everyday legislature is prone to grabbing clean sheets of paper and starting right off with something like, "BE IT ENACTED … ."

Particular words matter with statutes in large part because with statutes, the words are, in some sense, all there is. With a statute, there are no litigants, no dispute, no decision that *must* be made because there are parties disagreeing about a situation that needs a resolution. A legislature only acts if it wants to. Courts don't act unless they have to. Judges must sit and wait for a case to come in the door, at which point they are obliged to deal with it.

All this means that cases (judicial opinions) are, in their most essential nature, always backwards looking. While every judge is aware that judicial opinions will be preserved for use as precedent, the primary job of the writing judge is to explain the court's decision on the litigation matter that has come before it. If we are being hyper-precise and technical about it, the only thing truly decided by a case is that case. Future courts are bound by precedent under the doctrine of stare decisis, sure. But what exactly any given case of the past means as precedent for future courts is, inescapably, for future courts to decide.

This goes to the very core of the common law, and it's at the root of the notion that the common law system is sensible and trustworthy: Courts can be trusted to do a good job making (or "finding and explaining," if you prefer) the law because they decide only one case at a time, and each case has the court's full attention and is decided with the benefit of the opposing lawyers' arguments and all the relevant evidence.

Statutes, by contrast, are forward-looking. That's why we generally hope that legislatures will use committee hearings, expert-prepared research reports, and opposing arguments of constituents and lobbyists to arrive at something that is well-thought-out.

F.3.c. Thesaurus Dangers

Please understand that these warnings to hold in check the importance of particular words to the common law should not be taken to mean words don't matter.

Words are, of course, crucial for lawyers and lawyering. And if there is a cause of action that is known to judges and that has been written about in the treatises, law review articles, and judicial opinions, then lawyers and law students are very well advised to use the same words that are prevalent in the cases and legal literature.

If we go around looking for synonyms of the dependable, well-worn words used by the law – to add variety or spice things up – we'll quickly land ourselves in a slew of trouble. There's no faster way to ruin a good brief or written legal analysis than looking for synonyms to replace needful words like "element," "proof," "tort," "because," or "therefore," or, if we're talking about battery, words such as "touching" and "battery."

When it comes to legal writing, a thesaurus is a ready and lethal source of self-inflicted wounds.

But, at the end of the day, with the law itself, when we are talking about the common law, the words aren't the thing. What's crucial are the facts of the case and the outcome – and the concepts these represent.

G. Blackletter Law – Words to Use Warily

Because the common law is so untidy, because the common law's substance is so dispersed (in a sprawling, orderless amassment of documents, each of which, itself, is a sprawling mass of text), it is inevitable that people having to deal with the common law (law students, for instance) will find their way to something much more user-friendly.

That more user-friendly thing is what people are talking about when they use the phrase "blackletter law."

Blackletter law comprises strings of words that work as a series of shortcuts to understanding common-law doctrine. Masses of precedent are boiled down to crisp, concise phrases. As a consequence, blackletter law is tremendously useful for law students preparing for exams and for practicing attorneys trying to get a handle on the relevant legal doctrine for some new legal matter that has landed on their desk.

And for studying for the bar exam, blackletter law is a practical necessity.

But – and this is *very* important – blackletter law is not statutory text. And you must regard it accordingly.

In a statute, the text *is* the law. Formulations of blackletter law, on the other hand, are *not* the law. Rather, blackletter phrasings are stand-ins for the law. Thus, you must not treat words in blackletter phrases with anything like the regard that is due words in a statute.

With blackletter law, the words are just there to represent a *concept*, a concept that has been pulled, like taffy, out of the jumble of cases.

The bottom-line lesson is, when it comes to common law, do not fall into the trap of seeing the cases as a means toward achieving the end of learning blackletter law. Rather, let the blackletter law help you learn the real law, the law in the cases.

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2. An Overview of Tort Law

"If you don't know where you are going,
any road will get you there."

– attributed to Lewis Carroll, a paraphrase of the Cheshire Cat's counsel in *Alice's Adventures in Wonderland* (1865)

A. Lead-in

Now that you understand the fundamentals of causes of action, elements, and affirmative defenses, we can start to sketch an overview of the subject of tort law.

Before delving into the details of particular tort causes of action, it is extremely helpful to take the time to learn the broad outlines of the entire subject matter. Why? Having a framework of any subject makes it easier for you to understand and absorb details. Moreover, when it comes to torts, you will find that there are many points of connection among disparate aspects of the subject matter. For instance, an aspect of negligence doctrine – called res ipsa loquitur – is similar in important ways to the cause of action for strict liability. If you take the time at the outset to study the overview, you will be able to understand these linkages much more readily when they come up later on.

B. Organizing an Unorganized Subject

As a common-law subject, torts has no official organization scheme. It exists as a disconnected mass of judicial opinions spanning a multitude of jurisdictions. The opinions are placed, as they come out, into reporter volumes (i.e., those super lawyerly-looking books with matching spines lining the shelves in the law library). That is to say, the cases are just published in chronological order – not grouped by topic. In fact, you would have a hard time grouping cases by topic if you tried, because any given case often deals with multiple topics.

Yet to tackle the subject of torts methodically, it is necessary to adopt some organizational scheme. There is some unavoidable artificiality in doing this, but imposing some form of order is needed to make the subject comprehensible to the uninitiated.

The most straightforward way to organize the study of torts seems to be to group together causes of action, and then explore one cause of action at a time, running through the elements and relevant defenses for each. That is how this book is organized – at least for the most part. Unfortunately, some topics do not fit into this structure, since they are relevant to all or many tort causes of action. Such topics, which include remedies and special issues regarding who can sue, have been inserted where sensible.

To take a first cut at dividing up all the tort causes of action for study, we can separate them into two large buckets.

One bucket has torts that might be labelled with words like *intrinsic, tangible*, *lineal*, and *direct*. Included here are the torts of negligence, battery, trespass to land, strict products liability, and more. These torts are generally concerned with personal injury and property damage. Mostly this is bodily injury or physical damage to property, but there are some ways in which injuries of a purely mental or financial nature can form the basis for some of the torts in this category.

The other bucket has torts that could be labelled with words like *extrinsic, oblique*, *intangible*, and *indirect.* Included here are the torts of libel, slander, fraud, intentional interference with contract, intrusion-upon-seclusion-type invasion of privacy, and more.

None of those italicized words are perfect to identify their respective sets. And there's overlap between these two big groupings. But considering the world of torts to belong to one category or the other is helpful in starting to divide things up into manageable chunks. What's more, this sort of cleavage of the torts universe tends to track the ordering of innumerable treatises, casebooks, and other written treatments of tort law.

C. Torts Concerning Intrinsic/Direct Type Harms to Persons and Property

The first grouping of torts concerns harms of a generally tangible, lineal, or intrinsic nature to living persons or their physical property. These torts mostly concern some kind of direct injury to a person's physical body or physical property, although sometimes these torts can concern losses of mental well-being.

In this category of torts, the harm to person or property is relatively direct. Bar brawls, car crashes, and exploding soda-pop bottles are all examples.

These lineal-type tort causes of action can be divided into two categories: those that will accrue from accidents, and those that only apply to intentional actions.

The intent-requiring torts include battery and trespass to land, for instance, and the accident-inclusive torts include negligence and strict liability for defective products.

As a broad generalization, you will observe that there's a trade-off between the intent-requiring torts and the accident-inclusive torts. The intent-requiring torts generally do not require an injury. So I can sue you for trespass to land walking across my real estate even if you don't damage anything while you're doing it. Meanwhile, the accidents-included torts don't require proof of the defendant's intent, but you cannot sue unless there's damage. So I can sue you for negligence if your inattentiveness while driving causes a wreck that physically injures me or physically damages my car. But I can't sue you for negligence for your inattentive driving if there's no bodily harm or damaged property.

C.1. Causes of Action Useable for Accidents

There are two very important causes of action in tort law that can be used by plaintiffs without any need to show intent.

C.1.a. Negligence

The most general cause of action that is available for accidents is negligence. Motor-vehicle accidents, slip-and-falls, and most kinds of medical malpractice are negligence cases. There are five elements to the cause of action for negligence.

> In plain English:
>
> A plaintiff can win a negligence case – assuming the lack of any relevant defense – by showing that (1) the defendant had an obligation to be careful, (2) the defendant wasn't careful, and that carelessness was (3) an actual cause and (4) a not-too-indirect and not-too-far-fetched cause of (5) some injury or damage – generally bodily injury or damage to physical property.

Those are the elements of negligence. But those are not the words courts actually use to talk about negligence doctrine. We will have to translate our plain English into legal terms of art – "legalese" if you like.

> Restated in legal terms of art:
>
> A plaintiff can establish **a prima facie case for negligence** by showing: (1) the defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, and that breach was (3) an actual cause and (4) a proximate cause of (5) a requisite injury to the plaintiff's person or property.

The **duty of care** element simply means that, under the circumstances, the defendant had an obligation to be careful. A defendant is said to owe a duty of care (i.e., have an obligation to be careful) with regard to all "foreseeable" plaintiffs. This means that if you should have known you could hurt someone by being careless, then you had an obligation to be careful.

The **breach** element is established if the defendant was not, in fact, being as careful as they should have been. Generally, the standard for determining breach is the **reasonable person standard**. If the hypothetical reasonable person would have been more careful under the circumstances than the defendant actually was, then the defendant breached their duty of care.

The element of **actual causation** means that there is a logical cause-and-effect relationship between the defendant's carelessness and the plaintiff's injury. That is to say, if the defendant had actually been as careful as they were supposed to be, then the plaintiff never would have gotten hurt. Generally speaking, if the plaintiff would have gotten hurt *anyway*, then the element of actual causation is *not* met.

The element of **proximate causation** means, in essence, that the cause-and-effect relationship between the defendant's conduct and the plaintiff's injury cannot be too bizarre or too attenuated. If newlyweds driving back from their wedding reception are paying more attention to one another than to the road, and because of this, their car rear-ends yours, you can sue the driver, and maybe the distracting passenger, but you cannot sue the matchmaker who got the two lovebirds together. Why not? A court would say that even though the matchmaker's actions were an actual cause – since the automobile collision wouldn't have happened otherwise – the matchmaker's actions were nonetheless not a "proximate cause" of the collision.

The **injury** element requires that the plaintiff actually got hurt. So, for instance, you cannot sue someone in negligence just because you are mad at them for *almost* getting you killed. If you and your possessions come away without a scratch, then there is no negligence case. The injury requirement generally requires some physical damage to the plaintiff's personal property or some physical injury to the plaintiff's body.

That's the prima facie case for negligence. But even if the plaintiff succeeds in proving a prima facie claim, a defendant can still win with an affirmative defense. And there are three affirmative defenses that are particularly relevant to negligence.

The first two are **contributory negligence** and **comparative negligence**. These are really two different versions of the same idea, which is that the defendant is relieved from some or all liability if the plaintiff's own negligence contributed to the injury the plaintiff is suing over.

Contributory negligence is the older version, and it is part of the law in only a few states today. Comparative negligence (also commonly called "comparative fault") is the newer doctrine that has replaced contributory negligence in most jurisdictions.

Contributory negligence, where it applies, is a complete defense. Comparative negligence, however, may offer a complete defense or only a partial defense – depending on the law of the jurisdiction and the circumstances of the case. What's a "partial" defense? Often, the defense of comparative negligence will relieve a defendant of liability only for some percentage of the damages.

An additional affirmative defense is **assumption of the risk**. This defense is based on the idea that where the plaintiff knowingly and voluntarily assumed the risk of something bad happening, the defendant should not be liable.

C.1.b. Strict Liability

The cause of action for strict liability, like negligence, is another tort claim available in accident scenarios resulting in bodily injury or property damage. But while negligence is available broadly for just about any kind of accident, strict liability is available only in a few limited circumstances in which the law imposes an **absolute responsibility for safety**. Those circumstances are:

- wild animals
- trespassing livestock
- domestic animals with known vicious propensities
- ultrahazardous activities
- defective products

The elements for strict liability are the same as those for negligence with one powerful exception: The duty-of-care and breach-of-duty elements are removed. This means that if the cause of an injury falls into one of the five categories for strict liability, then it doesn't matter how careful a defendant was being.

> A plaintiff can establish **a prima facie case for strict liability** by showing: (1) the defendant's conduct falls into one of the categories for which there is an absolute responsibility for safety, and the defendant's conduct was the (2) actual cause and (3) proximate cause of (4) a requisite injury to the plaintiff's person or property.

If you know negligence, then the crucial thing to learn with regard to strict liability is understanding when it may be invoked. That is: How do we define the categories giving rise to absolute responsibility for safety?

Ultrahazardous activities trigger the absolute responsibility for safety. That much is clear. But there is considerable room for argument as to what qualifies as ultrahazardous. Some examples of activities the courts have said qualify as ultrahazardous are fireworks, blasting, crop dusting, fumigation, oil drilling, and just about anything nuclear. On the other hand, jurisdictions are split on whether transporting gasoline by tanker truck qualifies.

With regard to defective products liability, the key question is what counts as a defect. It's often said that there are three kinds of defect: a **manufacturing defect**, whereby some product wasn't made to specification; a **design defect**, where the product was designed in such a way that it was unreasonably dangerous; and a **warning defect**, in which the lack of a clear warning causes an otherwise safe product to be dangerous. An interesting aspect of strict products liability is that anyone in the distribution chain can be held liable, from the retailer to the distributor to the manufacturer.

We will save nearly all the elaborations, complications, and exceptions for later. But one might be worth mentioning now: Some readers may be given peace of mind to know that selling items at a garage sale does not make you a retailer for purposes of strict products liability.

A key affirmative defense for strict liability is comparative negligence, which, as we noted, is also known as comparative fault. In fact, it is the applicability of this defense to the non-negligence context of strict liability that arguably makes "comparative fault" a better name. (In this book, the phrases "comparative negligence" and "comparative fault" will be used interchangeably – all the better to get you used to the varying terminology.)

C.2. Causes of Action Requiring Intent – The "Intentional Torts"

The intentional torts are the first subject of study in this casebook, and an orienting rundown of the full set of intentional torts is the very next order of business in the chapter immediately following this one. So here, we'll keep it very brief.

Many torts involve some aspect of intent – such as fraud, for instance. But when people speak of "the intentional torts," they generally are referring to a classic list of seven torts of the sort that are among the lineal/tangible/direct torts as opposed to torts of the oblique/intangible/indirect/economic/dignitary sort.

The seven intentional torts are battery, assault, false imprisonment, outrage, trespass to land, trespass to chattels, and conversion.

The first four are "personal," meaning they involve some direct intrusion upon a living person (as opposed to physical property). Here each is boiled down to under 144 characters:

- **Battery** is tortious touching – punching, groping, stabbing, poisoning, and on and on.
- **Assault** is making someone think they are about to be on the receiving end of a battery.
- **False imprisonment** is restraining someone's movement, holding them against their will by force or threat.
- **Intentional infliction of emotional distress** (aka outrage) is causing severe mental distress by outrageous conduct.

The remaining three concern property interests. Reduced to soundbites, they are:

- **Trespass to land** is unpermitted going into or onto some aspect of real estate.
- **Trespass to chattels** is interference with or damage to non-real-estate tangible property – knickknacks, vehicles, furniture, etc.
- **Conversion** is trespass to chattels severe enough to force the defendant to pay the chattel's full value.

Crucially important for all the intentional torts are the affirmative defenses. Details will be forthcoming, but key defenses include **consent**, **self-defense**, **defense of others**, and **necessity**.

D. Torts Involving Oblique, Intangible Harms, Such as to Financial or Dignitary Interests

The other major group of tort causes of action applies where the harm is not a direct one to person or property. The harm may be financial, or it may be to one's sense of dignity or reputation. We will only discuss these very briefly, just enough to demonstrate the range of situations in which tort law provides a mode of redress for oblique harms.

Many of these oblique-type torts concern a purely financial loss.

The tort of **fraud** (in some jurisdictions called **deceit**) allows a cause of action in certain circumstances we would call, in the ordinary vernacular, "getting ripped off." A fraud claim requires that the defendant made a misrepresentation to the plaintiff, that the plaintiff relied on it, and that this ended up making the plaintiff worse off. A typical situation is where the defendant lies in order to get the plaintiff to purchase worthless goods or put money into a shady investment.

The tort of **intentional economic interference** allows a plaintiff to sue when someone does something to prevent the plaintiff from closing a business deal or getting the benefits of a valid contract. In the prototypical case, the defendant is an intermeddler, who for some reason, possibly out of spite, wants to make someone flounder in their career or line of business. The most important thing to understand about the intentional economic interference tort is that it cannot be brought against a party to a contract for failing to live up to the terms of a deal. The action available in such a situation is one for breach of contract. The intentional economic interference tort can only be brought against third parties who have no business involving themselves in the matter.

Other oblique torts are more concerned with the plaintiff's sense of dignity and integrity.

The tort of **defamation** can be brought against a person who communicates false, reputation-harming statements about the plaintiff. Defamation in writing is called **libel**, while defamation that is spoken is **slander**. Libel is easier to allege. For slander, a plaintiff will only be able to make out a prima facie case under certain circumstances, such as if the false statement is about certain sensitive topics or if the plaintiff can prove a direct financial loss resulting from the defamatory statement. The largest limitation on defamation comes in the form of the **First Amendment**, which can make it nearly impossible for public officials and public figures to sue their critics in most circumstances.

There are multiple torts that fit under the banner of **invasion of privacy**. One, **false light**, is similar to defamation in that it allows a cause of action for certain false statements, but it does not require the kind of harm to reputation that defamation requires. The tort of **intrusion upon seclusion** allows lawsuits against peeping toms and others engaged in eavesdropping, surveillance, or various other sorts of creepiness. Meanwhile, the cause of action for **public disclosure** allows suits against people who communicate embarrassing, private information about the plaintiff to the public at large. And finally, the tort cause of action called the **right of publicity** creates liability for certain commercial uses of a person's name, voice, or likeness. It is principally useful for famous people suing makers of unauthorized merchandise – like t-shirts, stickers, and coffee mugs – as well as for anyone whose name is unwittingly used in an advertisement. Consent is a defense – one, in fact, that you might find buried in the terms of service of online platforms.

There are yet more common-law tort causes of action – beyond what is covered in this book. Some of them are quite exotic. Examples are some relics of a different age that allow lawsuits to be brought by cuckolds and jilted bridegrooms. These may be more interesting for their historical value than anything else.

And there are still other torts – many with considerable present-day relevance – that are statutory in origin. These include claims against government officials for civil rights violations.

E. The Whole Torts Landscape Considered Together

As you can see, there are a variety of torts, each with its own tangle of convoluted doctrine prescribing when persons are entitled to redress. Ultimately, the range of tort claims and defenses reflects society's ideas about what counts as hurtful and wrong and what we owe to one another as citizens of the same complicated, crowded society. Our views on these subjects, of course, are complicated, so it is probably inevitable that tort law is complicated as well.

But as a student, take heart, because as complicated as it might be, tort law takes its current form from having been hammered into shape over the lumps and bumps of human concern – and that is a subject that you, just by living on this planet, have already become intimately familiar with.

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Intentional Tort Claims

3. Intentional Torts in General

"You did that on purpose!"

— Dr. Heinz Doofenshmirtz
in *Phineas and Ferb*, "Sidetracked" (2013)

A. Lead-in

There are seven traditional intentional torts – battery, assault, false imprisonment, intentional infliction of emotional distress (aka "IIED" and "outrage"), trespass to land, trespass to chattels, and conversion.

Four are personal: battery (invasive touching), assault (immediate apprehension of an imminent invasive touching), false imprisonment (detaining/confining someone), and intentional infliction of emotional distress (causing severe mental suffering by extreme and outrageous conduct).

Three are property-related: trespass to land (which includes trespass to all realty – buildings, fixtures, etc.), trespass to chattels (interference or damage to tangible, personal property), and conversion (trespass to chattels so extreme it justifies forcing the defendant to pay the full value of the chattel).

A more in-depth overview of intentional tort doctrine is forthcoming in this chapter further below. But first this chapter provides some framing and context for thinking about the subject of intentional torts as a whole.

B. The Context of the Intentional Torts Within Our Law, Our Society, and Your Studies

B.1. Intentional Torts as a Foundation of Civilized Society

There is a very strong sense in which the intentional torts correspond to a carefully designed foundation of a civilized society. Not that they were created that way. Rather, their structure makes sense when considered through that lens.

In a society that is small and tight-knit enough, a formal legal system may be needless. But when enough people are put together, then interpersonal relationships and cultural norms are not enough to allow each individual to feel secure in themselves and in what they need around them to survive and to thrive. The sense that people ought to have that security corresponds to a notion of "rights."

These are not fancy, advanced rights we are talking about here, like freedom of the press, but super basic rights like the freedom to not be randomly bludgeoned, or the right to keep food and tools you've made without having to fend off thieves. If a few people in a society can invade the rights of the others without limit or consequence, then the notion of society itself is threatened.

Many people's first thoughts about the use of law to secure such basic rights would be the criminal law. Sure. That will work. But criminal law depends not only on the courts but on the government – police, prosecutors, a penal system. If criminal law keeps the peace and gives you security in your person and possessions, then it is because of actions of the government (i.e., "the executive branch").

Tort law provides a means for an individual member of a society to force others to answer for their invasion of the basic rights of that individual member – without resorting to uncivil violence and without depending on government action to effect criminal enforcement. With tort law, everyone whose rights are invaded can take the matter of righting wrongs into their own hands, by instituting a private lawsuit against their antagonist. If you have access to the courts and if the courts recognize tort doctrine, then you don't need the attention and ministrations of the government.

If you were to list the most basic things you want others to not be able to do to you – assuming you will have to be answerable to others on the same basis – then you might come up with a list that corresponds pretty closely to the seven intentional torts.

Or not. You don't really have to agree with any of the foregoing. The point is not that you be persuaded by this particular view of government, rights, the courts, and tort law. Rather, the point is that this view is a way of making sense of the structure of intentional tort doctrine. And if you can see it as a coherent whole, you may be aided in mastering your understanding of it. That's both in terms of its overall architecture as well as its details: The seven intentional torts and their defenses can be seen as the foundation of a society where people feel secure in their persons and property while depending neither on the police and public prosecutors nor on a resort to violence and vigilantism.

B.2. In Legal History

It is fair to say that the intentional torts are the most basic tort causes of action, and accordingly, the doctrines of intentional torts tend to pre-date the development of negligence doctrine.

The phrase "fair to say" is crucial here, because it covers up a lot of messy history of the common law. The real history of the common law is bound up with common-law writ pleading, a terrifyingly complicated and abstruse system that was vanquished by modern civil procedure. And if you trace the history of tort doctrine back through the centuries, you'll find that rather than cleaving the world of redressable harms into intentional torts and negligence, the dominant bifurcation had more to do with whether the things being complained about were directly caused or indirectly caused by the actions of the defendant.

We won't say more about legal history here, except to note that for those new to the study of the law, the deeper history of common-law causes of action can be bewildering and confidence-shattering. Sometimes reading cases deeply intertwined with antiquated writ pleading can make you think you don't really understand what you've already learned. So when you come across them, take away what's useful for you and don't be troubled by the rest.

B.3. Vis-à-vis Other Subjects

The intentional torts – battery, assault, false imprisonment, intentional infliction of emotional distress (aka outrage and IIED), trespass to land, trespass to chattels, and conversion – are linked to and related to other subjects of one-L study in various ways.

Criminal law

The intentional torts have many, many conceptual and doctrinal linkages to criminal law. And, indeed, the earliest forms of tort actions in the English common law are understood to be spin-offs of criminal prosecutions. That being said, students should be wary of trying to apply knowledge learned in criminal law to tort law, and vice versa. Tort law and criminal law both have entwined early days in the English common law in the 1200s. But today's criminal law is a statutory affair, where state penal codes, criminal codes, and various other sorts of legislation have pushed the common law of crimes off the table. Meanwhile, torts – though it has been subject to some reforms around the edges by statute – remains a thoroughly common law subject.

Property law

The intentional torts play a key role in property law. In particular, the cause of action of trespass to land is of crucial importance in property law. Yet trespass to land is a tort. Accordingly, liability for trespass to land, and the rules of what makes for a prima facie case and what makes for an affirmative defense, are generally understood to be subjects of the course in tort law.

In exploring such matters, courses in tort law will say a plaintiff needs to own the property or have a present possessory interest to maintain a claim, and then move on to other things.

Property courses, by contrast, tend to focus on what ownership means, who wins between two people who dispute ownership or the right of possession, and so forth. Thus, the tort of trespass to land may be the cause of action in many cases in a property casebook, but such cases tend to hinge not on the tort doctrine of what leads to liability. Instead, to make it into the property books, such cases tend to hinge on who has the right of possession or ownership in the land itself.

Contract law

In a more attenuated way, the intentional torts play a foundational role for contract law. The cause of action for breach of contract is not a tort. The cause of action of breach of contract is within the domain of contract law. Yet a contract is a legally binding bargain whereby a promise of something is exchanged for something else. And the thing that is exchanged or promised often has value only because, at the end of the day, it's buttressed by the potential of tort liability.

For instance, consider the contract at issue in the 1903 English case of *Krell v. Henry*, in which enthusiastic royal-watcher Paul Krell contracted with C.S. Henry to rent some rooms in a building on Pall Mall to view the coronation parade for King Edward VII. (Edward's mother was the 63-year-reigning Queen Victoria, so it had been a long time since a coronation.) There would have been no point in Krell contracting to rent the place if Henry didn't have a legally redressable right to keep Krell out in the first place – a right enforceable through the tort of trespass to land.

B.4. Intentional Torts Compared with Negligence and Strict Liability

B.4.a. Surprises Lurk

In studying tort law, whether you encounter intentional torts first and then negligence and strict liability second, or whether you do it vice versa, it is helpful to consider how intentional torts and accident-embracing torts compare to one another.

One important reason for doing this comparison is that either way, when you start with one, you're in for a surprise with the other. And this effect is greatly intensified by the one-L context: Students are not only learning the law but learning how to learn the law.

If you study intentional torts first, you will get comfortable with the subject's well-ordered system of clear rules. (Applying the rules in practice isn't always clear, mind you, but the rules themselves tend toward being of the black-and-white variety.) This hard-won familiarity tends toward making you think that, even though you haven't learned all of tort law yet, you at least have learned how it works. But not so! Negligence law largely eschews crisp rules, embracing in their place hazy standards and fuzzy logic. It can feel like a nasty trick has been played on you.

If you study negligence law first, it's rough going right off the bat. You generally start with the fuzziest part of negligence doctrine – the existence of a duty of care. Then it's more vaguely articulated standards with habitually recurrent reliance on the word "reasonable" and – as if that might tie us too tightly – that fabulously spongy phrase "under the circumstances." Then, whiplash, comes the subject of actual causation, much of which is black-and-white and sharp-lined enough to turn a chess board green with envy. Then it's off to proximate causation, which jerks the class back to vagueness. This time, a whole swamp of it. Yet putting everything together, students see one pattern clearly emerge: The law largely conforms to intuitions of fairness. That's what explains all the slurpy, semisolid terrain that makes sucking sounds at your boots as you try to walk through it: In fashioning all the rules, clarity has been traded for fairness. But intentional torts doctrine largely took the other side of the bargain, seizing clarity at the expense of fairness. So negligence-trained students encounter the doctrine of intentional torts, they resist. Every clear answer seems to them like a trick, and inevitably, ineluctably, they succumb to a self-destructive impulse to make learning the subject much harder than it has to be.

So, either way, don't set yourself up for disappointment by assuming that all of tort law has the same essential nature or personality. And to help you see the whole more clearly, allow yourself to ponder, up front, the differences in approach.

B.4.b. The Intent/Damages Trade-off

When it comes to the accident-inclusive torts, such as negligence, it is no defense for the defendant to say, "I didn't mean to do it." The law can hold a person responsible for loss even without intent. But the accidental torts require as part of the prima facie case that the plaintiff show an actual injury – physical damage to the plaintiff's person or property.

In contrast, the intentional torts do not require proof of physical injury or damage. So, for example, intentionally spitting on someone qualifies as the tort of battery – even if there is no injury.

At the broadest level, considering both intentional and accident-inclusive torts together, there is a sense in which we can think of the defendant's intent as an alternative to the existence of damages. If the defendant intended to invade your legally protected interests in your body or property, then you may be able to recover regardless of whether actual harm has been suffered. That's intentional torts. On the other hand, if you have actually been hurt, then you may be able to recover regardless of whether the defendant intended any harm or offense. That's negligence and strict liability.

So when we look at the intentional torts and the accident-embracing torts together, tort law seems to take the stance that unless you've been hurt, or unless the defendant acted with bad intent, you should not bring your grievance to court.

Now let's be clear: That's an observation, a broad generalization. It's not really a rule of law. So you shouldn't think of it as a piece of doctrine you can apply in doing legal analysis of a set of facts. (As we get into the details, you'll see there are many exceptions and nuances that are important.) Rather, the point in telling you about the damages/intent trade-off is to help you see some of the deeper concepts at work in the overall architecture of tort doctrine. And that appreciation, in turn, may help you digest, remember, and ultimately master the legal rules at a more fine-grained level.

B.4.c. Differences in Doctrinal Structure

Another point of contrast between the intentional torts and the accident-inclusive torts is how the doctrine is structured. For accidents, there is really just one big cause of action – negligence, which takes care of the vast majority of claims arising from accidents. The other causes of action – strict liability, products liability, and informed-consent actions – could be categorized as modifications of negligence that are relevant in limited circumstances. By contrast, in intentional torts, there is no general tort of "intentitiogence." Instead we have seven specific intentional torts.

Painting with a broad brush, we can make some additional generalizations: While negligence is broad and flexible, the intentional torts tend toward the narrow and rigid. Correspondingly, while the doctrine of negligence is complex and its contours fuzzy, intentional torts doctrine is comparatively simple, with harder, more well-defined edges.

Take, for instance, the cause of action for battery. The elements are: (1) an action, that is (2) intentional, and which results in a (3) harmful or offensive (4) touching of the plaintiff. Those elements are mostly self-explanatory. There are some clarifications that will have to be made. For instance, does hitting someone with a thrown object count as a "touching"? (It does.) But such questions are relatively straightforward, and they have relatively straightforward answers. By contrast, the first element of the negligence cause of action is that "the defendant owed the plaintiff a duty of due care." That is not self-explanatory at all. Understanding what it means requires a lot of work.

None of this is to say that there are no difficult cases in intentional torts. There are, of course, hard cases on the margins. And novel facts can pose challenges to established doctrine. But, by and large, the intentional torts are generally about applying well-formed rules, not about balancing factors or making policy choices.

The bottom line is that moving between accident-inclusive torts and the intentional torts requires some mental adjustment. So if you start your study of torts with intentional torts, then when it comes to negligence you'll have to expect much less rule-intensiveness. And if you start learning intentional torts after studying negligence, you can look forward to intentional torts being a realm where questions of liability are more likely to lend themselves to a "right answer."

B.4.d. Differences in the Role of the Jury

Judges (aka "courts") decide questions of law. Juries determine issues of fact.

The doctrine of negligence and of the intentional torts does nothing to change the essential roles of the judge and jury with regard to law and fact. But the differences in doctrine do mean, as a practical matter, that the main factual issues that will preoccupy the jury tend to be different sorts of things in intentional torts cases and negligence cases.

For a negligence claim, intent is generally irrelevant. (An exception would be if there's a prayer for punitive damages and the defendant's bad intent is part of the rationale for why punitives are deserved.)

For the intentional torts, intent is doctrinally central, and as a factual matter, it lends itself to vigorous dispute. Thus, a large part of what juries must do in intentional torts cases is to decide whether or not the defendant had the requisite intent.

Meanwhile, in negligence cases, much of what the jury must do is apply vague standards based on what they know from common sense and from living in the community. For instance, negligence cases require proof of the breach of the duty of due care. How much care is due is generally gauged by what the hypothetical reasonable person would do under the circumstances. And determining what a reasonable person would do is largely left up to the jury. Lawyers can make arguments to try to sway the jury one way or the other. Experts can testify to the jury about what's reasonable. But at the end of the day, reasonableness is something to be determined in large part by a group of people who are, by design, lacking in any legal training.

C. An Overview of the Intentional Torts

C.1. What to Get Out of This Section

Here we will go over the main points of doctrine of all seven intentional torts. The chapters that follow go deeper, offering cases to read and getting into a lot of details and exceptions.

Why go through this overview if the same information (albeit with different examples and some varied wording) is coming up again in the chapters that follow? Here's the reason: If you first have a solid overall framework and forest-for-the-trees understanding, then, when you get to the details of any particular tort, element, or rule, you'll be able to learn it better, with more sticking power, because it will make more sense to you, as you'll understand how it fits into the bigger picture.

C.2. The Four Intentional Torts to the Person

First up are the four personal intentional torts.

C.2.a. Battery

The most basic of the personal intentional torts is battery. In fact, battery may be the most basic cause of action of all of torts and, arguably, all of law. The tort of battery requires **an act, with intent, effecting a harmful or offensive touching of a person.**

Commonly, the act element is easy to prove. Nevertheless, it is not a nullity. The act requirement plays an important role by keeping out situations where the defendant merely chooses not to prevent a harmful touching. Failing to intervene – that is, an omission to act – will not, without more, create battery liability.

The intent requirement is more relaxed than you might think. Knowing with substantial certainty that a person would be harmfully or offensively touched, for instance, suffices as intent for the purposes of battery. Intent is also satisfied where the defendant intended only a near miss – something that uses a doctrine called "transferred intent" (more on this later).

The concept of touching in battery is quite broad. For one, the touching does not need to be direct. Touching someone's clothing, or even an object the person is holding, can qualify. Setting in motion some process that eventually results in a touching qualifies as well. Setting up a bucket of water to pour on someone's head when they walk into a room weeks later will count as a touching.

The touching also does not need to be on the outside of the body. It will count as a touching to get someone to drink a beverage adulterated with a disgusting substance, a narcotic, or a quantum of poison.

Possibly the most potentially confusing element is that the touch be harmful or offensive. In keeping with a key unifying theme of the intentional torts, no actual harm need be done with the touching. A sturdy plaintiff, for instance, might not be harmed at all by a punch thrown by a weak defendant. For that matter, the plaintiff need not be offended. Regardless, a punch is "harmful or offensive" even if no harm or offense results. Thus, a punch is an actionable battery.

In a case without an injury, it might not be possible to win any appreciable monetary award. But a claim can nonetheless be made and vindicated. And since some harmless touchings are quite reprehensible (e.g., spitting on someone), a meaningfully substantial award of punitive damages might be justified as well.

Battery covers an enormous range of conduct, from the inappropriate to the catastrophic. Pulling hair is a battery. So is a bombing.

C.2.b. Assault

Assault is the **intentional creation of an apprehension of an imminent harmful or offensive touching**. In other words, making someone think they are about to be the recipient of a battery constitutes an assault. Throwing a punch and missing is an assault. Like battery, assault does not require an injury as part of the prima facie case.

Also like battery, the intent requirement is nonspecific. Intending to hit someone, but actually missing, qualifies as intent for the purpose of establishing assault.

C.2.c. False Imprisonment

The tort of false imprisonment is established by proof of **intentional confinement – experienced or harmful – of a person to a bounded area.** Kidnapping counts as false imprisonment. But a very brief period of locking someone in a room is false imprisonment as well. An actionable confinement can be accomplished by physical force, threat of physical force, or improper claim of legal authority.

Locking the plaintiff in the cellar would count. So would brandishing a firearm and saying, “Move and I shoot.” Overzealous store security guards can accrue liability for false imprisonment by making improper assertions of legal authority in detaining persons suspected of shoplifting.

No harm needs to be done, nor any injury inflicted, for a claim of false imprisonment.

False imprisonment is a civil cause of action that is analogous to – though not completely overlapping with – the crime of kidnapping.

C.2.d. Intentional Infliction of Emotional Distress, aka Outrage, aka IIED

The tort variously known as “outrage” or “intentional infliction of emotional distress” (a name unwieldy enough that it is usually shortened to “IIED”) is a more modern creation of the common law than battery, assault, or false imprisonment. Liability for the tort is triggered by **the intentional or reckless infliction, by extreme and outrageous conduct, of severe emotional distress**.

The key to remember with outrage is that merely insulting or treating someone badly will not suffice. The conduct has to be *extreme and outrageous.* Teasing and name-calling does not qualify. Falsely telling someone that a loved one is dead, however, would likely do it. Sometimes an outrage claim can be successfully pursued in employment situations where a worker's boss engaged in a prolonged campaign of harassment.

Also important, the mental distress experienced by the plaintiff must be *severe.* Making someone cry is not enough. Reducing someone to uncontrolled screaming or prolonged hysterical sobbing, however, would likely qualify as severe. Over the longer term, severity could be established by proving recurring night sweats, heart palpitations, panic attacks, or the wearing down of teeth through chronic grinding. Physical effects aren't necessary for proving a plaintiff's case, mind you, but they are certainly helpful in showing the needed level of severity.

IIED is something of an anomaly among the intentional torts for a couple of reasons. First, intent is not strictly required. Recklessness will suffice. Also, IIED is an arguable exception to our general observation that the intentional torts do not require a showing of damages. While there is no need to prove physical injury, property damage, lost wages, or the like, there is the requirement that the plaintiff suffer actual distress. If a plaintiff, perhaps because of a reserve of inner strength, were not caused severe distress despite the defendant's intentional and outrageous conduct, then there would be no cause of action.

C.3. The Three Intentional Torts to Property

Three claims concerning property round out the classic suite of intentional torts.

C.3.a. Trespass to Land

The intentional tort of trespass to land requires **an intentional physical invasion of a person's real property**. Real property is land along with anything built on or affixed to the land, as well as the subsurface below and the airspace above to a reasonable distance.

Failing to remove something from the plaintiff's land that the defendant is obligated to remove also counts as trespass to land.

To have a valid claim for trespass to land, no injury is necessary. Touching a physical portion of the land is not even necessary. A disgruntled homeowner could theoretically sue neighborhood kids for playing a game of catch in which a ball is thrown over a corner of the homeowner's lot. Of course, in such a case, no compensatory damages would be awarded, since there is no harm needing compensation. Punitive damages would be unavailable as well, since the kids' behavior would not warrant it. In such a case a court would likely award only nominal damages of $1. So, such a case would, as a practical matter, be pointless to pursue. But the fact that bringing such a claim is possible serves to illustrate the incredible sweep of the tort of trespass to land.

C.3.b. Trespass to Chattels

Chattels are items of tangible property that do not qualify as real property. Motor vehicles, paper clips, jewelry, horses, and helium balloons are all chattels. An action for trespass to chattels will lie when there is **an intentional interference with the plaintiff's chattel by use, intermeddling, or dispossession**.

The requirement for trespass to chattels is stricter than for trespass to land. Merely touching or waving a limb over real property counts as trespass to land. But for trespass to chattels, a mere touch will not qualify, nor will merely picking the item up. There has to be something more – something that amounts to an interference with the plaintiff's rights in the chattel. Stealing the item, damaging it, or destroying it would be more than enough.

C.3.c. Conversion

The intentional tort of conversion is an alternative cause of action for chattels. A conversion is effected by **an intentional exercise of dominion or control over a chattel that so substantially interferes with the plaintiff's rights as to require the defendant to be forced to purchase it.**

Conversion is essentially trespass to chattels, but with a heightened threshold that triggers a more powerful remedy. Here's an example: A defendant steals the plaintiff's car, puts a cinder block on the gas pedal, and causes it to propel itself off a cliff. That plaintiff has an excellent cause of action for conversion. Thus, the plaintiff can get the market value of the car before it was taken, and the defendant will take title to the smoldering wreck at the bottom of the canyon.

D. A Preview of Intentional Torts Defenses

Affirmative defenses play a starring role in the world of the intentional torts. The main defenses are consent, self-defense, defense of others, and necessity.

Most importantly, **consent** is a complete defense to the intentional torts. You won't succeed with a trespass to land lawsuit against guests you invited to your birthday party at your house. They can beat back your claim because you consented to their entry on your land. Likewise, you can't successfully sue your aunt for giving you a big hug – because you consented, impliedly if not expressly, to her touching you.

The defense of **necessity** allows you to avoid tort liability when you are acting to prevent a greater harm. For instance, you'll likely incur no trespass-to-chattels liability for absconding with a bowl of punch if you're using it to put out a fire.

And, of course, if someone tries to hurt you, you're entitled to use force in **self-defense**. If someone runs at you with a knife, you can sweep the leg and knock them to the ground without incurring liability for battery. (And, as soon as possible, get ahold of any surveillance footage capturing your triumph. That video footage sometimes gets erased sooner than you'd think.) Similarly, **defense of others** can allow a third-party intervenor to avoid battery liability for tackling your friend while your friend appears to be mugging your other friend – even though it's all a staged scene for a low-budget movie you're making. (Whatever is going on, by the way, don't stop recording.)

E. The Place of Damages in the Intentional Torts

As already emphasized, it is possible to plead and prove an intentional tort claim without a showing of damages. Nonetheless, the concept of damages does have an important place with the intentional torts.

At the outset, we need to note that there is often little point in bringing a lawsuit unless it is for damages. Therefore, in the real world, intentional tort cases will often include claims for compensatory damages.

Also, for many intentional torts, proving damages may be the quickest path to proving a prima facie case. For a battery claim, proving a physical injury makes it unnecessary to debate the issue as to whether the touching counts as "harmful or offensive." In an action for trespass to chattels, proving that the defendant's actions damaged the chattel means the "substantial interference" requirement is fulfilled, end of discussion.

But what about situations in which the plaintiff never succeeds in proving compensatory damages? What does the plaintiff get for prevailing in such a lawsuit? In such situations, courts will award **nominal damages**. "Nominal" here means "in name only." Nominal damages are usually one dollar, or a similar amount.

Why would anyone bother to file a lawsuit to get nominal damages of $1? Well, they almost never do. But there are a few reasons that a plaintiff might be motivated to pursue an intentional tort claim without damages. For one, an award of nominal damages might be useful as a means of establishing a legal right. A judgment in a trespass to land case, even without compensatory damages, can be used to get legal recognition of a property right. That, in turn, could potentially be the basis for an injunction against future trespasses. At that point, further trespassing can be deterred by the threat of contempt sanctions.

Probably the most lucrative function of nominal damages is as a hook upon which to hang an award of punitive damages. Let's consider a case of a defendant spitting on a plaintiff. Suppose the defendant is a spoiled A-list movie star who spits on a waiter at a restaurant. On top of nominal damages of $1, the waiter might convince a jury to award punitive damages in an amount sufficient to deter the defendant from such conduct in the future. And such an amount, for a rich celebrity, might be quite a lot of money.

Putting all practicality aside, a victory in court and $1 in nominal damages might, if nothing else, give a wronged plaintiff a feeling of satisfaction. And suing out of a sense of indignity happens more often than you might imagine.

F. Intent and its Various Iterations

F.1. In General: Purpose or Substantial Certainty

Now that we have a sketch of the intentional torts and understand their place in the overall architecture of tort law, it is helpful to look a little more closely at the concept of intent itself.

In general, "intent" means that the defendant either acts with **the purpose or goal of bringing about a certain consequence, or at least does so with substantial certainty that the consequence will occur**. The substantial certainty idea expands the concept of intent beyond the defendant's goals.

Suppose a defendant testifies in court, "I didn't really want to shoot the plaintiff. What I *wanted* to do was shoot the jukebox that the plaintiff was standing in front of. So, yeah, I pretty much knew the plaintiff was going to get shot. But that wasn't my *goal*." Here, the defendant's testimony establishes the requisite intent, since the defendant acted with substantial certainty. It doesn't matter that shooting the plaintiff wasn't the goal.

F.2. Divergence Among Torts

Beyond the fundamentals, the concept of intent begins to diverge among the various intentional torts. We said that intent means that the defendant acted purposely or with substantial certainty of producing *a certain consequence*. What "consequence" must be intended depends on the tort. With battery, for instance, the defendant generally must intend to commit a battery. But for trespass to land, the defendant does not need to intend a trespass at all – the defendant only needs to intend the action that causes the trespass. So, the intent to walk a certain path – even if undertaken in the earnest attempt to stay off the plaintiff's property – will satisfy the intent requirement of trespass to land. That is, the intent to put one foot in a certain place is intent enough, so long as that certain place happens to be across the property line. By contrast, the intent to raise your arms is not requisite intent for battery if you didn't think doing so would inflict a harmful or offensive touching on anyone.

Strangely, there is one intentional tort – intentional infliction of emotional distress – that, despite the word "intentional" in its name, requires only proof that the defendant acted with *recklessness*. (This may be one reason many people prefer the name "outrage" for the tort.)

F.3. Transferred Intent

Our discussion of intent is not complete without mention of the plaintiff-friendly doctrine of **transferred intent**. Where it applies, the doctrine of transferred intent allows the intent required by one intentional tort claim to be satisfied by showing the defendant's intent to do something that would have amounted to a different intentional tort claim.

The law recognizes **person-to-person** transferred intent, **tort-to-tort** transferred intent, and even transferred intent between torts and persons at the same time.

The concept is best explained with an example: If a defendant intends to hit Bart with a baseball, but errantly throws wide left so that the ball whizzes right by Ashanti's head, then the tortious intent to inflict a battery on Bart can be "transferred" to Ashanti for an assault claim. In this case, the intent transfers both from battery to assault and from Bart to Ashanti.

Transferred intent is generally recognized in U.S. tort law. But the details are disputed. Some say that intent can transfer among any of the five classic/older/traditional intentional torts of battery, assault, false imprisonment, trespass to land, and trespass to chattels. Other sources say that tort-to-tort transferred intent only works between assault and battery.

As a student, you might be inclined to wince at the news of the "disputed" nature of the doctrine in this area as an annoyance, an inconvenience on the forward march to mastery of tort law. But hold on. The dispute about transferred intent doctrine is actually very insight-producing about how the common law and the legal literature of secondary sources works. And it demonstrates how digging beneath the surface of seemingly settled, "blackletter" rules can unearth some nuggets of gold with which to surprise opposing counsel and win arguments in the courts.

Perhaps you are still impatient. *Just tell me the majority rule*, you might urge. Hmmm. That's precisely the dispute. There's kind of a majority view of what the majority view is, and then there's a newer, trending view of what the majority view is.

Haha. Yes, it's complicated – a real twisted-up puzzle. But why would that be bad? This is prime lawyering stuff. Read on.

Innumerable treatments of tort law declare that intent can transfer among persons and among any of the torts of battery, assault, false imprisonment, trespass to land, and trespass to chattels. (You can readily find examples by checking commercial outlines or study guides from commercial bar exam prep providers.) Under this view, acting with the purpose of effecting a trespass to chattels could suffice as the requisite intent for a battery. (An informal survey of books close at hand suggests this might be the majority view of the majority view.)

This view apparently dates to a 1967 article by William L. Prosser, *Transferred Intent*, in the Texas Law Review. Reaching into legal history as far back as the thirteenth century, Prosser found that the transferred intent doctrine traces back to the ancient, catch-all tort of "trespass" that ultimately spawned the "five modern torts," which Prosser lists in order as battery, assault, false imprisonment, trespass to chattels, and, finally, trespass to land. Prosser states, "It is fairly clear that when the defendant intends any one of the first four, his intention will be 'transferred' to make him liable for any one of the five, provided that the harm is direct and immediate, *i.e.* within the scope of the old action of trespass." 45 TEX. L. REV. 650, 655.

The tort Prosser left halfway out of his categorical statement, trespass to land, was more complicated, as he let on: "Where the tort intended is trespass to land, other considerations become involved. There is no essential reason why the doctrine should not be applied to make one who intends such a trespass liable, for example, for a resulting battery to a stranger. This was apparently done in one Illinois case ... . Other similar cases simply have not arisen." 45 TEX. L. REV. 650, 658.

Prosser is a giant among legal scholars, by the way. UC Berkeley, where Prosser was dean throughout the 1950s, lists him among its "Legends of Berkeley Law," writing: "William L. Prosser was the most influential American tort law scholar of the 20th century."

Pretty interesting, huh? A legal scholar's work revealed a crisscross of intent interchangeability springing ultimately from the primordial tort soup.

Except that he was completely wrong. That is the upshot of research done by legal scholar Peter B Kutner, whose 2016 paper, *The Prosser Myth of Transferred Intent,* provided a shakedown of Prosser's seminal '67 article. Kutner concluded: "Prosser advanced a mythical doctrine of transferred intent. What Prosser asserted to be the law was not the law when he wrote his article on transferred intent and amended his treatise. The cases he relied on to support his conclusions on transferred intent did not support them." 91 IND. L.J. 1105, 1107-1108 (2016).

Kutner found that American courts have generally accepted that intent transfers tort-to-tort between battery and assault, as well as person-to-person when it comes to battery and assault. Or at least courts did so after that view was set out in a 1934 work called the *Restatement of Torts* published by the American Law Institute. That view was repeated in 1965's *Restatement (Second) of Torts*. And that Second Restatement espoused the view that person-to-person transferred intent would also work for false imprisonment, for which Kutner also found support in the caselaw.

But tort-to-tort among all five torts of battery, assault, false imprisonment, trespass to chattels, and trespass to land? Not so much.

"As far as can be ascertained," Kutner wrote, "no court has ever endorsed and applied Prosser's claim that a defendant could be liable for any of the five torts stemming from the old trespass action when the defendant intended any one of the five. In modern American tort law, transferred intent operates only to the extent specified in the First and Second Restatements of Torts." 91 IND. L.J. at 1135.

F.4. Determining Intent

One last thing to point out is that intent is an issue for the jury. You may have wondered, how can you truly know what another person *intended*? In a metaphysical sense, perhaps there is no way to truly know the subjective mental experience of another person. But a jury's job isn't to engage in metaphysics. A jury decides, based on the preponderance of the evidence, whether the defendant acted with the requisite intent. The defendant might testify under oath that she or he did not intend the tortious action, but the jury can choose to disbelieve the defendant and decide, looking reasonably at the circumstances, that the defendant in fact did act with intent. That might not count as "proof" for a philosopher, but it counts as proof in a courtroom.

That's the general lay of the land with intent. The main takeaway should be that you cannot guess at what intent means based on your common understanding of the word "intent." You will need to carefully apply the specific doctrine (explained in succeeding chapters) for each intentional tort.

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4. Battery

"Ay, ay, a scratch, a scratch. Marry, 'tis enough."

Mercutio, freshly cut by Tybalt's sword, in
Romeo and Juliet, by William Shakespeare (1597)

A. Lead-in

Battery is intentionally touching someone in a way that is hurtful or offensive, harmful or abusive – i.e., in a way that invades their rights to bodily integrity. The tort of battery can fairly be said to be the most basic or most essential tort.

Along with the torts of trespass to land and trespass to chattels, battery traces its history in English law as far back as tort law goes, to an action called the writ of trespass *vi et armis* ("by force and arms"). Having its place in a triad alongside trespass to land and trespass to chattels, the tort of battery could just as well be called trespass to the body. That's the essence of the complaint – a physical intrusion by one person on another's flesh – whether accomplished by stabbing, spitting, grabbing, kicking, caressing, shoving, shooting, or any of a million other unwelcome ways.

B. Battery: Explanation

B.1. The Elements of Battery

Here is a blackletter statement of the elements of the tort of battery:

> A plaintiff can establish **a prima facie case for battery** by showing: (1) the defendant undertook an act, (2) with intent, effecting a (3) harmful or offensive (4) touching of the plaintiff.

Let's take the elements in turn.

B.2. Battery: The Act

First, there must be an act of the defendant. This is a simple requirement that is almost always very easy to meet. All it requires is that the defendant engage in some volitional action.

This requirement will not exclude many cases, but it will exclude a battery claim where the touching of the plaintiff is caused by some motor reflex or unconscious movement on the part of the defendant. So a sleepwalker can escape liability by pointing to the lack of an act, as could a jumpy person whose limbs flailed in reaction to a noise. But, of course, the jumpy person and the sleepwalker would also be excluded from liability by the second element, because there is a lack of intent. So in these cases, the act requirement is doing something, but not something practically different from what would be done by one of the other prima facie elements.

The act requirement, however, does have a usefulness distinct from the intent requirement in failure-to-act scenarios. The act element will exclude cases where the plaintiff's complaint is that the defendant failed to act to prevent a touching. For instance: Standing by and watching someone get hit by an object, even when a slight exertion would have deflected it, does not meet the act requirement. But note that persuading, with words, someone to stand in a certain spot where they will suffer a harmful or offensive touching would count as an act for the purpose of battery. And inveigling a third person to touch the plaintiff counts as an act; in such a case, if the intent is there and the touch is of the offensive or harmful kind, then the inveigler has committed a battery.

B.3. Battery: Intent

Next is intent. As is the case with intentional torts generally, acting either with purpose or with substantial certainty suffices as intent. Closing your eyes and swinging your arms widely in a tightly packed room – even if solely for the purpose of expressing an overwhelming *joie de vivre* – can suffice as intent for battery, because it's substantially certain that you will hit someone. Keep in mind, of course, that intent is a jury issue, so its determination depends ultimately on what the jury believes.

We still are left with this question: What is it that the defendant must intend? Unless transferred intent applies (discussed immediately below), the required object of intent is a battery. That is, the defendant must intend to inflict a harmful or offensive touching. This means that merely intending to move one's limbs is not enough to meet the intent requirement. Suppose you intend to pitch a baseball dangerously near an unaware bystander. That does not count as intent for battery. Now, it might be correctly characterized as negligence, and if the bystander is harmed, the thrower might be liable via a negligence claim. But the intent for battery would not be satisfied.

Importantly, the doctrine of **transferred intent** expands the scope of intent such that a defendant who intends to commit a battery on Arthur, but who misses and commits a battery instead on Beatrice, has acted with requisite intent for a claim by Beatrice. And in addition to transferring intent among persons, the transferred-intent doctrine permits transfers of intent between assault and battery. A defendant who intends an assault on Arthur – throwing a punch that just misses in order to make Arthur apprehend getting hit – has committed a battery if, despite aiming to miss, a touching occurs.

Intent can even transfer simultaneously from person to person and tort to tort. Throwing a hatchet with the aim of making a near-miss of Anne, but missing and grazing Burl, will suffice for intent to commit a battery against Burl.

B.4. Battery: Harmfulness or Offensiveness

People get touched by others all the time. One person may tap another on the shoulder to ask for the time. Persons in a crowd will unavoidably bump into one another. What keeps these touches from being actionable as batteries is the requirement of harmfulness or offensiveness. If it weren't for the harmful-or-offensive element, millions of battery claims would arise every second.

A touching that causes actual harm is harmful, and there is no need to take the analysis any further. But a touching need not inflict harm to be considered harmful or offensive. Nor is there a requirement that the plaintiff be "offended" in the sense of being affronted. A touching is "offensive" in the battery sense if it intrudes upon a person's reasonable sense of dignity.

To put it more plainly, people have the right to not be "messed with," and the harmful-or-offensive element tracks this. Any touching of a person in a way that is not socially sanctioned under the circumstances and that a person would reasonably find objectionable is a battery.

Societal convention plays a large role here. Tapping a stranger on the shoulder to ask the time is not battery because it's generally understood that this is how members of society interact with one another even when they are strangers. But tapping someone repeatedly on the shoulder to ask the time over and over again would be battery because, to sum it up in vernacular, "That's weird."

What counts as harmful or offensive may even differ geographically. In Boston, strangers brush into each other on sidewalks all the time. In Los Angeles – provided they are out of their cars and walking around – pedestrians don't touch. In Manhattan during the lunch hour, people unhesitatingly pack into elevators in such a way that there is substantial touching. But in the rural Midwest, people will wait for the next elevator rather than get cozy. Yet geographical differences only go so far. Even in Manhattan, if the elevator is otherwise empty and you sidle up and stand so that you are touching the next person, you have transcended social convention and likely committed a battery.

Regardless of whether some touchings – like the tap on the shoulder – are socially acceptable as a general matter, once a person has put another on warning, social convention yields to the individual's right to be let alone. Even a friendly hug of a close friend can constitute a battery after the friend bellows, "Don't touch me right now!"

One last point about the harmfulness-or-offensiveness element: Resist any tendency you might have to place emphasis on the words "harmful" and "offensive." There is no special significance to these particular words. They are simply the most often-used shorthand for describing a concept that arises out of precedent. It bears repeating that battery is a common-law doctrine, not a provision of a statute. The phrase "harmful or offensive" is essentially a slogan – a pithy, easy-to-remember phrase that helps represent something deeper and more complex. And not two things (i.e., one being "harmful" and the other being "offensive"), but one unitary thing. Along those lines, the phrase "messed with" is another slogan that can be used to represent that same, deeper idea.

B.5. Battery: The Touching

The prototypical case of battery would involve something like a defendant punching the plaintiff in the face. That certainly is a touching. But you should think about "touching" much more broadly.

The touching can, for instance, be indirect. Sneakily removing bolts in a balcony railing such that a person leaning on it falls will count as a "touching." So can putting some foul substance in a person's drink. Laying a trap for someone that doesn't spring until years later would be a touching as well.

Touching things physically connected to a person can also count as a touching. Yanking on someone's clothing, kicking the stool they're sitting on, or laying a finger on a stack of books they are carrying – all of those will count as a touching for purposes of battery.

B.6. Battery: Damages

Battery does not require damages for a prima facie case. A successful claim for battery without any proof of physical harm will entitle the plaintiff to nominal damages. On the other hand, any bodily injury that is sustained will serve to meet the requirement of harmfulness or offensiveness. In this sense, you might say that injury is sufficient but not necessary to round out a case for battery.

It should be kept in mind that although proof of compensatory damages is not required for a prima facie case for battery, a battery action will definitely be more financially enticing if it supports a significant compensatory damages claim. Any bodily injury that is a result of the battery will support a claim for compensatory damages. But plaintiffs can also generally recover compensatory damages that do not have a physical basis, so long as they stem from the battery.

C. Battery: Exploration

C.1. Case: *Garratt v. Dailey* (Wash. 1955)

C.1.a. Advance Notes

Among the most legendary cases for the tort of battery – and tort law as a whole – is the case of *Garratt v. Dailey*, 46 Wn.2d 197 (Wash. 1955). It stands for a number of key doctrinal rules of battery, including that touchings can be indirect and that there is no minimum age for a defendant to be liable for battery. But don't read this case simply for such blackletter rules. Allow yourself to be drawn into the story and to wonder about the characters and the circumstances beyond what is explicitly provided by the case.

Also, you should read critically. But what does "read critically" actually mean? For one, don't assume the case came out the right way. Consider whether you think the case reached the right result and why. But don't stop after you've formed an opinion. Use your own thinking as a springboard to evaluate the analysis and reasoning in the case. What are strengths? What are weaknesses? What was left out that you wish had been explored or explained? How could things have been made clearer?

You don't need to formulate particular answers to all these questions. The point of these questions is not to straitjacket you with a task list. It's the opposite – an enjoinment for you to free your mind. Thus: You should ponder over questions you find intriguing. You should form opinions you feel are worth forming. Trust your own sensibilities and curiosities. Consider that if you find something puzzling, that is likely because it deserves to be puzzled over.

C.1.b. Opinion

Note about editing marks: The superscript tilde ˜ denotes a deletion from the text. It is intended as a less obtrusive means of indicating an ellipsis than three dots or three asterisks.

Garratt v. Dailey

Supreme Court of Washington
February 14, 1955

46 Wn.2d 197. Ruth Garratt, Appellant, v. Brian Dailey, a Minor, by George S. Dailey, his Guardian ad Litem, Respondent. Supreme Court of Washington, Department Two. No. 32841. Judges: Hill, J. Schwellenbach, Donworth, and Weaver, JJ., concur. Opinion by: Hill, J.

Hill, J.:

The liability of an infant for an alleged battery is presented to this court for the first time. Brian Dailey (age 5 years, 9 months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the backyard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the backyard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

> "III. ... that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

> "IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any wilful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person* or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, *Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff*."

(Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be $11,000. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions (see Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9), state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be. *Paul v. Hummel* (1868), 43 Mo. 119; *Huchting v. Engel* (1863), 17 Wis. 237; *Briese v. Maechtle* (1911), 146 Wis. 89; 1 Cooley on Torts (4th ed.) 194, § 66; Prosser on Torts 1085, § 108; 2 Kent's Commentaries 241; 27 Am. Jur. 812, Infants, § 90.

In our analysis of the applicable law, we start with the basic premise that Brian, whether 5 or 55, must have committed some wrongful act before he could be liable for appellant's injuries.

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

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

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

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

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

See, also, Prosser on Torts 41, § 8.

We have here the conceded volitional act of Brian, *i.e.*, the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. *Vosburg v. Putney* (1891), 80 Wis. 523; *Briese v. Maechtle, supra*.

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

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

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

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

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

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

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

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

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

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

The plaintiff-appellant urges as another ground for a new trial that she was refused the right to cross-examine Brian. Some twenty pages of cross-examination indicate that there was no refusal of the right of cross-examination. The only occasion that impressed us as being a restriction on the right of cross-examination occurred when plaintiff was attempting to develop the fact that Brian had had chairs pulled out from under him at kindergarten and had complained about it.˜ The fact that plaintiff was seeking to develop came into the record by the very simple method of asking Brian what had happened at kindergarten. Consequently,˜ the restriction imposed by the trial court was not prejudicial.˜

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

Remanded for clarification.

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C.1.c. Arguments to Consider re *Garratt v. Dailey*

C.1.c.1. Intentional torts by young children

Consider the following argument:

> The court in this case is not bound by the law to impose tort liability for battery upon children of Brian Dailey's age. This proposition is supported by the following:
>
> First, there is no binding precedent on the Supreme Court of Washington. The cases cited are from other jurisdictions (Missouri and Wisconsin). The other authorities are legal commentaries (e.g., Cooley, Prosser, Kent). Cases from other jurisdictions and commentators' views are not legally binding.

> That there are many sources in favor of the rule should be accorded little weight if any at all. Rather, the court should scrutinize the soundness of their reasoning.
>
> The better argument is that contained in the law review article Francis H. Bohlen, *Liability in Tort of Infants and Insane Persons*, 23 MICH. L. REV. 9 (1924). In his scholarly treatment, Professor Bohlen observes: "Immaturity or deficiency which makes it impossible for the infant or insane person to realize the consequences of his acts and to provide against their effects, makes it equally impossible for him to realize the necessity of refraining from acts of aggression." Bohlen, 23 MICH. L. REV. at 32.
>
> In this case of first impression under the tort law of the State of Washington, where cited authorities have no force but the force of their logic, the correct holding would be the one that aligns with Professor Bohlen's analysis. Accordingly, the Washington Supreme Court should remand this matter to the trial court to determine whether Brian Dailey had the requisite maturity to realize the necessity of refraining from acts of aggression. If the factfinder determines Brian has this maturity, battery liability may follow. If not, then not.

A. What kind of argument is this? (For instance, how could you characterize it? Is it factual? Legal? Is it based on logic? Empirical facts? Credibility of sources?)

B. Is the argument persuasive? What are its strengths?

C. What are the argument's weaknesses? What are counterarguments?

D. How could the above argument be bolstered? In particular, how could it be bolstered against any identified counterarguments?

C.1.c.2. Inferring Brian's intent

Consider the following argument:

> The court says, "Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and

she would be entitled to a judgment against him for the resulting damages."

That is dubious because:

Number One: Small children (of, for instance, the age of 5) are impulsive and frequently do things for no reason at all, at least in the following sense: Children are often motivated to undertake various actions with no practical objective whatsoever, instead undertaking various actions in accord with hypothesized, non-existent circumstances, and this conduct often involves manipulating physical objects in such a way that is entirely inappropriate given the identity of the object but instead corresponds only roughly, speculatively, and dubiously to what would be appropriate for a wholly distinct not-present object, and then only under said purely hypothesized, non-existent circumstances. People call this "play." Put differently, for all we know Brian moved the canvas chair because he was pretending it was a pirate ship. Although given that the chair was made of wood and canvas, a sailing ship may be a little too on the nose. A 5-year-old might just as likely regard it as a howitzer, a robot, or a planet. Because of this, one cannot infer, by a more-likely-than-not (preponderance of the evidence) standard, that Brian's action was "for the purpose or with the intent of causing" Ruth Garratt to fall and hit the ground.

Number Two: Even if we were to generously regard the court's phrase of "with the intent of causing" as embracing Brian's mental state as having substantial certainty of bringing about Ruth Garratt's contact with the ground, it cannot be inferred that Brian necessarily regarded Ruth Garratt subsequently contacting the ground to be a harmful or offensive touching – at least not without additional evidence. Unless previously having witnessed an adult's catastrophic fall, or having been sternly lectured on the matter, or something similar, a 5-year-old has no reason to comprehend a person falling backwards, buttocks-first, to be harmful or offensive.

Consider, as ***subpoint A***, that small children are small and, proportionally speaking, have gigantic heads and short legs. This means their buttocks is actually and proportionately much closer to the ground.

> Moreover consider, as ***subpoint B***, that young children have growing bones that are softer and more pliable, and thus much less prone to fracture. (Children's hospital Scottish Rite likens a child's bones to "young tree branches, which bend before they snap." By contrast, according to Children's Healthcare of Atlanta, "An adult's bones are harder, more brittle and more likely to break than bend.") All this together means children are highly sproingy. (Interestingly, the first recorded use of "sproing" is around the time of the case.) At any rate, children are lousy with cartilage and don't get hurt easily from falling and thus have no necessary basis in experience for comprehending the possibility, much less the substantial certainty, that an adult in her 50s could be harmfully or offensively touched in the course of falling to the ground over the distance from the sitting surface of a possibly low-slung canvas chair to the ground of the backyard (plausibly sproingy itself, particularly in the verdant and ever-moist Pacific Northwest).
>
> Finally, ***subpoint C***, as a result of their experiences, a 5-year-old tends to understand the world as a place where falling down is not only hilarious but a well-accepted consequence of neighborly social interactions which ultimately build camaraderie and social cohesiveness within a physically dynamic milieu. One cannot infer intent to inflict a harmful or offensive touching from chair-pulling by a person in the trammels of such a worldview.

Regarding the preceding argument:

A. What kind of argument is this? (In particular, how does it compare to the argument that Washington law does not and should not allow a battery claim against children because immaturity that makes it impossible for a child to realize the consequences of their acts makes it impossible for them to realize the necessity of refraining from actions invading the rights of others?)

B. Is the argument persuasive? What are its strengths?

C. What are the argument's weaknesses? What are counterarguments?

D. How could the above argument be bolstered? In particular, how could it be bolstered against any identified counterarguments?

C.1.d. A Mystery that Leads to a Lesson in Good, Old-fashioned Lawyering: Suing a Kid: Who Pays?

Under the common law, parents are not financially responsible for tort liability incurred by their children. Many people are surprised to hear this, but it is true. A legislature is free to pass a statute making parents additionally liable for their children's torts, such that if a child doesn't have money to pay a damages judgment, a victorious plaintiff can recover the damages from the parents. But to the extent state legislatures have adopted such statutes, they are often quite limited, such as by circumstances or dollar amount.

Of course, a parent might be liable for a child's actions because of the parent's own culpability. A parent will have their own liability for battery by instructing a child to punch another child in the nose – if, that is, the child follows the instructions. And a parent could have negligence liability, for instance, by giving a child something dangerous or overseeing a situation in which a hyperactive, impulsive child runs around and hurts someone. Negligence claims in such circumstances can be called "negligent entrustment" or "negligent supervision." (These aren't different claims from "negligence," just more specific labels.) Either way, such claims are based on the parent's failure to use reasonable care – thus it's a case of the parent being liable for the parent's negligence.

There are other doctrines applicable in various circumstances that could make a parent liable when their child injures someone or invades someone's rights. But there's no general common law rule putting parents on the hook for their kids' torts.

So why did Garratt bother to sue the 5-year-old Brian Dailey, then?

We can guess.

Maybe Brian inherited money recently from a just-departed aunt who thought Brian was a nice boy and who valued his companionship. (And maybe, in this town in the 1950s, news of an aunt's inheritance made a quick circuit of the coffee shops.)

Maybe Brian Dailey was a child actor who had accumulated a substantial sum of money from the entertainment industry. Although, given that this took place in Washington, not California, that doesn't seem very likely.

Maybe there's some kind of clue in the case. And indeed, there's a huge clue within the case! But it's in a portion that was deleted from the casebook edit above. Here's the deleted clue-bearing passage:

> "It is argued that some courts predicate an infant's liability for tort upon the basis of the existence of an estate in the infant; hence it was error for the trial court to refuse to admit as an exhibit a policy of liability insurance as evidence that there was a source from which a judgment might be satisfied. In our opinion, the liability of an infant for his tort does not depend upon the size of his estate or even upon the existence of one. That is a matter of concern only to the plaintiff who seeks to enforce a judgment against the infant."

Garratt v. Dailey, 46 Wn.2d at 204.

There are two straightforward things that we can tell from this passage. One is a bit of law. The other is a bit of factual trivia. First, the legal bit: The law in the state of Washington is such that a child's tort liability does not hinge on whether the child is able to pay a judgment. (That, indeed, is the regular rule everywhere.) Second, the trivia fact: Brian was apparently backed by an insurance policy such that the insurer would pay the judgment.

But the most interesting thing revealed by the above passage is something not said out loud but that can be clearly inferred. And it's something very useful for a law student to understand. It has to do with the interaction of tort law, the rules of evidence, trial strategy, and jury dynamics.

To understand it, you have to understand evidence law. But that won't be a problem. Evidence is an upper-level law school class that is often a degree requirement and, regardless, is a matter of foundational, minimal competency for all lawyers. Evidence law is the law that decides how the judge should rule when someone says, "Objection!" at trial. The recurrent question in evidence law is whether certain testimony is "admissible," which means whether it can be "admitted" in evidence, which in turn means whether a jury can hear it.

Some parts of evidence law are, admittedly, quite complicated. But 98% of evidence law is extremely easy, and you can learn it in the next few seconds. Here it comes: Relevant evidence is admissible. Irrelevant evidence is inadmissible.

And "relevant" means what you think it means. It's relevant if it is useful for the jury in determining something that must be determined in order to reach a verdict. Otherwise, it's irrelevant.

So, for instance, when this case was at trial, evidence that is probative of Brian Dailey's intent would be relevant, because intent is one prima facie element of battery. (The word "probative" just means *tending to prove*.)

Thus, what we have here makes for a valuable lesson about trial lawyering.

Given that tort law determines what's relevant, and given that something must be relevant to be put in front of the jury, Garratt's lawyer is seeking a way of making the existence of the insurance policy relevant. That way, its existence can be revealed to the jury.

Why? Garratt's lawyer figures it like this: "Hey, a jury is going to feel a whole lot better in finding for my client Ruth Garratt and awarding a goodly sum against a small child, if, when the jury is going back to the jury room, they understand that the money is not going to come from Brian or his family, but is just going to sort of fall from the sky like rain, emerging essentially from the air because it's coming out of the coffers of some nameless, faceless insurance company."

That train of thought reflects standard conventional wisdom about juries.

So what's going on here is that the existence of the insurance policy is valuable to the plaintiff for a reason that has nothing to do with tort doctrine. Thus, the lawyer has set about constructing a legal argument for the insurance policy's legal relevance.

This is real, honest-to-goodness lawyering: Seeing the opportunity to further the client's interests, forming a strategy, and then constructing legal arguments to bring it to fruition.

As a result, the plaintiff's lawyer ends up in a rather funny position, arguing that the defendant cannot possibly be liable unless the defendant has some way to pay a judgment. That's right: The plaintiff's lawyer is arguing for a rule that would make it harder for plaintiffs to win in these sorts of cases! It's a one-step-back-to-go-two-steps-forward kind of thing.

But it doesn't work. The last thing the court says about it is: "That is a matter of concern only to the plaintiff who seeks to enforce a judgment against the infant." In other words, the court is saying the insurance policy is not relevant for this trial. If, later on, you've won and you're seeking to satisfy the judgement, then it will be relevant. But now, it's not.

C.2. Case: *Fisher v. Carrousel Motor Hotel* (Tex. 1967)

C.2.a. Advance Notes

This case explores the availability of damages for a battery that has no physical-injury component.

A key feature of the common law is that it consists of precedent, which is a set of cases, each of which is a story about real people involved in some actual dispute. This is very unlike statutory law, where a legislature promulgates a set of abstract provisions isolated from any factual, personal, or historical context.

For the common law, context is key. And, of course, not all of the context is reflected in the text of a case itself.

One thing about a case that is always worth noting is the year. It's often interesting to ask: Where does this case fit into American history? The following case is from 1967. Here are some things that were going on in 1967: The Cold War, the Space Race, the Civil Rights Movement, the Vietnam War, the Hippie/counterculture movement.

Something else to notice – something which is crucial in a way you may only fully appreciate when you are a practicing lawyer – is the procedural context or "procedural posture." What happened to get the case to this particular court at this particular point? In the following case, there was a trial. The plaintiff won the trial – the jury's verdict was for the plaintiff. But following the verdict, the judge rendered judgment for the defendants notwithstanding the jury's verdict. The plaintiff appealed to the intermediate appeals court. The appeals court affirmed the lower court, which is to say that the appeals court agreed with the judge's decision to render judgment for the defendants even though the jury found for the plaintiff. Then this state's highest court, the Texas Supreme Court, agreed to take review of the case.

As this case comes before Texas's high court, the question is whether the court will uphold the trial court judge's decision to render judgment for the defendants, notwithstanding the jury's verdict for the plaintiff, will stand.

All of that context surrounds what this casebook presented as a very well-established rule of battery: that no physical injury or damages are necessary for a battery, that an offensive touching suffices.

C.2.b. Opinion

Fisher v. Carrousel Motor Hotel, Inc.

Supreme Court of Texas
December 27, 1967

11 Tex. Sup. J. 143; 424 S.W.2d 627. Emmit E. FISHER, Petitioner, v. CARROUSEL MOTOR HOTEL, INC., et al., Respondents. From 61st District Court, Harris County. Appealed to Harris County, Tenth District, Fisher v. Carrousel Motor Hotel, Inc., 414 S.W.2d 774 (Tex. Civ. App. 1967). Writ granted, 11 Tex. Sup. Ct. J. 9, October 4, 1967. No. B-342. Opinion by Greenhill, Associate Justice.

Justice JOE R. GREENHILL:

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

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

The jury found that Flynn "forceably dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that Fisher could not be served there, thus subjecting Fisher to humiliation and indignity. It was stipulated that Flynn was an employee of the Carrousel Hotel and, as such, managed the Brass Ring Club. The jury also found that Flynn acted maliciously and awarded Fisher $400 actual damages for his humiliation and indignity and $500 exemplary damages for Flynn's malicious conduct.

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

> "The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by an action for the tort commonly called battery. The protection extends to any part of the body, or to anything which is attached to it and practically

> identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand will be sufficient; * * * The plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it."

Under the facts of this case, we have no difficulty in holding that the intentional grabbing of plaintiff's plate constituted a battery. The intentional snatching of an object from one's hand is as clearly an offensive invasion of his person as would be an actual contact with the body. "To constitute an assault and battery, it is not necessary to touch the plaintiff's body or even his clothing; knocking or snatching anything from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient." *Morgan v. Loyacomo,* 190 Miss. 656 (1941).

The rationale for holding an offensive contact with such an object to be a battery is explained in 1 Restatement of Torts 2d § 18 (Comment p. 31) as follows:

> "Since the essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body, it is not necessary that the plaintiff's actual body be disturbed. Unpermitted and intentional contacts with anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability is actionable as an offensive contact with his person. There are some things such as clothing or a cane or, indeed, anything directly grasped by the hand which are so intimately connected with one's body as to be universally regarded as part of the person."

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

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

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C.2.c. Questions to Ponder About *Fisher v. Carrousel Motor Hotel*

A. How important is it that the courts were available to hear Fisher's complaint? Some have opined that cases where no actual injury occurs would be better handled outside the court system, such as by some alternative dispute forum. If private arbitration or private mediation had been available, could that be said to serve as well or better than courts in a case such as this? What are arguments that such alternative dispute forums would not serve just as well as courts?

B. Consider that the Civil Rights Act of 1964 prohibits race-based discrimination by public accommodations such as hotels. Also note that the statute allows the United States to seek a federal injunction to prohibit what the Carrousel Motor Hotel did in this case. Even where such a legal tool is available, is it still important for a plaintiff to be able to bring a cause of action under tort law in a circumstance such as this?

C.3. Case: *Leichtman v. WLW Jacor* (Ohio App. 1994)

C.3.a. Advance Notes

The following case confronts the question of what constitutes a touching in the contentious context of talk radio.

C.3.b. Opinion

Leichtman v. WLW Jacor

Court of Appeals of Ohio, Hamilton County
January 26, 1994

92 Ohio App.3d 232. LEICHTMAN, Appellant, v. WLW JACOR COMMUNICATIONS, INC. et al., Appellees. No. C-920922. DOAN, P.J., and HILDEBRANDT and GORMAN, JJ., concurred.

PER CURIAM:

In his complaint, [Aaron] Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, {Andy} Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress."~

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other … , and
>
> (b) a harmful contact with the person of the other directly or indirectly results[; or]
>
> (c) an offensive contact with the person of the other directly or indirectly results.

In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." It has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness." Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact. R.C. 3704.01(B) and 5709.20(A); Ohio Adm. Code 3745-17.

As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury – that others will commit no intentioned aggressions upon them."

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. We do not, however, adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. Also, whether the "substantial certainty" prong of intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in employment cases as defined by the Supreme Court˜, need not be decided here because Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act. Finally, because Leichtman alleges that Furman deliberately blew smoke into his face, we find it unnecessary to address offensive contact from passive or secondary smoke˜.

Neither Cunningham nor WLW is entitled to judgment on the battery claim under Civ.R. 12(B)(6). Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal. Leichtman's complaint states, "At Defendant Cunningham's urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff's face."

With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. However, whether an employer is liable under the doctrine of respondeat superior because its employee is acting within the scope of employment is ordinarily a question of fact. Accordingly, Leichtman's claim for battery with the allegations against the three defendants in the second count of the complaint is sufficient to withstand a motion to dismiss under Civ.R. 12(B)(6).˜

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court. However, absent circumstances that warrant sanctions for frivolous appeals under App.R. 23, we refuse to limit one's right to sue. Section 16, Article I, Ohio Constitution states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

This case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case. Some need a forum in which they can express corrosive contempt for another without dragging their antagonist through the expense inherent in a lawsuit. Until such an alternative forum is created, Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.˜

Judgment accordingly.

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C.3.c. Questions to Ponder About *Leichtman v. WLW*

A. Do you agree that contact with smoke should qualify as a touching for purposes of battery? If so, how far should this be taken? To perfume? To bad breath? At a fundamental level, even noise involves physical touch – with one molecule in the air transferring kinetic energy to the next as part of the process of propagating sound waves. Where would you draw the line?

B. Is this a trivial case? Is that the implication when the court says, “Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts.”? Is it important that the courts should be available for cases such as this?

C. If there needs to be a place for disputes such as this, do you agree with the court that some alternative dispute resolution forum would be better? If you were assigned the case of *Fisher v. Carrousel Motor Hotel*, how does that fit into what the court says here about alternative forums?

D. If you were arguing that the courts should stay available for cases such as this, what societal interests could be said to be served by judicial resolution of disputes such as these?

C.4. Case: *Bohrmann v. Maine Yankee Atomic Power* (D. Me. 1996)

C.4.a. Advance Notes

This next case confronts questions of what constitutes a touching and the necessity of injury in the context of a nuclear power plant with radioactive emissions.

C.4.b. Opinion

Note about editing marks: The superscript angle brackets < > denotes material from a footnote that was inserted into the above-the-line text.

Bohrmann v. Maine Yankee Atomic Power

U.S. District Court for the District of Maine
May 1, 1996

926 F.Supp. 211. Erich BOHRMANN, Andrew Daniels, Jeffrey Gagnon, Nevena Novkovic, and Eric Ortman, Plaintiffs, v. MAINE YANKEE ATOMIC POWER COMPANY, Defendant. Civil No. 95-359-P-C.

Chief Judge GENE CARTER:

Plaintiffs, several University of Southern Maine students, have filed the present action against Maine Yankee Atomic Power

Company ("Maine Yankee") for injuries they allegedly sustained after being exposed to radiation when touring Defendant's nuclear power plant in Wiscasset, Maine.~

The facts alleged in the Complaint are as follows. Plaintiffs are five University of Southern Maine students who were among a group of chemistry students invited to tour Defendant's facility. Plaintiffs allege that approximately two weeks before their tour, there was a radioactive gas leak in Defendant's primary auxiliary building (PAB) as a result of design flaws and faulty engineering when Defendant "sluiced the demineralizers in its Chemical and Volume Control System." The students toured Maine Yankee on the morning of October 11, 1994, at which time, Defendant allegedly was in the process of repairing the leakage problem. Plaintiffs claim that "Maine Yankee officials had decided to flush out resin 'hot spots' in the demineralizer" and scheduled the procedure to occur during Plaintiffs' tour. Plaintiffs further allege that the officials were aware that the flushing procedure would release radioactive gases. Plaintiffs claim that they were never apprised of the problems at Defendant's facility.

Plaintiffs allege that each student was given a pocket-sized Self-Reading Dosimeter, which measures only gamma radiation. The students were not provided with Thermo-Luminescent Dosimeters, which also measure beta radiation and which are worn by the employees of Defendant.

Plaintiffs claim that despite his being warned that radioactive gases would be released in the PAB, the lead tour guide led the students into the "hot" side of the plant. Plaintiffs allege that the tour guides knowingly took the students through a plume of unfiltered radioactive gases. While the students were walking through the radioactive gases, the continuous air monitor in the PAB was sounding an alarm. After spending thirty to forty minutes on the "hot" side of the plant, the students returned to the "hot" side's entry point and stepped into portal monitors. Plaintiffs and the tour guides allegedly "alarmed out," indicating that they had all been exposed to excessive radioactive contamination from the tour. In fact, Plaintiffs Bohrmann and Ortman continued to "alarm out" up to twenty minutes after they left the PAB.

Plaintiffs allege that Maine Yankee employees never suggested that the students remove their contaminated clothing or that the students take a shower and wash themselves. Two hours after the exposure to radioactive gases, Defendant told a few students that they needed to go for a "whole body count" to assess their radiation exposure. Plaintiff Gagnon allegedly was told that he had nothing to worry about and was not told to undergo a whole body count. Plaintiffs claim that Maine Yankee employees falsely told them that they had not been subjected to gamma radiation and that only gamma radiation was "bad." Defendant's employees allegedly told Plaintiffs that they had not been exposed to anything that would pose a health risk.

Plaintiffs assert that Defendant did not promptly or accurately determine the radiation dose to which they had been subjected. Although urinalyses were done for the tour guides to determine possible inhalation of Strontium 89, Defendant did not offer to conduct such tests on Plaintiffs. Plaintiffs allege that Defendant belatedly used a whole body counter on a few of the students, but the device was not properly programmed to provide accurate readings. Defendant allegedly failed to calculate accurately the dose exposure for the students because Defendant's readings of exposure amounts were at least thirty to forty percent too low. It is not known how much radioactive gas each student inhaled.

Plaintiffs assert that Defendant deliberately failed to report the contamination of Plaintiffs and the tour guides to the Nuclear Regulatory Commission or the State Nuclear Safety Inspector until after the contamination was reported in the media several days later. Plaintiffs allegedly did not become aware of the extent of their exposure until they read a newspaper report of the incident later that week. Defendant allegedly destroyed the charts showing the level of radioactive gases in the PAB soon after October 11, 1994. Plaintiffs assert that such destruction makes it impossible to quantify the release of radiation to which they had been exposed and allegedly constitutes a violation of federal regulations mandating the retention of the records.

Plaintiff Bohrmann claims to have suffered a significant decrease in his white blood cell count. In addition, Plaintiffs allege that they live with "the significant distress and uncertainty caused by exposure to unreasonably high levels of nuclear radiation." Plaintiffs now seek compensatory and punitive damages.~

As concerns Plaintiffs' claims for damages pursuant to theories of intentional infliction of emotional distress and battery, the Court concludes that such intentional tort claims are not inconsistent with the federal safety standards. To recover on either theory, Plaintiffs must demonstrate that Defendant intentionally exposed Plaintiffs to radiation without their consent, and that such intentional conduct on the part of Defendant caused them damages. *See, e.g., Latremore v. Latremore,* 584 A.2d 626, 631 (Me. 1990) (setting forth elements of intentional infliction of emotional distress); *Pattershall v. Jenness,* 485 A.2d 980, 984 (Me. 1984) (an element of battery is an intentional act). <The Court intimates no opinion as to whether the facts as alleged by Plaintiffs amount to physical contact so as to constitute a battery.>

There is no reason apparent to this Court to believe that Congress intended that a defendant be insulated from liability for its intentional acts solely by complying with the federal safety standards. Instead, compliance with the federal regulations merely demonstrates the absence of negligence. See *Coley*, 768 F.Supp. at 629. The federal safety standards have no bearing on a defendant's liability for its intentional acts. While a plaintiff may recover on an intentional tort theory without proving exposure to radiation exceeding the federal safety standards, a plaintiff may not recover without first proving that he sustained damages, and such proof may be difficult to establish in the absence of proving a violation of the federal safety standards. See, e.g., *Laswell v. Brown,* 683 F.2d 261, 269 (8th Cir.1982) (concluding that "lawsuit for personal injuries cannot be based only upon the mere possibility of some future harm"), cert. denied, 459 U.S. 1210 (1983); *Johnston v. United States,* 597 F.Supp. 374, 425-26 (D.Kan. 1984); *Bubash v. Philadelphia Elec. Co.,* 717 F.Supp. 297, 300 (M.D.Pa. 1989) (concluding that mere exposure to radiation is not an actionable physical injury). Nevertheless, the absence of a violation of the federal standards does not necessarily establish the absence of an actual injury.~

Accordingly, it is ORDERED that~ Defendant's Motion to Dismiss be, and it is hereby, DENIED as to [battery].

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C.4.c. Questions to Ponder About *Bohrmann v. Maine Yankee*

A. Should intentional exposure to radioactivity count as battery? If you were assigned *Leichtman v. WLW Jacor*, is your position on radiation consistent with your position on tobacco smoke? Can you argue that one is battery but not the other? What could distinguish the two?

B. Compare this case to *Fisher v. Carrousel Motor Hotel*, if you were assigned that case. Why do you think the plaintiffs here were not able to recover for mental distress damages?

—||——||——||—

5. Assault

"Back off a bit with the blade, I beg. Held this close it flashes a baleful gleam of blood."

– Phrygian in *Euripides*, Orestes (408 B.C.)

A. Lead-in

An assault happens when the defendant intentionally creates for the plaintiff an imminent apprehension of a battery. That is, you're assaulted when you are made to think you're about to be harmfully or offensively touched.

Assault might seem like a strange tort. Before law school, you probably had an intuitive idea of battery. That is, you could probably guess that you could sue someone over a harmful or offensive touching. But it might come as a surprise that you can sue someone just for giving you the apprehension of such a touching. Nonetheless, assault is a long-established part of the common law's package of rights meant to foster and protect our civilized society. We all have the right to be free from the perception of imminent attack, and we can sue to enforce it. It's a right that has existed in the common law for centuries.

B. Assault: Historical Footings

B.1. Case: *I de S et Ux v. W de S* (Assizes 1348)

B.1.a. Advance Notes

The following case is credited as the first to recognize the action of assault. Many of the details are lost to history. We don't even know the litigants' names, save their initials. Yet even though we are separated from the litigants by many centuries, the hatchet swing in this case still paints a vivid picture.

In the case's caption, "Ux" means "wife." In this case, that's the spouse of "I de S."

B.1.b. Opinion

I de S et Ux v. W de S

At the Assizes
Unknown month and date, 1348

Y.B.Lib Assessonum folio 99, placitum 60.

The FACTS as set forth by the REPORTER:

I de S and M, his wife, complain of W de S concerning this that the said W, in the year etc., with force and arms (*vi et armis*) did make an assault upon the said M at S and beat her. And W pleaded not guilty. And it was found by the verdict of the Inquest that the said W came at night to the house of the said I and sought to buy of his wine, but the door of the Tavern was shut and he beat upon the door with a hatchet which he had in his hand, and the wife of the plaintiff put her head out of a window and commanded him to stop, and he saw and he struck (at her) with the hatchet but he did not hit the woman. Whereupon the Inquest said that it seemed to them that there was no trespass since no harm (was) done.

THORPE, C.J.

There is harm done and a trespass for which he shall recover damages since he made an assault upon the woman, as has been found, although he did no other harm. Wherefore tax the damages, etc., and they taxed the damages at half a mark. Thorpe awarded that they should recovered their damages etc. and that the other should be taken. And so note that for an assault made a man shall recover damages, etc.

So ordered.

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B.1.c. Historical Note on *I de S et Ux v. W de S*

The recognition of an action for assault in *I de S et Ux v. W de S*, where there was only a mental harm and no physical contact, represented a great step in the evolution of tort law to its modern form. William Prosser's classic torts casebook calls *I de S et Ux* "the great-grandparent of all assault cases." Victor E. Schwartz et al., PROSSER, WADE AND SCHWARTZ'S TORTS 37 (11th ed. 2005). To the extent that is true, and given that assault itself can be credited with sprouting still other torts, *I de S et Ux* has a claim on being the great-great-grandparent of all actions for negligent infliction of emotional distress and intentional infliction of emotional distress.

While 1348 was an important year in tort law, English history remembers the year mostly for something else. In June 1348, ships crossing the English Channel first brought bubonic plague to Dorset on the southern edge of England. The ensuing epidemic – the Black Death – moved across the country to kill half of England's population before the end of the year.

One wonders how *I de S et Ux* fits into that history. Perhaps the case represents the eve of catastrophe – a moment when English society had a high enough standard of living that it had the luxury of recognizing fundamental rights of people to be left alone even where no physical harm was suffered. Or perhaps *I de S et Ux* came down while the epidemic raged. If that were true, it might be seen as a stand taken against the breakdown of civil order despite mass death and an impending sense of doom.

C. Assault: Explanation

C.1. The Elements of Assault

Here is a blackletter statement of assault doctrine as it exists today:

> A plaintiff can establish **a prima facie case for assault** by showing: (1) the defendant undertook an act, (2) with intent, effecting (3) the imminent apprehension of (4) a harmful or offensive (5) touching of the plaintiff.

Let's take the elements in turn.

C.2. Assault: Intent

To meet the intent standard for assault, the plaintiff must show that the defendant intended to create the apprehension in the plaintiff that is the essence of the tort.

But, as an alternative, the plaintiff can use the transferred-intent doctrine – transferring intent from person-to-person and from tort-to-tort.

In the assault context, person-to-person transference of intent takes place when the defendant intends to create an immediate apprehension in X, but in fact causes an immediate apprehension in Y. In such a case, Y can show the requisite intent for the prima facie case.

Tort-to-tort transference of intent takes place between battery and assault. Suppose the defendant intends to strike the plaintiff in the back – thus intending to commit a battery but not an assault. This intent suffices for the intent element of an assault claim. So if, for instance, the plaintiff turns around just before the defendant strikes, and thus is able to move out of the way, the plaintiff has a good cause of action for assault.

As explained previously, transferred intent can also work two ways at once. If the defendant intends to commit a battery by throwing a beer bottle at Jill, but throws wide left so that Kai has to duck out of the way, the defendant has exhibited the requisite intent for Kai's claim against the defendant for assault.

C.3. Assault: Apprehension of Imminent Contact

Assault requires that the plaintiff experience an immediate apprehension of a battery.

Importantly, **the apprehension must be of an imminent or immediate touching**. Threats of harm that might occur in the future – even in the quite near future – will not support an apprehension claim. Having the plaintiff anticipate a battery the next day or even later in the same day is not enough. The apprehended contact need not be of something happening instantaneously, but it must be of the present. The idea is that unless something happens now – an escape, a defensive counter-move, an intervention by a third party, or a quickly changed mind on the part of the defendant – a battery is coming.

It does not matter, by the way, if the threatened battery could not come to fruition. Aiming an unloaded gun at a person – so long as the person believes the gun to be loaded – counts as an assault.

Apprehension is distinguished from fear. Fear is not required for an assault case. Suppose a small child – cranky and weak from having missed an afternoon nap – swats at a mixed-martial arts champion. No fear results. But there is an actionable assault. It might be a bad move as far as public image goes, but the MMA champ can sue the child for assault and win.

Traditionally, there had to be some physical act or movement to effect an assault. It could be raising a stick for a swing, or even reaching into a pocket. Sometimes courts say that "words alone cannot constitute an assault." Many courts, however, when pressed, would probably agree that surrounding circumstances could make for a situation in which an assault would lie for words alone. A plaintiff already held at gunpoint by a third party, for instance, would, one would certainly think, be able to add an assault claim against the interloping defendant who yells "Fire!"

Authorities observe that words can have the effect of alleviating the potential for an apprehension.

Suppose the defendant says, "I don't have any bullets, which is a shame," at which point the defendant pulls out a pistol and says, "because if I did, I would shoot you right now." There is no assault in such a situation – at least according to various commentators. It should be pointed out, however, that while this example holds up as a simplistic, abstract hypothetical, it does seem a bit dubious in a real-life context. A jury, one imagines, could readily believe a plaintiff's testimony that they experienced an apprehension of imminent gunfire despite the defendant's ammunition disavowal. Anyone unhinged enough to pull a gun on you, saying it's unloaded but stating a wish to do you harm, might plausibly be regarded – one would think – as unhinged enough to in fact have a round chambered.

C.4. Assault: Harmful or Offensive Quality

The requirement for harmfulness or offensiveness of the apprehended touching is the same as it is for the actual touching of battery. For assault, the apprehended touch could be violent, disgusting, amorous, or all of those things. It might be slight or severe. What matters legally is only that the touch would be among those that are hurtful, harmful, abusive, or offensive, such that it represents an incursion into the physical domain of one's own bodily integrity and dignity.

As with battery, the phrase "harmful or offensive" should not be parsed as words, each of which is grasped by way of a dictionary. Rather, "harmful or offensive" should be understood as a mere slogan representing a large and sprawling mass of precedent. It's a concept about the right to be free of corporeal intrusions, delineated by centuries of caselaw.

D. Assault: Contemporary Applications

D.1. Case: *He v. Rubio* (D.C. Cir. 2026)

D.1.a. Advance Notes

The following case makes for a nice bookend to *I de S et Ux v. W de S* (Assizes 1348). As contrasted with that case, which showed off the common law of assault at its most ancient, the following case, *He v. Rubio*, shows off the common law of assault at its much more recent. In so doing, *He v. Rubio* exemplifies the sort of contemporary situation in which assault has the unique capacity to provide a remedy.

The case of *He v. Rubio also* is an opportunity to encounter an important federal statute – the Federal Tort Claims Act. The United States of America, as a sovereign entity, is protected against legal liability through its sovereign immunity.

What is more, Congress has, by statute, provided federal employees with immunity from tort for actions taken by federal employees arising out of the course of their official duties. The 1988 legislation establishing this immunity is known as the Westfall Act.

Between sovereign immunity and the Westfall Act, people subjected to injury or tortious invasions of rights by federal employees on the job would often be left without any means of redress in the courts – except for the provisions of the Federal Tort Claims Act. Passed in 1946, the FTCA provides a limited waiver of sovereign immunity in certain situations where the federal government, if it were a private actor, would have tort liability.

For the most part, the FTCA limits its own tort liability to negligence.

Yet while the FTCA generally disallows tort claims for battery, assault, and false imprisonment, a 1974 amendment allows those claims against the United States based on the actions of federal law enforcement officers.

Indeed, a claim for assault against federal law enforcement officers is precisely what is at issue in this next case.

D.1.b. Opinion

He v. Rubio

U.S. Court of Appeals for the District of Columbia Circuit
(from Virginia)
June 23, 2026

Gengshu Scott HE, et al., Plaintiff-Appellants v. Marco RUBIO, United States Secretary of State, in his official capacity and United States of America, Defendant-Appellees. No. 24-5034. Before: Henderson, Pillard and Wilkins, Circuit Judges.

Karen LeCraft Henderson, Circuit Judge:

Former State Department employee Gengshu He and his family sued the Secretary of the Department of State (State Department) and the United States under the Federal Tort Claims Act, claiming that two law enforcement officers with the State Department came to their home in Virginia; beat on their front door; threatened, cursed and shouted at He; and grabbed him by the wrist in front of the family. Before leaving the Hes' home, one of the officers pointed his fingers in the shape of a gun at He's minor son, pretended to shoot the boy and called him a racial slur. In this appeal, we consider whether it is plausible that the officers' alleged conduct meets the requirements for common law assault against He's family members. We conclude that it is plausible. We therefore reverse the district court's dismissal of the He family's claim and remand for further proceedings.

I

The following facts come from the operative complaint. Gengshu He is a naturalized American citizen who was born in China. He immigrated to this country with his mother when he was approximately 10 years old. Raised in Philadelphia, He went on to earn his bachelor's degree in computer science at Penn State University. In 2006, He joined the federal workforce, joining the State Department in 2014. He has a wife, Jun Zhang (also an American citizen of Chinese descent) and two sons, both of "elementary school age." They live together in Annandale, Virginia, along with Zhang's parents, Wenqing and Rong Zhang.

This case arises out of a tense encounter at the He residence. On the late Friday afternoon of February 12, 2021, He and his family were at their home preparing celebrations for the Chinese New Year. They were also self-quarantining to protect themselves from COVID-19 and had posted signs outside their residence excluding visitors. At around 4:00 p.m., the family heard a "loud banging" at the front door that "continu[ed] for more than 30 seconds." With his "wife and two children … huddled behind" him and his in-laws standing close by, He opened the door. Standing on the Hes' front patio were two men in "dark clothing." He recognized one of the men as Michael Peart, a law enforcement officer with the Bureau of Diplomatic Security at the State Department where He worked.

This was not He's first encounter with Peart. He claims that while he was employed at the State Department, Peart targeted him for harassment based on his status as a Chinese immigrant. By He's telling, the problems began as early as March 2019. While He was at his workstation one day, Peart approached him, "slapped him on the shoulder and back" and said "[t]here you are, the troublemaker." Peart then ordered He to follow him to a room where another law enforcement officer was waiting. For the next two hours, Peart and his colleague questioned He about his status as a Chinese immigrant and pressured He "to admit to some wrongdoing that Peart never defined." After the encounter, Peart continued to harass He by phone and email, demanding that He agree to a follow-up meeting and "confess" to misconduct. The last of these communications He received from Peart was on

February 9, 2021. Peart's email stated that He was under administrative investigation for undisclosed misconduct and insisted that He attend an "official interview."

Three days after He received Peart's email, Peart was standing at He's front door, unannounced and uninvited, in the company of another man who "identified himself only as 'Ken.'" <The man was later identified as Kenneth Velez, another law enforcement officer with the State Department's Diplomatic Security Bureau.> In front of He's wife, children, and in-laws, Peart said that he had given He "enough time to come clean" and had come to "ambush" him at his home. When He claimed "not [to] know what Peart was referencing," Peart "cursed" and "shouted" at He, reached across the threshold and grabbed He by the wrist. He's two children then began to cry and He felt his wife "trembling" behind him. He pulled away from Peart's grip and "told [him] to keep his distance." Peart then stated that he wanted to give He his business card. When He instructed Peart to put it on the patio, Peart "cursed again and threw the card on the ground." Peart turned his attention to one of He's young sons. Peart then "made a pretend gun using his forefinger and thumb," pointed it at the child, "pressed his thumb down as if to shoot," laughed and called the child a "little chink." *{The word "chink" is well-recognized as a racial slur for a person of Chinese or East Asian birth or descent. – Ed.}* Before leaving, Peart repeated his demand that He agree to an "in-person" interview at the State Department. Peart and his associate departed shortly thereafter.

He claims the confrontation with Peart traumatized his family. After the incident, He's in-laws "experienced insomnia and depression." He's sons could not sleep alone and suffered from nightmares. One of the boys, four years old at the time, wet his bed on multiple nights.

In April 2022, He and his family sued the Secretary of the State Department and the United States (collectively, the Secretary) in district court. {Among other claims, the complaint alleged}, on behalf of He's wife, two children and in-laws˜ a single claim of common law assault under the FTCA based on Peart's actions at the He residence˜.

The district court dismissed the claim. In the court's view, the He family's assault claim was implausible on its face because Peart's alleged misconduct – although "threatening" and "deplorable" – did not place any of He's family members in reasonable apprehension of imminent physical harm.

II

We have jurisdiction under 28 U.S.C. § 1291 and our review of the district court's dismissal of the He family's FTCA claim under Rule 12(b)(6) is de novo. The FTCA permits private individuals to sue the United States for money damages "for certain torts committed by federal employees acting within the scope of their employment." *Martin v. United States*, 605 U.S. 395, 400 (2025). To state a claim under the FTCA, the plaintiff must plausibly allege that "the United States, if a private person, would be liable to the claimant" under "the law of the place" where the government employee's wrongful "act or omission occurred." 28 U.S.C. § 1346(b)(1). As their sole FTCA claim, the He family asserts that the Secretary is liable under Virginia law for the common law tort of assault based on Peart's actions at the Hes' Annandale residence. We therefore begin our analysis by "tak[ing] note of the elements [the He family] must plead" under Virginia law to state a claim of common law assault against the Secretary. *Sanchez v. Off. of State Superintendent of Educ.*, 45 F.4th 388, 395 (D.C. Cir. 2022) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). The FTCA also requires a plaintiff asserting an assault claim to allege that the tortfeasor was an "investigative or law enforcement officer[ ]" at the time of the misconduct. 28 U.S.C. § 2680(h). The He family has plausibly alleged that Peart and his associate were law enforcement officers at the time of the alleged assault.

Virginia follows the Second Restatement of Torts for the elements of common law assault. *Koffman v. Garnett*, 574 S.E.2d 258, 261 (Va. 2003); *see Shoemaker v. Funkhouser*, 856 S.E.2d 174, 178 n.2 (Va. 2021) ("We have often accepted the Second Restatement of Torts as authoritative."). And "[l]ike many jurisdictions, Virginia has merged the common law crime [of assault] with the common law tort of assault." *Clark v.*

Commonwealth, 691 S.E.2d 786, 789 (Va. 2010). We therefore rely on Virginia's criminal assault cases to aid our analysis.

Common law assault in Virginia consists of three elements. First, there must be at least one "overt act" by the defendant; "words alone are never sufficient to constitute an assault." Id. Obvious examples of overt acts include "aiming and gunning a speeding vehicle" at a person, *Zimmerman v. Commonwealth*, 585 S.E.2d 538, 540 (Va. 2003), or "striking at [another] with a stick or other weapon," *Harper v. Commonwealth*, 85 S.E.2d 249, 255 (Va. 1955). But the act itself "does not require the present ability to inflict harm." *Carter v. Commonwealth*, 606 S.E.2d 839, 842 (Va. 2005). It can be as simple as "moving towards" someone in a threatening manner. *Blankenship v. Commonwealth*, 838 S.E.2d 568, 575 (Va. App. 2020).

Second, the defendant must intend that the overt act "cause either harmful or offensive contact with another person *or* apprehension of such contact." *Koffman* at 261 (emphasis added). The defendant's "intent may be inferred from the nature of the overt act and the surrounding circumstances." *Clark* at 789. His "[w]ords and prior conduct are highly relevant" as well. *Id*. And to show the defendant acted with the required intent, it is not always necessary to prove that the defendant specifically intended to place the plaintiff in fear of harm. If the defendant acts "with the intention of affecting a third person … but puts [the plaintiff] in apprehension of a harmful or offensive contact," that is sufficient. Restatement (Second) of Torts § 32(2) (A.L.I. 1965). This result obtains because common law assault in Virginia follows the doctrine of transferred intent – the principle "that if one person intends to harm a second person but instead unintentionally harms a third, the first person's criminal or tortious intent toward the second applies to the third as well." *Transferred-Intent Doctrine*, Black's Law Dictionary (12th ed. 2024); *see Blow v. Commonwealth*, 665 S.E.2d 254, 258 (Va. App. 2008) ("[I]t is clear that the [transferred-intent] doctrine is a viable part of our law.").

Third, the overt act or acts must in fact create a "reasonable apprehension" of offensive or harmful contact that is "imminent." *Koffman* at 261. As with the intent requirement, the defendant's "previous statements and actions," *Clark* at 789, help determine whether the overt "act [was] sufficient to create a reasonable apprehension on the part of" the plaintiff, *id.* at 790. The plaintiff's own actions can also "demonstrate that [he] reasonably feared a threat of bodily injury." *Blankenship* at 574. "Imminent" bodily harm or contact, moreover, "does not mean immediate, in the sense of instantaneous contact," Restatement (Second) of Torts § 29(1) cmt. b, although that is plainly sufficient. The plaintiff need only have the reasonable fear that the harmful or offensive contact will occur "in a very short interval of time" or without "significant delay." *Id.*

III

Our task at the Rule 12(b)(6) motion-to-dismiss stage is to "determine[ ] whether the [He family] has pleaded th[e] elements" of assault with enough "factual support to 'state a claim that is plausible on its face.'" *Sanchez* at 395 (quoting *Iqbal* at 678). Facial plausibility "requires 'more than a sheer possibility that a defendant has acted unlawfully,' but it is not a 'probability requirement.'" *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal* at 678). A claim is facially plausible if "the plaintiff pleads factual content that allows [us] to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 678. In applying that standard, courts "do[ ] not resolve contests surrounding the facts [or] the merits of a claim." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). The time for that comes later in the proceedings.˜

The He family's complaint paints a vivid picture of what happened at their residence on that late Friday afternoon in February 2021. While the Hes were at home, Peart and his associate approached their front door and "loud[ly] bang[ed]" on it for more than thirty seconds. The men "had no explained reason for being" there. *Clark* at 789. They were not welcome guests; the Hes had posted signs outside of their home declining visitors. With his family directly behind him, He opened the door to confront the visitors. Standing before them were "[t]wo men, wearing dark clothing" with no "identifying marks or uniform[s]." "The men did not identify themselves" until He recognized one of them to be Peart. Once identified, Peart stated that this was an "ambush" and

He's family watched as Peart "cursed" and "shouted" at He, "reached … inside the threshold" and "grabbed" He by the wrist. After He had pulled away, Peart noticed one of the He's children "huddled" behind their father. Peart then pointed his thumb and forefinger in the shape of a gun at the young boy, pressed his thumb down "as if to shoot" the child, laughed and called the boy a "little chink."

We think these facts are sufficient to state a plausible claim of assault under Virginia law. Based on the allegations in the complaint, Peart's act of grabbing He by the wrist easily satisfied the first two elements of assault; it was an overt act "intended to cause either harmful or offensive contact with another person or apprehension of such contact." *Koffman* at 261. The Secretary's suggestion that Peart grabbed He merely to "give [him] a business card" is implausible on its face given the aggressive "nature of the overt act," *Clark* at 789. Nor is the Secretary correct that Peart's grabbing of He cannot establish an assault against He's family members because they were not "the focus of that alleged act." As noted earlier, to prevail on a claim of assault it is not necessary that the plaintiff be the intended target of the overt act. If the defendant commits the act "with the intention of affecting a third party" but "puts [the plaintiff] in [reasonable] apprehension of a harmful or offensive contact," that is an assault. Restatement (Second) of Torts § 32(2). In this case, Peart's deliberate act of grabbing He could amount to an assault against the rest of the He family if Peart's act, viewed "in the context of [his] previous statements and actions," *Clark* at 789, caused He's family to reasonably fear imminent bodily harm – satisfying the third element of assault.

On the third element, it is plausible that Peart's conduct caused He's family to reasonably fear imminent harm to themselves. As an initial matter, the family has pleaded sufficient facts demonstrating that Peart's conduct "caused [them] to actually … fear bodily harm." *Blankenship* at 574. When they saw Peart reach into their home and grab their family member, He's two children started crying and He's wife was "trembling." He's in-laws were also "frightened" during the incident. That He's family members "felt threatened by [Peart's] behavior" is clear from the face of their complaint. *Blankenship* at 574.

In our view, it is also plausible that a reasonable person in the He family's position would fear for his safety. Peart's behavior towards the Hes was aggressive from the moment he arrived on their doorstep. Peart and his associate came to the Hes' home even though they were "not welcome on [the] property." *Blankenship* at 575. They "loud[ly] bang[ed]" on the Hes' front door. In front of the entire group, Peart announced that he had come to "ambush" one of their family members. The family then watched as Peart became belligerent, "curs[ing]" and "shout[ing]" at He, and physically aggressive as he reached into their home and seized He by the wrist. We will not attempt to pin down the definite point in time when the family's fear of imminent harm ripened into a reasonable one. But it is plausible the moment came when the family witnessed Peart reach inside and physically grab one of their family members. Because of their proximity to Peart's conduct, Peart's inexplicable behavior in the moments prior and especially his sudden escalation to battery, it is plausible that He's family members reasonably feared Peart was going to harm them as well.

The Secretary argues the allegations do not plausibly show the He family was in reasonable fear of "imminent" harm because the family does not allege they were "within Peart's reach" when Peart grabbed He. The district court similarly faulted the family members for not "alleg[ing] that Peart advanced beyond the doorway to within striking distance of" them. We think this asks too much˜ at the Rule 12(b)(6) motion-to-dismiss stage. And in any event,"[i]t is not necessary that [the plaintiff] be within striking distance of the" defendant for the feared harm to be sufficiently "imminent" to cross the line into assault. Restatement (Second) of Torts § 29(1) cmt. b; *see, e.g.*, *Blankenship* at 575 (defendant assaulted victim by "moving towards" him from "about twenty feet away" while threatening to do bodily harm). The He family's allegations indicate they were within a few feet of Peart as he physically grabbed their family member. That is a close enough distance for us to infer that Peart could have done them harm without "significant delay." Restatement (Second) of Torts § 29(1) cmt. b.

Peart's subsequent act of making his fingers into the shape of a gun and pointing at He's young son also plausibly satisfied the elements of assault. There is no serious dispute that Peart's "threatening gesture," *Bowie v. Murphy*, 624 S.E.2d 74, 80 (Va. 2006), was an overt act. Whether Peart "inten[ded]" the act "to cause a fear of bodily harm," *Blankenship* at 574, "the nature of the overt act" and the defendant's surrounding "statements and actions" can reveal whether the defendant's purpose was to instill fear, *Clark* at 789. Here, Peart pantomiming the act of shooting He's child – in front of the child – was an inherently threatening act. And the Secretary's suggestion that Peart's act was merely intended as a joke (Peart laughed afterwards) is belied by everything Peart allegedly did and said immediately before and after the act. We have already covered Peart's threatening "[w]ords and prior conduct" but their outrageousness bears repeating – his unexpected "[ ]appearance at [the family's home] where [ ]he had no explained reason for being," his "unconditional threat," *Clark* at 789, to "ambush" the child's father, his "curs[ing]" and "shout[ing]" at the father and his physical force against the father. That is all "highly relevant" evidence, *Clark* at 789, supporting the reasonable inference that Peart "intended to place [He's child] in fear or apprehension of bodily harm" by imitating the act of shooting him, *id.* at 790. That Peart called the child a racial slur afterward is further proof that Peart's purpose behind his act was to instill fear.

As for the last element, it is plausible that Peart's act "caused [He's son] to actually and reasonably fear [imminent] bodily harm." *Blankenship* at 574. We can easily infer that Peart's act put fear into him – Peart's conduct on February 12 caused the child to have "nightmares" for "several weeks." On whether Peart's act was "sufficient to create a reasonable apprehension" in He's son, *Clark* at 790, "[w]e must interpret" Peart's act in the context of everything the child saw Peart do immediately before, *id.* at 789. He's son had just witnessed Peart threaten, curse, shout at and manhandle his father. Under the circumstances, he could have reasonably believed that Peart's threatening gun gesture was a prelude to the use of more physical force – this time against him.

The Secretary contends that Peart's hand-gun gesture is not an actionable assault because it was apparent that Peart was not pointing an "actual gun" at He's son. We think the Secretary's observation misses the point. That Peart's act may not have caused He's son to reasonably fear being shot does not mean the act did not create a reasonable fear of imminent bodily harm – however carried out. And as we have explained, it is plausible that Peart's act did create such a fear in the boy.˜

For the foregoing reasons, the judgment of the district court is reversed.

So ordered.

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D.1.c. Questions to Ponder About *He v. Rubio*

A. During the confrontation at the house, when Peart told He that he wanted to give He his business card, why do you think He instructed Peart to put it on the patio? After He did so, Peart cursed and threw the card down. What was going on there? (Here's the reason for asking: Speculating about these things is not something law school traditionally attempts to provide training in. Nevertheless, directed application of imagination is a very big part of lawyering. Lawyers need to be able to guess at what people might have been worried about, what they might have been working toward – and what they might worry about or work toward in the future. Lawyers can't know such things by simply imagining, of course. But imaginative speculation about why people did what they did in the past – or what they might want to do in the future and how they might try to do it – can help a lawyer work up a list of questions to ask and of whom they should be asked. And coming up with questions to ask is essential to lawyering, whether that's litigation, transactional practice, or other endeavors.)

B. How does this court's opinion compare to cases you've read from the middle 20th Century? How does it compare to even older cases from prior centuries? Assume that the *He* case is a typical representative of its era and consider: What seems relatively more important to courts now versus prior eras? What seems less important? Then: How do your inferences inform your sense of what would be more important today in terms of advocacy before the courts in arguing the law?

C. It has been said a number of times in this book that the common law is about concepts arising out of precedent, not the meaning of particular words. Or, another way this book has put it: With the common law, the facts and results of past cases are more important than the particular words that courts used to explain their holding. How does *He v. Rubio* fit into that rubric? For instance, a main point of disagreement between the lower court and the appeals court seems to be about the temporal proximity required for assault, as in how soon must the plaintiff be anticipating the oncoming battery. Insofar as resolving that issue, to what extent does the court rely on the wording of precedent as opposed to analogizing to past cases on the facts? And to take that a bit further: What lessons can you draw about effective argument making – brief writing and oral argument – in front of a contemporary court?

D. One way of looking at lawyering is that lawyers do legal analysis. And one way of conceptualizing legal analysis is that it is the application of law to facts to produce a conclusion. (The model of legal analysis as applying facts to law to produce conclusions is a basic conception at the root of the traditional law school "issue spotter" essay exam.) How does the court's opinion in *He v. Rubio* exemplify the application of law to facts to reach a conclusion?

E. Quick Questions for Assault and Battery

E.1. Check-Your-Understanding Questions: Happy Campers

Betty and Harvey are two campers at Lake Monaveit Summer Camp. Betty, wanting to get Harvey back for pushing her into the lake during canoe races, sneaks up on Harvey as he is sleeping and spoons peanut butter onto his hair. When Harvey wakes up, Betty is sitting there grinning. Harvey runs his hands through his hair, feels the peanut butter, licks a finger, and breaks out into hearty laughter.

Questions:

A. Does Harvey have a good claim against Betty for assault?

B. For battery?

E.2. Check-Your-Understanding Questions: *L'Homme au Travail*

Stephen is giving Gerald a haircut. Gerald is a working model who does mostly catalog work, although lately he has been struggling. He has asked Stephen for a little off the top – just a trim. As Stephen works, Gerald is absorbed in his cell phone. When he finally looks up in the mirror, he sees that Stephen has changed his entire look, making his hair much, much shorter. Stephen's intention is to give Gerald's career a boost, and he's convinced that the haircut will get him more work. After Gerald leaves the salon, as he is walking down the street, he runs into Freda, an acquaintance who is the chief marketing officer of a major retailer. As soon as Freda sees Gerald, she begins running her fingers through his hair. She loves the haircut, and based on his new look, she offers him a $1.5 million exclusive contract to be the new face of her company's *L'Homme au Travail* clothing line.

Questions:

A. Does Gerald have a good claim against Stephen for assault?

B. For battery?

C. Does Gerald have a good claim against Freda for assault?

D. For battery?

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6. False Imprisonment

"Yeah, I'm still here. Unless you wanna open the front door for me."

John McClane in *Die Hard* (1988),
responding by radio to terrorist Hans Gruber,
who has seized control of a Los Angeles high-rise

A. Lead-in

The tort of false imprisonment gives plaintiffs a claim to assert when they are held against their will.

It is tempting to think of false imprisonment as an ancient relic, a tort with only very rare applicability. The examples of defendants that come most readily to mind might be pirates and highwaymen, working in remote places far from the arm of the law. Yet the tort of false imprisonment is relevant all over the landscape of modern life – as close by as department stores, parking garages, and the airport.

At the outset it is helpful to note that you should not try to make sense of this tort by its name. "False imprisonment" is a double misnomer. First, there is no requirement that the plaintiff be put in prison. All that is necessary is confinement, which might be accomplished without any walls or physical restraints of any kind. For instance, compelling a plaintiff at knifepoint to not move is sufficient confinement for false imprisonment. Second, in so far as people understand the word "false" to mean "not true," then that is a misnomer as well, because a prima facie case requires true confinement. In the false imprisonment context, think of "false" as meaning wrongful or illegitimate.

B. False Imprisonment: Explanation

B.1. The Elements of False Imprisonment

Here is a blackletter statement of false imprisonment:

> A plaintiff can establish **a prima facie case of false imprisonment** by showing the defendant (1) intentionally (2) confined the plaintiff, and that the plaintiff (3) was aware of (or harmed by) the confinement.

Let's take the elements in turn.

B.2. False Imprisonment: Intent

The intent required for false imprisonment is the intent to confine. The defendant need not have bad intentions, nor must the defendant intend that the confinement be illegal, tortious, or even improper. Working with the best of intentions and a conviction of being on the right side of the law is perfectly compatible with the requisite intent to confine.

Like battery and assault, it has been held that false imprisonment observes party-to-party transferred intent. If Amy intends to confine Bella, but winds up confining Constance, then Amy has the requisite intent for Constance's prima facie case against Amy for false imprisonment.

B.3. False Imprisonment: Meaning of Confinement

To be confined for the purpose of false imprisonment, the plaintiff must be restricted to some **closed, bounded area for some appreciable amount of time**.

Confining a person to a room certainly counts, but so does confining a person to a particular city or state. The area need not be strictly delineated; a subway mugger who orders a plaintiff not to run away on threat of being shot effects an actionable confinement regardless of whether the mugging takes place in an enclosed subway car, on a platform, or in the ticketing area. The plaintiff in such circumstances is confined to the space in which she or he is standing, and thus the confinement is actionable.

Even though the area of confinement can be large or small, it must be complete. Freedom of movement must be bounded in all directions. A mere roadblock will not count. Suppose a plaintiff, out for a walk in the city, meets a gang of thugs who, through threats, prevent the plaintiff from walking on the public sidewalk on Elm Street between 10th Street and 11th Street. If the plaintiff can freely back up and walk somewhere else, then there is no false imprisonment.

Along these lines, a plaintiff cannot use false imprisonment to sue for being wrongly kept out of some particular place. That is to say, the confinement of false imprisonment does not work in reverse. If a plaintiff is not allowed into a certain restaurant or club, there is no false imprisonment. It will not do to say that the area of confinement is "the rest of the world."

In cases where the confinement is achieved by means of physical barriers, courts often say that there must be **no reasonable means of escape**. Suppose the defendant locks the door to the room the plaintiff is in. We must ask if there is some other reasonable way out. If the sliding-glass door to the patio is open, and if the patio opens onto a golf course, then that's a reasonable means of escape, and no false imprisonment claim will lie. But if the only means of escape were jumping from a second-story balcony or crawling through HVAC ducts, then the means of escape would not be reasonable and the plaintiff would have a good claim for false imprisonment.

There is **no minimum amount of time** for a valid confinement. Typically, courts will say that the confinement need only be for an "appreciable time." A confinement of one minute, for example, would be much more than enough.

The duration of the confinement may become a live issue in the context of an affirmative defense of consent. For instance, amusement park patrons have consented to a confinement when they board a dark ride and pull down the lap bar. But a confinement for how long? If the ride stops, must the park release the lap bars immediately and let everyone go? Or can they take some time to restart the ride before they must release patrons? That question turns on the scope of the consent, and it could be a close issue that requires a jury to resolve.

B.4. False Imprisonment: Method of Confinement

In a false imprisonment case, the confinement can be accomplished by a number of means. The most straightforward is by **physical barriers**, such as with walls or fences. But false imprisonment can also be accomplished by **force or imminent threat of force**. Threatening a plaintiff at gunpoint is an obvious example; however, the threat need not be against the plaintiff. The threat could be directed at a third person. Some authorities say the third person must be a family member or someone who is immediately present, but one imagines, if pressed, courts would permit a false imprisonment cause of action for threats to strangers, so long as they were serious and credible.

One aspect of the doctrine that is crystal clear is that **the threat must be imminent**. Telling a person to stay put – or else suffer injury the next day – would not be considered confinement within the meaning of the tort. The fact that the false imprisonment tort does not allow recovery in such a situation seems to imply that, in the view of the law, a would-be plaintiff should go and seek police involvement before the threat matures.

The barriers, force, or threat need not be directed at persons, but can also be aimed at the plaintiff's property. A plaintiff who is "free" to walk away only by surrendering chattels – that would be unreasonable to leave without – is not free at all under the eyes of false-imprisonment law. Suppose a drunk and belligerent party host refuses to return the plaintiff's coat when the plaintiff is ready to leave the party. That deprivation of property will count as confinement for false imprisonment.

Another recognized method of confinement is **improper assertion of legal authority**. Flashing a fake police badge and informing a plaintiff that they are under arrest is an obvious example. But improper assertion of legal authority could be made by a real peace officer with a real badge. In the real world, suits against individual police officers for false imprisonment are rare. But the reason has nothing to do with the doctrine of false imprisonment itself. Individuals are frequently judgment-proof, plaintiffs might not be believed when offering testimony contrary to that of a law enforcement officer, and state statutes may shield law enforcement officers from suit. But as far as common-law tort doctrine goes, a police officer making an invalid arrest is liable for false imprisonment.

A common context for false imprisonment accomplished by improper legal assertions is with security officers in retail stores, who may falsely tell suspected shoplifters that they are under a legal obligation to stay on the premises and answer questions, or that they must wait for the police to arrive. Often, store security has no legal basis upon which to make such a claim (although in any given jurisdiction, store security officers might have an authentic legal right to detain people through a statute or a common law "shopkeeper's privilege").

The confinement does not need to be accomplished by an overt act. An **omission** might do the trick under certain circumstances. If the defendant is under an existing obligation to act, then the omission to release the plaintiff can be false imprisonment. For example, lawfully confined inmates must be released when their sentences are up, and a jailer who omits to unlock the cell when required to do so becomes liable for false imprisonment. Similarly, an amusement park patron pulling down a locking lapbar on a roller coaster has consented to a confinement. But if the ride operator refuses to release the lapbar when the ride is over, there is liability for false imprisonment.

B.5. False Imprisonment: Awareness (or Harm)

In addition to intent and confinement, the balance of authority adds the requirement that the plaintiff must be aware of the confinement.

Because of the awareness requirement, an unconscious person locked in a room cannot, upon waking up to a recently left-open door, make out a case for false imprisonment. Many have noted that the awareness requirement in the false imprisonment tort is consonant with tort's emphasis on an individual's sense of autonomy.

According to convention, however, there is an exception to the awareness requirement. Authorities commonly state, without elaboration, that if the prisoner is harmed by the confinement, then awareness is not required. This exception creates something of a puzzle: It's not so easy to imagine a situation in which a plaintiff is harmed by a confinement of which she or he is unaware *and* where the confinement itself is the essence of the harm, as opposed to a battery. Suffice it to say, it must not come up very often.

B.6. False Imprisonment: Scope of Privilege or Consent

Privilege or consent is an affirmative defense to false imprisonment. And in many cases, the scope of that privilege or consent is likely to be crucial. Consider some examples: Jailers who confine their inmates have a legal privilege to do so. And riders on common carrier transport have consented to a confinement. But at what point does privilege or consent run out?

B.7. Terminology for the Tort

As noted above, “false imprisonment” is a double misnomer in that there’s no requirement that the plaintiff be put in a prison-like confinement, and, of course, the confinement must be *actual* – i.e. “true” – for false imprisonment liability to arise.

There are other terms courts or commentators may sometimes use – either as a synonym for the false imprisonment tort or to refer to the underlying factual occurrence that gives rise to the claim. You may find the phrases “wrongful confinement” or “unlawful confinement” used on occasion, or even just “confinement.” Arguably those terms are more fitting, as they avoid the double-misnomer issue of “false imprisonment.” Yet they are not widely used as a general, substitute label for the tort. Other labels along the same lines are “wrongful detention” and “unlawful detention.”

What is probably most often used as an alternative name for the tort of false imprisonment is the even more troublesome term “false arrest.”

The term “false arrest” can lead to confusion on the one hand because “false arrest” might be taken to imply that the initial confinement need be wrongful. That is not true, however, because the initial confinement might be perfectly fine – such as locking the doors on a mountain gondola – while the false imprisonment liability results from a subsequent failure to release. Another potential source of confusion from using “false arrest” as a synonym for the common-law false imprisonment tort is that “false arrest” is used in connection with an allegation of arrest in violation of the Fourth Amendment to the U.S. Constitution – i.e., a matter of constitutional law and criminal procedure.

For what it’s worth, the author of this casebook has always thought a good name for the tort would be “detenture.” Has a certain ring to it. Why not see what AI thinks of the idea? ChatGPT 5.6, apparently factory-set to maximum flattery, provided this:

I like it—**quite a lot**. **“The tort of detenture”** sounds as though it ought to have been sitting beside assault, battery, detinue, and conversion since the Year Books.

Its principal virtue is that it names the actual interference: **detaining a person**. “False imprisonment” misleadingly suggests a prison, whereas the doctrinal subject is confinement much more broadly˜ “Detention” could remain the neutral word for the underlying act, lawful or unlawful, while **detenture** would name the tortious version.

The especially delightful feature is its relationship to **detinue**. Detinue is the traditional action concerning the wrongful detention of personal property.˜ That would give us a wonderfully tidy pair:

> **Detinue:** wrongful detention of a chattel

> **Detenture:** wrongful detention of a person

There is almost an intuitive logic to it: *You cannot commit detinue against me, but you can commit detenture against me.*˜

I hear the pronunciation as **də-TEN-chər**, approximately parallel to *indenture*. And it does indeed have a ring:

DETENTURE

The tort traditionally known as false imprisonment

That presentation would be ideal for a casebook.˜

My verdict: **excellent as an avowed casebook coinage˜** It sounds venerable, communicates the correct idea, and creates an irresistible detinue–detenture pairing.

Sweet validation! Well, a casebook author can’t really give a tort a new name. But a judge can. In any given one-L law-school classroom, probably at least one or two people will end up being judges. So, how about it? (Just kidding! *(Unless you might do it.)*)

C. False Imprisonment: Exploration

C.1. Case: *Sousanis v. Northwest Airlines* (N.D. Cal. 2000)

C.1.a. Advance Notes

This case presents false imprisonment in a thoroughly modern context: an airplane on the tarmac that's going nowhere.

This case is short, and its straightforward prose is not at all hard to read. But that does not mean you should quickly get through it. The case of *Sousanis v. Northwest Airlines* can be a wellspring of headscratchers. There are multiple places a reader might say, "Hey, wait a minute!"

You might consider reading the case and then composing a list of questions you have and, perhaps, lingering doubts. The sine qua non of lawyering is making arguments. And making arguments starts with asking questions and not dismissing little lingering, nudging doubts that poke at you while reading something. To take full advantage of the exercise, take a bit of time mulling things over after you read. In particular, don't charge headlong into the post-case notes, which attempt to explore a number of prickling concerns that can come from the opinion.

C.1.b. Opinion

Sousanis v. Northwest Airlines

U.S. District Court for the Northern District of California
March 3, 2000

Marti SOUSANIS, Plaintiff, v. NORTHWEST AIRLINES, INC. et al. Defendants. No. C-99-2994. MHP. 2000 U.S. Dist. LEXIS 23607; 2000 WL 34015861. Not Reported in F.Supp.2d.

Chief Judge MARILYN HALL PATEL:

On May 11, 1999, plaintiff Marti Sousanis filed suit in California state court against Northwest Airlines and twenty "Doe" defendants alleging various tort and contract claims pertaining to a detained flight. On June 17, 1999, defendant Northwest removed the action to this court on diversity grounds.˜

BACKGROUND

Plaintiff, a San Francisco resident, spent her 1998 winter holiday in Detroit. In November 1998, she purchased a $540 round-trip airline ticket from Northwest. Plaintiff departed San Francisco on December 23, 1998 and was scheduled to return on Saturday January 2, 1999.

Detroit experienced a blizzard during the New Year's weekend, and Detroit Metro Airport was blanketed with snow and ice. Plaintiff boarded her homebound flight as scheduled. However, the flight was detained and ultimately canceled due to the inclement weather. The next day, plaintiff obtained a boarding pass for Northwest Flight Number 992. This flight was scheduled to depart in the early afternoon, but worsening weather caused further delays. Plaintiff claims that Northwest made a series of disingenuous announcements about when it expected the flight to leave.

At 6:00 p.m. on January 3, Northwest instructed the passengers of Flight 992 to board the aircraft. Once the passengers were seated, the doors were secured but the plane never took off. For approximately six hours, Flight 992 remained parked at the gate or on the runway due to weather-related and mechanical problems.

During the protracted wait, Northwest flight attendants repeatedly instructed the passengers to remain seated with their seat belts fastened. Plaintiff alleges that she suffers a chronic back condition that worsens if she is forced to sit for too long. She contends that her physical therapist advises that she stand and stretch at least every thirty minutes. In addition, plaintiff purports to have panic and anxiety attacks when she anticipates an impending back spasm. Plaintiff claims that she began to feel her back tighten after some period of remaining in her seat on Flight 992. So, plaintiff stood up in her row to stretch her back. According to plaintiff, a flight attendant ordered her to sit down because the seat belt sign was illuminated. Plaintiff alleges that she attempted to explain her condition to the flight attendant, but that she would not listen. Instead, she summoned other flight attendants, including the supervising flight attendant.

The supervising flight attendant advised plaintiff that her refusal to comply with flight crew instructions constituted a violation of federal law. Plaintiff alleges that she again tried to explain to the supervising flight attendant her medical need for special accommodation. The supervising flight attendant handed plaintiff a notice advising her that passengers who interfere with the operation of the aircraft are subject to arrest. After her altercation with the supervising flight attendant, plaintiff did not attempt to stand up again. Plaintiff recalls being in tears and in pain for the remainder of the approximately six hour wait.

Plaintiff asserts that during the wait, several passengers occasionally stood up and/or walked to the restroom. She also notes that Northwest crew members were able to move freely about the plane. At around midnight, Northwest canceled Flight 992 and the passengers deplaned. On Monday, January 4, 1999, plaintiff returned to San Francisco on Northwest Flight Number 929.

LEGAL STANDARD

A motion to dismiss for failure to state a claim will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief.˜

DISCUSSION˜

The tort of false imprisonment is defined in California as "the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." *Molko v. Holy Spirit Assn.,* 46 Cal.3d 1092, 1123 (1988). Plaintiff alleges that she was detained against her will in her seat for a period of approximately six hours, while other passengers were occasionally permitted to stand, stretch and use the lavatories as the aircraft sat on the tarmac. She argues that while she did consent to boarding the aircraft initially, she did not consent to being confined to her seat during the long delay. Defendant asserts that plaintiff consented to remaining in her seat while the seat belt sign was illuminated as a condition of boarding the aircraft, and could not, as a matter of law, withdraw it.

Both plaintiff and defendant rely on *Abourezk v. New York Airline, Inc.*, 705 F.Supp. 656 (D.D.C. 1989) to support their positions. While not exactly on point, it presents the closest factual scenario to the case at bar in an area of sparse precedent. There, the court held that the passenger plaintiff was not falsely imprisoned when he was not allowed off an airplane which was delayed on the ground for three hours because of inclement weather at the destination airport. The delay had caused the plaintiff to miss his appointment, thus rendering his trip moot, so he asked to deplane while the aircraft was waiting in the takeoff line. The pilot refused, and the plane eventually flew on to New York.

Plaintiff does not allege that she asked to deplane, only that she be allowed to stand, stretch and move about. The pilot in this case had full and lawful authority to control the actions of the passengers for their own safety. See 14 C.F.R. § 121.533. Plaintiff states in her complaint that the captain kept the seat belt sign illuminated for virtually the entire delay. Therefore, defendant was acting pursuant to federal law in confining plaintiff to her seat, and plaintiff could not withdraw her consent. The *Abourezk* court explained that the plaintiff's agreement with the airline did not provide that he "could unilaterally determine that he should be deplaned in circumstances such as those presented herein." Similar to *Abourezk*, here plaintiff's agreement with defendant did not allow for her to withdraw her consent to obeying federally mandated safety rules. Defendant was acting lawfully by confining plaintiff to her seat within the aircraft while the seat belt sign was illuminated. The court finds that plaintiff has failed to plead the elements required to state a false imprisonment claim, and thus dismisses that claim with prejudice.

CONCLUSION

For the foregoing reasons, the court GRANTS defendant's motion to dismiss.~

IT IS SO ORDERED

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C.1.c. Scrutinizing the Cited Federal Reg

The court's decision appears to be based in large part on the observation that "{t}he pilot in this case had full and lawful authority to control the actions of the passengers for their own safety." In support of this, the court cites 14 C.F.R. § 121.533. Here is the complete text of that regulation:

> § 121.533 Responsibility for operational control: Domestic operations.
>
> (a) Each certificate holder conducting domestic operations is responsible for operational control.
>
> (b) The pilot in command and the aircraft dispatcher are jointly responsible for the preflight planning, delay, and dispatch release of a flight in compliance with this chapter and operations specifications.
>
> (c) The aircraft dispatcher is responsible for—
>
> (1) Monitoring the progress of each flight;
>
> (2) Issuing necessary information for the safety of the flight; and
>
> (3) Cancelling or redispatching a flight if, in his opinion or the opinion of the pilot in command, the flight cannot operate or continue to operate safely as planned or released.
>
> (d) Each pilot in command of an aircraft is, during flight time, in command of the aircraft and crew and is responsible for the safety of the passengers, crewmembers, cargo, and airplane.
>
> (e) Each pilot in command has full control and authority in the operation of the aircraft, without limitation, over other crewmembers and their duties during flight time, whether or not he holds valid certificates authorizing him to perform the duties of those crewmembers.

14 C.F.R. § 121.533 (as amended Jan. 26, 1996; current through 2026).

Does the cited authority support the court's statement? And more importantly: What are the arguments that the cited authority *does not* support the court's statement?

(Analysis providing answers to these questions can be found below, *eodem*, § C.1.d.2.)

C.1.d. Unpacking the Court's Analysis

1. The prima facie case and the burden on the consent issue

The court held that the plaintiff "failed to plead the elements required to state a false imprisonment claim."

The court, however, does not refer to elements in its analysis. Which element or elements of the prima facie case do you think the court believed were missing?

The court does not explicitly state what elements a plaintiff must plead to state a prima facie case under California law, but the court implies that the "nonconsensual" nature of the confinement is a required element of the plaintiff's case. And, indeed, California puts the burden of proof of non-consent on the plaintiff.

This is contrary to the traditional common-law formulation, and, indeed, it seems off. You can imprison someone, and it is effectively presumed consensual. If the plaintiff claims you imprisoned them without consent, the burden is on them to prove lack of consent.

California's strange prima facie formulation is a consequence of old cases saying the tort is the same as the crime under California statute. See, e.g., *Parrott v. Bank of America*, 217 P.2d 89, 94-95 (Cal. App. 1950). But burdens placed on plaintiffs and burdens placed on prosecutors would seem to involve quite distinct interests. If the default is in favor of freedom and against imprisonment, you'd think the burdens would go in opposite directions: For the tort, the plaintiff is seeking to vindicate their right to remain unimprisoned. For the crime, the prosecutor is seeking to send the defendant to jail.

Assuming proof of lack of consent is what the court believes Sousanis was missing from her complaint, then consider: Would it have made any difference if the court had followed the traditional formulation of the law that sees consent as an affirmative defense, rather than holding that lack of consent is part of a prima facie case?

2. Is this about scope of consent, inability to withdraw consent, or the effect of federal law?

Assuming the court has reasoned that the defect in the plaintiff's complaint is failing to allege a lack of consent, this ties into the court's discussion of federal regulations regarding the captain's authority to confine passengers by way of the seat belt sign. The court writes:

> "The pilot in this case had full and lawful authority to control the actions of the passengers for their own safety. See 14 C.F.R. § 121.533. Plaintiff states in her complaint that the captain kept the seat belt sign illuminated for virtually the entire delay. Therefore, defendant was acting pursuant to federal law in confining plaintiff to her seat, and plaintiff could not withdraw her consent.˜ {P}laintiff's agreement with defendant did not allow for her to withdraw her consent to obeying federally mandated safety rules. Defendant was acting lawfully by confining plaintiff to her seat within the aircraft while the seat belt sign was illuminated."

So what is the court saying here? Here are some possibilities:

1. Per her allegations, Sousanis consented to the confinement. For there to be a lack of consent, she would have to *withdraw* her consent – but this she could not do because federal law does not allow it.
2. Sousanis alleged a lack of consent, but it doesn't count legally because the federal regulation precludes her defense.
3. Even if federal law, on its own, does not preclude her lack-of-consent allegation on a legal basis, Sousanis's case fails because of the effect of her action in boarding the aircraft given the existence of the pilot's authority under the federal safety rules. Put differently, it is not the legal effect of federal law; rather, it's the factual effect: Sousanis has effectively alleged her own consent because her complaint, in saying she got on the airplane, effectively alleges that she consented to all actions taken by the airline in accordance with federal safety rules.

The flaw with No. 1 – withdrawal irrelevant: The problem with No. 1 is that, according to Sousanis, she never consented to the unreasonably prolonged confinement. Rather, according to her, by boarding the airplane she only consented to some reasonably expected length of confinement. This much is clear from the court's own description of Sousanis's position, "that while she did consent to boarding the aircraft initially, she did not consent to being confined to her seat during the long delay." The "withdrawal of consent" issue in No. 1 is therefore a red herring. Since she never consented to a six-hour tarmac confinement in the first place, there was no consent she needed to withdraw.

An analogy: You get on a roller coaster and pull down the lap bar so it locks. Once the train has left the station and is going up the lift hill, it's too late to withdraw your consent. But if the train comes back into the station and the operator won't release the lap bars promptly to let riders disembark, the situation is that you are being confined beyond the scope of your consent. Whether or not you've "withdrawn" your consent is irrelevant at that point, as there's no ongoing consent for you to withdraw.

The flaw with No. 2 – responsibility not command: The problem with No. 2 is that federal safety rules do not say the captain has authority to cause passengers to do as the captain pleases. Instead, 14 C.F.R. § 121.533(d) provides that the "pilot in command of an aircraft is, during flight time, in command of the aircraft and crew." That provision notably does not include "passengers" in the list of things within the pilot's command. What § 121.533(d) does say about "passengers" is quite distinct. The regulation states the pilot "is responsible for the safety of the passengers," which is a far cry from being able to command them. In other words, instead of subordinating the passengers to the pilot's authority (as is the case with crewmembers), § 121.533(d) burdens the pilot with the passengers' safety.

The flaw with No. 3 – responsibility not command: The problem with No. 3 is the same as the preceding problem with No. 2: Federal rules don't make the pilot "the boss of" the passengers. Therefore, as a factual matter, Sousanis didn't agree to be subject to the pilot's whim in the name of safety.

Additional flaw with Nos. 2 and 3 – the regulation has purpose other than voiding liability: Another problem with Nos. 2 and 3 is that, even if it were assumed for argument's sake that the pilot has, under § 121.533(d), command authority over passengers for the sake of safety and that passengers must obey, it does not logically follow that the airline would be immune and Sousanis left without a claim.

Consider what is said to have transpired: The pilot commanded Sousanis to remain seated; Sousanis obeyed. The rule, in this case, would have served its purpose: Order was maintained, and the pilot's authority was not undermined in the moment. That is, the pilot's authority was intact while passengers were aboard the aircraft. Operational needs were met. Logically, it does not follow that, no matter what, the pilot and the pilot's employer should thereafter be shielded from all liability, even if they abused their federally given authority.

"You have to do what I say" cannot reasonably imply "and I never have to answer for what I make you do." Quite the opposite. With great power comes great responsibility. (There's a lot of jurisprudential wisdom in those six words from Spider-Man's uncle.)

Additional flaw with Nos. 2 and 3 – seat belt signs, flight attendants, and the prohibition of unclicking: Yet another problem with No. 2 and No. 3 is that the facts do not show that the pilot – i.e., the captain – of the aircraft commanded Sousanis to stay in her seat. The custom and practice of commercial airline pilots is such that pilots often make a cabin announcement along the lines of, "I've illuminated the seat belt sign. Don't get up unless you have to make a quick trip to the lavatory." In the facts of *Sousanis v. Northwest Airlines,* it appears that the command to not get up at all (i.e., the interpretation of the seat belt sign as an absolute mandate) came not from the pilot but from a flight attendant who chastised and threatened Sousanis. And § 121.533(d) says nothing about cabin crew having command authority over passengers. Even if it did, it still couldn't reasonably mean that cabin crew could arbitrarily require Sousanis to stay seated (under written threat of arrest) while allowing other passengers to occasionally get up.

C.1.e. Dismissal with Prejudice: No Chance to Amend

The court dismissed Sousanis's lawsuit at the pleadings stage, meaning that Sousanis's lawsuit will not progress to the stage where Sousanis can present evidence. And the court dismissed "with prejudice," meaning that Sousanis will not be allowed to amend her complaint to supply any allegations the court has deemed missing.

The district court's dismissal was apparently not appealed.

C.1.f. California Law for Events in Michigan?

Among the natural questions to have after reading the case is this: Why did the court apply California law for false imprisonment alleged to have occurred in Michigan? The answer is not clear from the case.

Interestingly, in a different part of the opinion (not reproduced in this casebook's edit), the court dismissed claims Sousanis brought under California statutes, such as consumer-protection law, because of geography. The court rejected the idea that California statute would apply based on the fact Sousanis bought her ticket in California and originally embarked there. Instead, the court held the California laws could not apply to "events which occurred in Michigan." *Sousanis,* 2000 U.S. Dist. LEXIS 23607, at *17-18

The result is a curious path to the early demise of Sousanis's lawsuit: The court applied the Michigan location to dismiss the California statutory claims. But the court applied the California false imprisonment law to dismiss the claim of imprisonment in Michigan. Yet not only that. The court also denied Sousanis's requested change of venue to the Eastern District of Michigan. See *Sousanis* at *2.

C.1.g. Leave the Gate and Wait: Airline Incentives and Tarmac Delays

1. A nagging question considered: Why'd Northwest do it?

Reading *Sousanis,* a natural question to have is: Why, if the storm was so bad, did the airline load passengers onto the plane just to have the plane sit for hours without going anywhere?

It's a good question. And there's no single factor that explains it. Rather, in the late 1990s, there were a variety of factors incentivizing airlines to have planes push back from the gate even when there was little prospect they could take off anytime soon.

One reason, unfortunately, was to look good. At the time, some important on-time statistics for airlines scored leaving the gate when scheduled as an on-time departure. Thus, forcing people to wait in the plane rather than in the departure lounge was a way to juice at least some performance stats.

Another reason was that airlines only leased so many gates for their operations. So a practice of loading passengers onto planes and then parking them on the apron made room to handle newly arrived planes without building or leasing more facilities.

An additional pressure may have come from air traffic control's ways of prioritizing runway usage. To maintain a plane's place in the queue for takeoff, a plane might have had to get out onto the tarmac.

2. Question to ponder: Do airline incentives undermine Northwest's safety-rules rationale?

With the considerations, immediately above, concerning the incentives airlines had for confining passengers for long times in planes not going anywhere, what might that have meant for the safety-rules rationale undergirding the court's opinion? In other words: How could Sousanis's counsel have used evidence of financial, statistical, and/or ATC-operations-related incentives to undermine the argument of Northwest and the view adopted by the court that the airline was "acting lawfully" in accordance with "federal mandated safety rules"? What would be the counter-arguments?

Regardless of whether extrinsic facts about tarmac incentives should or should not factor into the analysis, do you think that if presented to the district court such facts would have mattered to the judge's decision?

C.1.h. The New Year's Nightmare of '99

There are many, many airline passenger horror stories, but the debacle at Detroit's DTW airport that Marti Sousanis was caught up in was a particularly noteworthy one.

The multi-day delay disaster at Detroit Metropolitan Airport made national news. A report appearing in the Seattle Times contained some colorful quotes. "Northwest has hit a new low … keeping people prisoner in their little containers," attorney Larry Charfoos told a reporter after filing a suit in Michigan state court on behalf of two Detroit-area residents who spent eight hours confined on a plane. Charfoos made this unflattering assessment: "No passengers have ever been locked into airplanes for that long unless there was a hostage taking."

While Marti Sousanis's six-hour purgatory on a plane that left the gate and never took off seems totally needless, here's something even more inexplicable: A plane that completes its journey over the sea and lands at its destination yet won't let its passengers off.

That was the case with Northwest Airlines Flight 1829 from Sint Maarten.

The Wall Street Journal did an in-depth report on the ill-fated flight that started in a Caribbean paradise only to get mired in Detroit's dire affair. Things actually got off to a bad start, the paper reported, even before boarding. At Princess Juliana International Airport, check-in terminals glitched out. Seat assignments were consequently scrambled. There was more bad stuff, and more bad stuff. Fast forward to Northwest 1829 finally making it back to Detroit: The plane touched down on a DTW runway 22 hours late.

And that's when things got *really* bad. The plane parked. And waited. And waited and waited. For one hour. And then another. The toilets on the 757 overflowed, adding a sewage odor to the miasma of despair. "The air stank. Babies screamed. Adults screamed, too," the paper reported.

When all was said and done, the passengers were made to wait on the Detroit tarmac for seven hours before being allowed to deplane.

It makes you think. Deplaning without a gate is inconvenient, of course. But at what point is it time to bring out the stairway truck? And if not that, how about calling the fire department to rescue all the people locked up against their will in a metal box? Fire department personnel, after all, are called as a matter of course to rescue people stranded by blackouts in elevators. So why not people on planes deprived of gate space by cost-conscious airlines?

Does our society recognize some sort of airline exceptionalism? Should it?

C.1.i. Legal Reforms for Passenger Rights

Following the Detroit debacle, tort law may have let down some litigants. But Congress, at least, woke up to constituents. The very next month, February 1999, more than 30 members of Congress co-sponsored the Airline Passenger Bill of Rights Act of 1999. While that bill did not pass, the U.S. Department of Transportation eventually adopted regulations providing for passenger rights. And in 2010, USDOT issued a rule requiring U.S. carriers to adopt plans for lengthy tarmac delays, providing for deplaning of passengers within three hours as well as food and water before that.

C.2. Review Problems About False Imprisonment

Problem 1: Arturo's Art Project

"Please wait right here! I want to show you my art project, and I just need a couple of minutes to find it!" says 9-year-old Arturo to his Grandma Gigi, even as she is trying to leave the house to get on the road for a multi-hour drive on the tail-end of a busy holiday weekend.

"If you leave without seeing his art project, he's honestly going to be devastated, Gigi," says Arturo's mom, Melinda (who is Gigi's daughter-in-law). "He's so emotionally fragile as it is, and it'll mean the world to him if you can just hold on. It's somewhere in his room."

Grandma Gigi has seen Arturo's room. It's a disaster that has met with Gigi's exaggerated-eye-rolling disapproval all weekend. But to no avail. And why didn't Arturo think to show off his art project before now if it was so important? Nevertheless, Grandma Gigi is compelled by a sense of familial duty, concern for Arturo's mental well-being, and an invisible force field of guilt spanning the house's front door, so she stays. Arturo doesn't locate his art project for another 45 minutes. When it's revealed, it's a racecar with Gigi's initials emblazoned on the side. Sadly, when asked about that, Arturo explains the letters are the name of a fictional corporation from some anime television series Gigi is sorely regretful to have brought up as a topic, because that takes another 15 minutes.)

The delay means that Grandma Gigi hits the thick of the holiday traffic. It condemns her to an extra three hours on the road before getting back home.

Questions:

A. Does Grandma Gigi have a good claim for false imprisonment against Arturo? If so, on what basis? What's the reasoning?

B. Against Melinda? If so, on what basis? What's the reasoning?

Problem 2: Shawn's Shopping Trip

Shawn has driven an hour from home up into the mountains to the town of Summit Valley to do some antique shopping. Shawn arrives around 9:30 a.m., when there is ordinarily great street parking still available on Stream Street, a cul-de-sac that dead-ends by the creek. But his way is blocked by an 18-wheeler moving van owned by Acclivity Carriers.

"You'll have to park somewhere else. There's no access to this road right now," one of the movers tells him. "You can park somewhere else and walk in."

So Shawn maneuvers through the mountain town's streets and eventually finds a place to park on Creek Court, another cul-de-sac. It's an annoyance and a pain, because it means Shawn has to walk down a steep incline to get to the stores he wants to visit, which is tough on his knees.

It's just after 10 a.m. when he gets back to Stream Street, the movers block his path again, now with bright yellow "DO NOT CROSS" tape held up with orange looper tubes (aka "stanchions" or "delineator posts").

"Excuse me," Shawn says to a mover who comes up to confront him. "I need to get through to visit the antique shops."

"You can go anywhere else you want," the mover says. "But for the next 10 minutes you can't walk onto Stream Street. Not even on the sidewalk. We need all the space for moving heavy stuff. If you try, we'll have you arrested. That's why that police officer is standing over there," the mover says, gesturing to a uniformed law enforcement officer some 15 yards away.

(Shawn didn't know it at the time, but the mover was bluffing. The mover had no legal authority to block the sidewalk; the police officer was standing around for unrelated reasons, and Shawn had a legal right to use the sidewalk.)

After 10 minutes, the movers removed the looper tubes. In the early afternoon, Shawn is done shopping and ready to head home. He walks up the incline to return to his car with a haul of antiques. When he gets to Creek Court, he sees the same moving truck from Acclivity Carriers has now repositioned itself here. Between the buildings and the creek, the only way to drive out is on the asphalt surface of Creek Court, but that way is fully blocked by the semi.

"I need you to move your truck. I realize it's an inconvenience, but I want to go home and you've blocked-in my car," Shawn says to Acclivity Carriers' person in charge.

"Sorry. No can do. Obviously, we won't stop you from going home. But if you want to drive your car off of Creek Court, you're not going to be able to do that for another hour. We're still unloading here."

Questions:

A. In the morning, around 9:30 a.m. when Shawn was trying to park, did he have a good false imprisonment claim against Acclivity Carriers for what they were doing with Stream Street? Why or why not?

B. Later in the morning, after 10:00 a.m. when Shawn was walking, did he have a good false imprisonment claim against Acclivity Carriers for what they were doing around Stream Street? Why or why not?

C. In the afternoon, did Shawn have a good false imprisonment claim against Acclivity Carriers for what they were doing at Creek Court? Why or why not?

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7. Intentional Infliction of Emotional Distress

"If only these treasures were not so fragile
as they are precious and beautiful."

– Johann Wolfgang von Goethe,
The Sorrows of Young Werther (1774)

A. Lead-in

The tort of intentional infliction of emotional distress is the most recent of the intentional torts. First arriving on the scene in the late 1800s, the tort won general acceptance the last half of the 1900s. It often goes by the abbreviation "IIED" and many other names as well, the most concise of which is "outrage." Other, longer names are "intentional infliction of emotional harm," "intentional infliction of mental distress," and "intentional infliction of mental shock."

Happily, in our society, people are largely civil to one another. But even when they are not, their insulting behavior rarely rises to the level required for liability under IIED. As we will see, IIED claims require unusual facts and extreme behavior.

One place where IIED does seem to pop up with some frequency is in the employment context. Sadly, there seem to be all too many people wanting to inflict misery on their co-workers. But IIED comes up in other contexts as well – not the least of which are high school hallways and social media sites.

B. IIED: Explanation

B.1. The Elements of IIED

Here is a blackletter formulation for intentional infliction of emotional distress:

> A plaintiff can establish **a prima facie case for intentional infliction of emotional distress** by showing that the defendant (1) intentionally or recklessly, (2) by extreme and outrageous conduct (3) inflicted severe emotional distress on the plaintiff.

B.2. IIED: Intent (or Recklessness)

Like many other torts terms, intentional infliction of emotional distress is a misnomer. **The intent element of the prima facie case is satisfied when the defendant either intended the plaintiff's severe emotional distress, or acted in deliberate disregard of a high probability of causing the plaintiff to suffer severe emotional distress (i.e., recklessness).** Thus, despite its traditional classification as an intentional personal tort, and despite the "intentional" in its name, IIED does not require that the defendant act intentionally. Recklessness will suffice.

When it comes to transferred intent, IIED is a lone wolf: **Intent generally does not transfer for the outrage tort.** So the intent to cause a battery, by itself, is insufficient intent for IIED. And the intent to cause person X to suffer severe emotional distress will not suffice as intent for a suit brought by Y for emotional distress.

The nonapplicability of transferred intent for IIED notwithstanding, it should be noted that some courts have held that a plaintiff can successfully sue a defendant for IIED where the defendant inflicts intentional bodily harm on the plaintiff's immediate family member in the plaintiff's presence – even if the defendant did not intend any emotional distress by doing so. This sort of fact scenario is probably best thought of not as transferred intent, however, but as an instance of recklessness fulfilling the intent requirement. That is, in such a situation, the defendant is construed to have acted in deliberate disregard of the likelihood that the plaintiff would be made to suffer severe emotional distress.

B.3. IIED: Extremeness and Outrageousness

IIED is quite different from other intentional torts in terms of what it takes to trigger it.

Battery, for instance, requires a mere touching that qualifies as harmful or offensive. The touching can be fleeting and slight. And being offensive is sufficient. There's no requirement that it be *really, really* offensive. Trespass to land's requirement of an entry has no qualitative or quantitative threshold. The tiniest entry will suffice. But IIED is different. For IIED, **the plaintiff must prove that the defendant acted in an extreme and outrageous way.**

The extremeness and outrageousness requirement also distinguishes itself compared to other aspects of IIED doctrine. While the intent element may be comparatively easy to meet in an IIED claim (considering recklessness will substitute for true intent), the requirement of extreme and outrageous conduct is a high bar. Being rude or insulting – even startlingly rude and grossly insulting – is not nearly enough to qualify as extreme and outrageous conduct. Much more is needed – such as peculiar circumstances, known vulnerabilities, shocking spectacle, or long-running and doggedly pursued repetition.

A typical statement is that the conduct "must transcend all bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." *Graham v. Guilderland Central School District*, 256 A.D.2d 863, 863-64 (N.Y. App. 1998).

Notable case – *Nickerson v. Hodges* (La. 1920): One vivid example of outrageousness comes from *Nickerson v. Hodges,* 84 So. 37 (La. 1920). The plaintiff, Miss Nickerson, earnestly believed that a pot of gold was buried on her property. Her belief was based on family rumor and bolstered by a fortune teller. The neighbors – aware that Nickerson had a history of mental illness – filled a pot with rocks and dirt, put a lid on it, and buried it where she could find it. Included with the pot were instructions to encourage Nickerson to open the pot for the first time in front of a gathering of people. She did. The court reports that "the results were quite serious indeed, and the mental suffering and humiliation must have been quite unbearable, to say nothing of the disappointment and conviction, which she carried to her grave some two years later, that she had been robbed." Despite the death of the plaintiff before trial, her estate succeeded in winning a claim for intentional infliction of emotional distress.

Some other examples of extremeness and outrageousness for IIED include killing a pet animal in the pet owner's presence (*LaPorte v. Associated Independents, Inc.* 163 So.2d 267 (Fla. 1964)) and burning a cross in the yard of a Black person's residence (*Johnson v. Smith*, 878 F.Supp. 1150 (N.D. Ill. 1995)).

Notwithstanding these examples, IIED claims do not necessarily have to involve grim spectacle. They can involve quiet, isolated suffering as well. In *Kroger Co. v. Willgruber*, 920 S.W.2d 61 (Ky. 1996), the court recognized an outrage claim where the complaint alleged that an employee, fired for a refusal to violate ethical rules, was then sent to chase a nonexistent job in another state.

While mere insults and incivility are generally not outrageous enough for IIED, there are **two situations in which invective alone can be enough to sustain a claim:**

First is where there is **a continued pattern of insults or demeaning behavior**. Given enough time, simple boorishness can eventually accumulate to tortious proportions. Most people won't stand around and be continuously insulted if they can help it, so actionable patterns of repeated verbal abuse often happen in a context where the plaintiff is economically compelled to stay and endure the mistreatment. Workplaces and schools are frequent examples.

Second, courts have traditionally allowed actionable claims for **even single instances of gross insult where the defendant is an innkeeper or common carrier**. Allowance of such claims harkens to an ancient ethic that demands travellers – far from home and dependent on the assistance of strangers – are to be treated especially well.

Useful tip – Dobbs' four indicia of outrageousness:

To generalize about the extreme-and-outrageous requirement, one can often see a theme of inequality between the plaintiff and defendant. Along these lines, Professor Dan B. Dobbs identifies four markers, any of which tend to support a finding of outrageousness:

> (1) abusing one's position over or power with respect to the plaintiff,
>
> (2) taking advantage of a plaintiff whom the defendant knows to be particularly vulnerable,
>
> (3) repeating offensive conduct in a situation where the plaintiff is not, as a practical matter, free to leave,
>
> (4) perpetrating or threatening violence against a person or property in which the plaintiff is known to have a particular interest.

See Dan B. Dobbs, The Law of Torts, p. 827 (2000).

Note that because the threshold for what counts as outrageous depends on societal mores. What is outrageous in one era may not be in the next. So, as our culture changes, IIED will change right along with it.

B.4. IIED: Severe Emotional Distress

Another high threshold for outrage claims is the requirement that **the plaintiff must have suffered severe emotional distress**. Suffice it to say that merely being upset or even reduced to tears is not enough. The word "severe" is key.

In an earlier era of IIED, plaintiffs had to prove some physical symptom of the distress – heart problems, stomach ulcers, teeth worn from grinding, or some other corporeal manifestation of torment. In fact, some jurisdictions might still require a physical symptom. Today, however, courts generally leave it up to the jury to determine whether or not the distress is truly severe. Medical testimony is optional. But, of course, where physical ailments can be proved, the plaintiff's case benefits.

The extremeness and outrageousness of the conduct tends to go hand-in-hand with the severity of the emotional distress. A strong showing of outrageousness aids the showing of severity.

It's helpful to take a moment to contrast IIED's requirement of severe emotional distress with assault's requirement of an apprehension of harmful or offensive contact. A particularly stalwart plaintiff, unfazed by an apparently impending finger poke, can bring an assault claim – unflappability notwithstanding. But an emotionally tough plaintiff, one who lets the defendant's taunts and slings roll off of her or his back, *is* barred from claiming IIED. No severe distress, no claim.

C. IIED: Exploration

C.1. Case: *Wilson v. Monarch Paper* (5th Cir. 1991)

C.1.a. Advance Notes

The following case looks at IIED in the employer/employee context, combined with an allegation of age discrimination. Among other things, the case highlights the level of dependence people have on their jobs – both for money and for a sense of well-being.

In this case, the plaintiff prevailed on his IIED claim and received a sizable jury verdict. The claim's success was upheld on appeal in this opinion.

Here are some things you can get out of this case: You will get a vivid and memorable example of the tort – one that exemplifies the outrageousness requirement and the emotional-distress severity requirement. You will be able to consider a modern context for IIED, and an important, recurrent fact pattern: long-running demeaning treatment in the workplace. This case also corresponds well with some of the markers identified by torts scholar Dan B. Dobbs as supporting a finding of outrageousness, including the abuse of a position of power over the plaintiff and repeating offensive conduct in circumstances where simply walking away is not a practical option for the plaintiff.

C.1.b. Opinion

Wilson v. Monarch Paper

U.S. Court of Appeals for the Fifth Circuit

(from Texas)

August 16, 1991

939 F.2d 1138. Richard E. WILSON, Plaintiff-Appellee, v. MONARCH PAPER COMPANY, the Unisource Corporation, and Alco Standard Corporation, Defendants-Appellants. No. 89-2293. Before REYNALDO G. GARZA, JOLLY and JONES, Circuit Judges.

Judge E. GRADY JOLLY:

I˜

Because Monarch is challenging the sufficiency of the evidence, the facts are recited in the light most favorable to the jury's verdict. In 1970, at age 48, Richard E. Wilson was hired by Monarch Paper Company. Monarch is an incorporated division of Unisource Corporation, and Unisource is an incorporated group of Alco Standard Corporation. Wilson served as manager of the Corpus Christi division until November 1, 1977, when he was moved to the corporate staff in Houston to serve as "Corporate Director of Physical Distribution." During that time, he routinely received merit raises and performance bonuses. In 1980, Wilson received the additional title of "Vice President." In 1981, Wilson was given the additional title of "Assistant to John Blankenship," Monarch's President at the time.

While he was Director of Physical Distribution, Wilson received most of his assignments from Blankenship. Blankenship always seemed pleased with Wilson's performance and Wilson was never reprimanded or counseled about his performance. Blankenship provided Wilson with objective performance criteria at the beginning of each year, and Wilson's bonuses at the end of the year were based on his good performance under that objective criteria. In 1981, Wilson was placed in charge of the completion of an office warehouse building in Dallas, the largest construction project Monarch had ever undertaken. Wilson successfully completed that project within budget.

In 1981, Wilson saw a portion of Monarch's long-range plans that indicated that Monarch was presently advancing younger persons in all levels of Monarch management. Tom Davis, who was hired as Employee Relations Manager of Monarch in 1979, testified that from the time he started to work at Monarch, he heard repeated references by the division managers (including Larry Clark, who later became the Executive Vice President of Monarch) to the age of employees on the corporate staff, including Wilson.

In October 1981, Blankenship became Chairman of Monarch and Unisource brought in a new, 42-year-old president from outside the company, Hamilton Bisbee. An announcement was made that Larry Clark would be assuming expanded responsibilities in physical distribution.˜ When Bisbee arrived at Monarch in November 1981, Wilson was still deeply involved in the Dallas construction project. Richard Gozon, who was 43 years old and the President of Unisource, outlined Blankenship's new responsibilities as Chairman of the company and requested that Blankenship, Bisbee, Wilson, and John Hartley of Unisource "continue to work very closely together on the completion of the Dallas project." Bisbee, however, refused to speak to Wilson or to "interface" with him. This "silent treatment" was apparently tactical; Bisbee later told another Monarch employee, Bill Shehan, "if I ever stop talking to you, you're dead." Shehan also testified that at a meeting in Philadelphia at about the time Bisbee became President of Monarch, Gozon told Bisbee, "I'm not telling you that you have to fire Dick Wilson. I'm telling you that he cannot make any more money."

As soon as the Dallas building project was completed, Bisbee and Gozon intensified an effort designed to get rid of Wilson.˜ During the same time frame, Bisbee was preparing a long-range plan for Monarch, in which he made numerous references to age and expressed his desire to bring in "new blood" and to develop a "young team." This long-range plan was transmitted to Gozon, who expressed no dissatisfaction with the goals Bisbee had set out in the plan. In the meantime, Bisbee and Clark began dismantling Wilson's job by removing his responsibilities and assigning them to other employees. Clark was also seen entering Wilson's office after hours and removing files.

Blankenship was diagnosed with cancer in February 1982. In March 1982, Wilson was hospitalized for orthopedic surgery. Immediately after Blankenship's death in June 1982, Bisbee and Snelgrove gave Wilson three options: (1) he could take a sales job in Corpus Christi at half his pay; (2) he could be terminated with three months' severance pay; or (3) he could accept a job as warehouse supervisor in the Houston warehouse at the same salary but with a reduction in benefits. The benefits included participation in the management bonus plan, and the loss of the use of a company car, a company club membership, and a company expense account.

Wilson accepted the warehouse position. Wilson believed that he was being offered the position of Warehouse Manager, the only vacant position in the Houston warehouse at the time. When Wilson reported for duty at the warehouse on August 16, 1982, however, he was placed instead in the position of an entry level supervisor, a position that required no more than one year's experience in the paper business. Wilson, with his thirty years of experience in the paper business and a college degree, was vastly overqualified and overpaid for that position.

Soon after he went to the warehouse, Wilson was subjected to harassment and verbal abuse by his supervisor, Operations Manager and Acting Warehouse Manager Paul Bradley (who had previously been subordinate to Wilson). Bradley referred to Wilson as "old man" and admitted posting a sign in the warehouse that said "Wilson is old." In Bradley's absence, Wilson was placed under the supervision of a man in his twenties. Finally, Wilson was further demeaned when he was placed in charge of housekeeping but was not given any employees to assist him in the housekeeping duties. Wilson, the former vice-president and assistant to the president, was thus reduced finally to sweeping the floors and cleaning up the employees' cafeteria, duties which occupied 75 percent of his working time.

In the late fall of 1982, Wilson began suffering from respiratory problems caused by the dusty conditions in the warehouse and stress from the unrelenting harassment by his employer. On January 6, 1983, Wilson left work to see a doctor about his respiratory problems. He was advised to stay out of a dusty environment and was later advised that he had a clinically significant allergy to dust. Shortly after January 6, 1983, Wilson consulted a psychiatrist who diagnosed him as suffering from reactive depression, possibly suicidal, because of on-the-job stress. The psychiatrist also advised that Wilson should stay away from work indefinitely.

Wilson filed an age discrimination charge with the EEOC in January 1983. Although he continued being treated by a psychiatrist, his condition deteriorated to the point that in March 1983, he was involuntarily hospitalized with a psychotic manic episode. Prior to the difficulties with his employer, Wilson had no history of emotional illness.

Wilson's emotional illness was severe and long-lasting. He was diagnosed with manic-depressive illness or bipolar disorder. After his first hospitalization for a manic episode, in which he was locked in a padded cell and heavily sedated, he fell into a deep depression. The depression was unremitting for over two years and necessitated an additional hospital stay in which he was given electroconvulsive therapy (shock treatments). It was not until 1987 that Wilson's illness began remission, thus allowing him to carry on a semblance of a normal life.

II

On February 27, 1984, Wilson filed suit against the defendants, alleging age discrimination and various state law tort and contract claims. The defendants filed a counterclaim, seeking damages in excess of $10,000 for libel and slander, but later dismissed it.~ On November 30 and December 28, 1988, the case was tried before a jury on Wilson's remaining claims that the defendants (1) reassigned him because of his age; (2) intentionally inflicted emotional distress; and (3) terminated his long-term disability benefits in retaliation for filing charges of age discrimination under the Age Discrimination in Employment Act (ADEA).

The district court denied the defendants' motions for directed verdict. The jury returned a special verdict in favor of Wilson on his age discrimination claim, awarding him $156,000 in damages, plus an equal amount in liquidated damages. The jury also found in favor of Wilson on his claim for intentional infliction of emotional distress, awarding him past damages of $622,359.15, future damages of $225,000, and punitive damages of $2,250,000. The jury found in favor of the defendants on Wilson's retaliation claim. The district court entered judgment for $3,409,359.15 plus prejudgment interest. The district court denied the defendants' motions for judgment NOV, new trial, or, alternatively, a remittitur. The defendants appeal.

III~

To prevail on a claim for intentional infliction of emotional distress, Texas law requires that the following four elements be established:

> (1) that the defendant acted intentionally or recklessly;
>
> (2) that the conduct was 'extreme and outrageous';
>
> (3) that the actions of the defendant caused the plaintiff emotional distress; and
>
> (4) that the emotional distress suffered by the plaintiff was severe.

The sole issue before us is whether Monarch's conduct was "extreme and outrageous."

"Extreme and outrageous conduct" is an amorphous phrase that escapes precise definition. In *Dean v. Ford Motor Credit Co.*, 885 F.2d 300 (5th Cir. 1989), however, we stated that

> [l]iability [for outrageous conduct] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.... Generally, the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim, "Outrageous."

885 F.2d at 306 (citing Restatement (Second) of Torts § 46, Comment d (1965)). The Restatement also provides for some limits on jury verdicts by stating that liability "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.... There is no occasion for the law to intervene in every case where someone's feelings are hurt." Rest. (Second) of Torts § 46.

The facts of a given claim of outrageous conduct must be analyzed in context, and ours is the employment setting. We are cognizant that "the work culture in some situations may contemplate a degree of teasing and taunting that in other circumstances might be considered cruel and outrageous." *Keeton, et al., Prosser & Keeton on Torts* (5th ed. 1984 & 1988 Supp.). We further recognize that properly to manage its business, every employer must on occasion review, criticize, demote, transfer, and discipline employees. We also acknowledge that it is not unusual for an employer, instead of directly discharging an employee, to create unpleasant and onerous work conditions designed to force an employee to quit, i.e., "constructively" to discharge the employee. In short, although this sort of conduct often rises to the level of illegality, except in the *most* unusual cases it is not the sort of conduct, as deplorable as it may sometimes be, that constitutes "extreme and outrageous" conduct.˜

Wilson contends that Monarch's conduct was equally outrageous as the ˜incidents˜ in *Dean*. Generally, Wilson argues that an average member of the community would exclaim "Outrageous!" upon hearing that a 60-year-old man, with 30 years of experience in his industry, was subjected to a year-long campaign of harassment and abuse because his company wanted to force him out of his job as part of its expressed written goal of getting rid of older employees and moving younger people into management.˜

Most of Monarch's conduct is similar in degree to conduct in *Dean* that failed to reach the level of outrageousness. We hold that all of this conduct, except as explicated below, is within the "realm of an ordinary employment dispute," and, in the context of the employment milieu, is not so extreme and outrageous as to be properly addressed outside of Wilson's ADEA claim.

Wilson argues, however, that what takes this case out of the realm of an ordinary employment dispute is the degrading and humiliating way that he was stripped of his duties and demoted from an executive manager to an entry level warehouse supervisor with menial and demeaning duties. We agree.

Monarch argues that assigning an executive with a college education and thirty years experience to janitorial duties is not extreme and outrageous conduct. The jury did not agree and neither do we. We find it difficult to conceive a workplace scenario more painful and embarrassing than an executive, indeed a vice-president and the assistant to the president, being subjected before his fellow employees to the most menial janitorial services and duties of cleaning up after entry level employees: the steep downhill push to total humiliation was complete. The evidence, considered as a whole, will fully support the view, which the jury apparently held, that Monarch, unwilling to fire Wilson outright, *intentionally and systematically* set out to humiliate him in the hopes that he would quit. A reasonable jury could have found that this employer conduct was intentional and mean spirited, so severe that it resulted in institutional confinement and treatment for someone with no history of mental problems. Finally, the evidence supports the conclusion that this conduct was, indeed, so outrageous that civilized society should not tolerate it. Accordingly, the judgment of the district court in denying Monarch's motions for directed verdict, JNOV and a new trial on this claim is affirmed.˜

In conclusion, we express real concern about the consequences of applying the cause of action of intentional infliction of emotional distress to the workplace. This concern is, however, primarily a concern for the State of Texas, its courts and its legislature. Although the award in this case is astonishingly high, neither the quantum of damages, nor the applicability of punitive damages has been appealed.˜

AFFIRMED.

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C.1.c. Questions to Ponder About *Wilson v. Monarch Paper*

A. Is this the kind of thing that a would-be plaintiff should just "put up with"? Or is it a good thing that people in Wilson's position can sue?

B. The court expressed "real concern about the consequences of applying {IIED} to the workplace." Are there special dangers to recognizing a cause of action for IIED in the employment context? Could it be a good idea for a state legislature to bar such claims by statute?

C. The court says that "extreme and outrageous" is amorphous and eludes attempts at precise definition. With favor, the court notes the trope that extreme and outrageous conduct is the kind of conduct that would cause a person to exclaim, "Outrageous." Is this approach to defining the tort circular? And if so, is it therefore, unhelpful? Or does this explanation help to communicate something about the essence of the IIED tort?

C.2. Case: *Dzamko v. Dossantos* (Conn. 2013)

C.2.a. Advance Notes

The following case looks at IIED in the modern social-media context.

The defendant is Joseph C. Dossantos, who engaged in sexually explicit conversations by text message, online, with persons he believed to be 14-year-old girls, but who were actually undercover police. To seem younger than he in fact was, Dossantos provided pictures, ostensibly of him, that were actually of the plaintiff Joseph Dzamko. Dzamko, who happened to be a police officer in a neighboring town, was soon ensnared in the imbroglio, becoming the target of an internal affairs investigation. Though the police eventually righted their understanding of the facts, Joseph Dzamko and his wife Sarah Dzamko alleged they endured mental distress. They sued Dossantos for IIED.

In the opinion below, the trial court considers Dossantos's motion to dismiss the claims from the lawsuit by way of a motion to strike them from the complaint as failing to state claims for which legal relief could be granted. Put differently, Dossantos is arguing that even if proved true, the allegations would not support a prima facie case for IIED. The trial court disagreed and held for the plaintiffs.

What can you get out of this reading?

For one, this case is an excellent example of IIED's expansive concept of intent, broadened in a plaintiff-favoring way to include recklessness. In this situation, it would seem to be difficult to prove that Dossantos acted with the purpose of bringing about severe emotional distress for Joseph Dzamko or was substantially certain it would come about. And that proof would be even more difficult with regard to the spouse, Sarah. Accordingly, you can see how recklessness has a considerable impact in opening up the availability of this tort to plaintiffs.

Additionally, this case is valuable because of its procedural posture. As a motion concerned with the sufficiency of the allegations in the complaint, this case helps illuminate what is required to bring an IIED lawsuit, as opposed to what is required to win it.

This case also provides a sharp example of the single-instance type of IIED claim. There is no allegation of a pattern of repeated harassing conduct over a course of months or years. Rather, the lawsuit appears to be based on just one occurrence of sending photos. (Although, it appears, the defendant tried the same things more than a dozen other times, albeit without additional consequences of triggering police action.)

Finally – like many IIED litigations – this case provides a memorable and vivid example of the tort.

C.2.b. Opinion

Dzamko v. Dossantos

Superior Court of Connecticut
October 23, 2013

2013 Conn. Super. LEXIS 2372; 2013 LX 46336; 2013 WL 5969531. Joseph Dzamko et al. v. Joseph C. Dossantos. CV136027575.

Judge JON C. BLUE:

The Motion To Strike now before the court involves allegations of well-established torts committed in the age of the internet. Although the facts are novel, the applicable law is not. As Holmes, J. once wrote, "I am frightened weekly but always when you walk up to the lion and lay hold the hide comes off and the same old donkey of a question of law is underneath."

The alleged facts (assumed, for present purposes, to be true) arise out of a mistaken identity scenario, worthy of a modern Shakespeare, involving the intersection of Facebook pilferage and an internet sting operation. In 2012, the defendant, Joseph C. Dossantos, initiated sexually explicit conversations in an internet chat room, optimistically labeled "Connecticut Romance." Dossantos mistakenly believed that he was communicating with two fourteen-year-old girls. In fact, as courtwatchers will already surmise, the "fourteen-year-old girls" were, in fact, police detectives. Dossantos, who was forty years old, wanted his correspondents to believe that he was younger than he was. To bolster his claim, he sent three digital images of "himself" to one of the "girls." Unhappily, the images were not images of Dossantos. They were, rather, images of the plaintiff, Joseph Dzamko ("Joseph"), appropriated by Dossantos from Joseph's Facebook page. The images of Joseph were not themselves compromising.

They were perfectly normal photographs. But the context in which Dossantos used them plainly made it appear that the person thus depicted was engaged in sexually predatory behavior.

The detective receiving the transmissions recognized the person so depicted. It was Joseph. By malign fate, Joseph was a police officer in another town and had been a Police Academy classmate of the detective. The detective forwarded the images of Joseph to Internal Affairs. Internal Affairs investigated, and Joseph had to tell his wife, Sarah Dzamko ("Sarah") what had happened. The investigating officers eventually traced Joseph's Facebook images to Dossantos. Dossantos, confronted with the evidence, admitted that he had not only sent Joseph's images to the detective as images of himself but that he had done the same thing with at least twenty other females (or persons who he presumed to be females) on the internet. Forensic review of Dossantos' computer revealed that these transmissions had occurred in the context of sexually explicit conversations. All of this caused Joseph and Sarah great distress.

On April 9, 2013, Joseph and Sarah commenced this action against Dossantos˜. On July 19, 2013, Dossantos filed the Motion To Strike now before the Court. The Motion seeks to strike the Fourth, Fifth, and Ninth Counts˜. The Motion contends that these counts fail to state claims upon which relief can be granted.˜

Fourth Count—
False Light Publicity.

{The court held this claim was adequately pled against Dossantos.}

Fifth Count—
Intentional Infliction of Emotional Distress (Joseph).

The Fifth Count alleges intentional infliction of emotional distress as to Joseph. The elements of this cause of action are "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe." *Perez–Dickson v. City of Bridgeport*, 304 Conn. 483, 526-27 (2012). The Fifth Count adequately pleads these elements.

With respect to the first element, the Revised Complaint sufficiently alleges facts from which it could reasonably be inferred that, at a minimum, Dossantos should have known that emotional distress would be the likely result of his conduct. It is very well known that images transmitted on the internet are not likely to remain private for very long. All too often, they are retransmitted to the world. Think of the much-publicized issue of "sexting" images sent by clueless teenagers. These images, once sent to a single, supposedly private source, end up being resent to hundreds, and soon thousands, of other people. Any reasonable person could foretell that eventually someone was going to recognize the person in the images transmitted by Dossantos and draw conclusions that would, in turn, cause that person to suffer emotional distress.

Dossantos denies that his conduct was extreme and outrageous, but he cannot do that with a straight face. The test is whether "the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, Outrageous!" *Perez–Dickson,* 304 Conn. at 527. This is such a case.

Dossantos does not dispute the remaining elements of the alleged tort. The emotional distress sustained by the plaintiff must, of course, be severe, but that is sufficiently alleged here.

Ninth Count— Intentional Infliction of Emotional Distress—Sarah.

The Ninth Count alleges intentional infliction of emotional distress as to Sarah. That count alleges that Dossantos's conduct "was carried out with the knowledge that it probably would cause ... Sarah ... to suffer emotional distress." This is not, as Dossantos argues, an allegation of bystander emotional distress, such as that of a witness to an automobile accident. Dossantos's conduct implied that Joseph was a sexual predator. This would naturally reflect on Joseph's spouse and cause her great personal embarrassment and natural concern for her own personal health quite apart from the distress she may have experienced from observing Joseph's own travail. Under these circumstances, the tort of intentional infliction of emotional distress with respect to Sarah has been adequately pleaded.

The Motion To Strike is denied˜.

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C.2.c. Questions to Ponder About *Dzamko v. Dossantos*

A. The 'Outrageous!' test. The *Dzamko* court references the exclamation-of-the-average-member-of-the-community idea for explaining extremeness and outrageousness, as did the *Wilson v. Monarch Paper* court. There are a couple of differences, however. For one, the *Dzamko* court uses an exclamation point ("Outrageous!"). The other difference is that the *Dzamko* court calls it a "test." Is it a good test? And what do you think of the *Dzamko* court's application of the test to the facts of this case? Would the average person exclaim "Outrageous!" upon learning of Dossantos's conduct? Did you?

B. Family distress. The *Dzamko* court allows an IIED claim not only for Joseph Dzamko, but also for his wife, Sarah, brushing aside concerns that this is "bystander emotional distress." Do you agree that Sarah should have a claim? Supposing the Dzamkos had children, should they be able to bring claims as well? If Joseph's mother and father had been aware of this, should they also have claims?

D. The First Amendment Defense to IIED

As a final note, it's worth considering that an IIED cause of action can be trumped by the First Amendment – at least where the cause of the emotional distress is speech about a matter of public concern.

In *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), the U.S. Supreme Court unanimously held that a magazine had a protectable free-speech interest in lampooning a politically active televangelist, Jerry Falwell, by publishing an account of a fictional sexual encounter between Falwell and his mother. Later, in *Snyder v. Phelps*, 562 U.S. 443 (2011), the father of a Marine killed in the Iraq War sought to uphold an IIED verdict against a group that protested his son's funeral. The protestors used the funeral as a platform to voice anti-gay and anti-Catholic views. Standing on public sidewalks, they held placards with slogans including "You are going to hell" and "Thank God for dead soldiers." The U.S. Supreme Court held 8-1 that the father's IIED cause of action was barred by the First Amendment.

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8. Trespass to Land

"As I went walking, I saw a sign there
And on the sign, it said 'No Trespassing.'
But on the other side, it didn't say nothing,
That side was made for you and me."

– Woody Guthrie, "This Land is Your Land" (1944)

A. Lead-in

Trespass to land is one of the most ancient torts – and one of the most basic. It's also fundamental. It sits at the root of our capitalist economy. While we might be able to imagine a world without the torts of assault or intentional infliction of emotional distress, it is hard to imagine American society without a private right to take others to court for coming and going as they please on your land.

Just because trespass to land is old, and just because respect for private property is thoroughly ingrained in our culture, do not make the mistake of thinking trespass to land has little relevance to modern practice. Unauthorized incursions on land happen all the time. And trespass to land is a powerful tort, working against seemingly blameless defendants in ways that would make negligence doctrine blanch.

Consent is, of course, a defense. Many if not most trespass-to-land cases involve a consent defense and a question of whether the consent was exceeded.

B. Trespass to Land: Explanation

B.1. The Elements of Trespass to Land

The pleading requirements for the tort of trespass to land can be summed up as follows:

> A plaintiff can establish **a prima facie case for trespass to land** by showing: the defendant (1) intentionally (2) caused an intrusion, either by entry onto or failure to leave or remove from, (3) plaintiff's real property.

B.2. Element: Plaintiff's Real Property

Instead of taking the elements in order, as we've done with other torts, it is necessary to talk first about the last element – what constitutes the plaintiff's real property. Understanding this is a prerequisite to understanding anything else about the tort.

To begin with, let's get something basic out of the way. The plaintiff does not need to be the "owner" of the land in question. **The plaintiff needs only be the possessor of the real property**. For instance, a couple living in a rented house can sue for trespass to land, even though they only have a lease and no title. In fact, the landlord of leased property might not have standing to sue for trespass – at least where there is no damage to the landlord's interest. When we speak of "possessing" real property we mean something more than standing resolutely on a piece of it, as in a game of king of the mountain, or renting a room for the night. Further detail about what counts as possession or a possessory interest will be left for the Property course. Just keep in mind that as far as the trespass tort goes, being a lessee is as good as holding title to the land.

Moreover, you need to think of the word "land" broadly. What we are talking about here is not merely soil and rock but the broader concept of **real property**, also known as **realty**.

Real property is the land and everything affixed to it, including improvements, buildings, and all fixtures. Because real property can be divided vertically as well as horizontally, an individual apartment on an upper story can be "land" for the purposes of trespass to land. As an example, imagine an old multi-story warehouse downtown that has been converted into full-floor loft apartments. Suppose Tracie is the tenant-lessee of the third-floor loft, and Flora is the tenant of the fourth-floor loft. If Tracie ventures up to the fourth-floor loft without Flora's permission, Tracie has committed a trespass, even though her GPS coordinates have never taken her outside the latitudes and longitudes of her own apartment.

Assuming it's not divided up vertically (as with a multi-story building), the property interest in a plot of land extends down into the subsurface of the Earth and upward into the sky. Thus, an undivided square lot defines a 3-D real property interest having the shape of an inverted four-sided pyramid, with the point at the center of the Earth, and the outward sloping sides extending into the heavens. The Latin used to express this idea is *cuius est solum, eius est usque ad coelum et ad inferos* ("whoever owns the soil, it is theirs all the way upwards to Heaven and downward to Hell"). The doctrine born of this idea is referred to in abbreviated fashion as ***ad coelum* doctrine**, which carves out just the "to the heavens" part of the Latin phrase (usually pronounced "add SEE-lum").

As you can imagine, the *ad coelum* conception became a problem with the invention of the airplane, but the law adjusted to accommodate modern aviation. Exactly how far the property right extends into the atmosphere was the subject of a constitutional takings case, *U.S. v. Causby.* The *Causby* case sheds some light on how low one can fly, float, or hover without committing the tort of trespass to land. According to the teaching of *Causby*, that would be the minimum safe distance for flight as prescribed by federal regulation. See 328 U.S. 256, 263-64 (U.S. 1946). The *Causby* court specifically noted that airplanes "which skim the surface but do not touch it" are entering upon the land every bit as much as a trespass accomplished by more conventional means.

So, if some good-hearted kids are playing a game of catch with a baseball, and if they intentionally throw the ball over a corner of the lot of a neighbor, they are liable to that neighbor for trespass to land – that is assuming there was no implied license for them to use the neighbor's airspace in this way. (Though, admittedly, it is difficult to imagine a neighbor cranky enough to sue.)

B.3. Element: Intent

You may find that the intent requirement for trespass to land is unintuitive. So you'll have to pay careful attention to the doctrine here.

As with the other intentional torts, the intent required is the intent to act with the purpose or with the substantial certainty of bringing about some consequence. But that intended consequence is quite different from other intentional torts. The intent for trespass to land needs only to be to cause the movement that intrudes on the plaintiff's land. Put another way, there does not need to be an intent to *trespass*, just an intent to effect the action that constitutes the trespass.

Let's consider an example: Suppose the defendant intends to place a small wire-and-plastic marking flag in the defendant's own ground. But, because of the defendant's innocent misunderstanding of property boundaries, the piece of ground into which the defendant plants the flag happens to be on the plaintiff's property. That's a trespass to land. The intent requirement is satisfied.

It does not matter that the defendant was mistaken. Further, it does not matter if the defendant is non-negligent in entering the plaintiff's land. In fact, the defendant could have consulted all the documents in the county hall of records and used state-of-the-art GPS to map out a route. All that is required for intent is that the defendant intended to place the object where it was actually placed. If that happens to be a corner of land belonging to the plaintiff, then the defendant has committed trespass to land.

It is helpful to contrast this with the intent required for battery. Unless some doctrine of transferred intent applies, the intent required for battery is the intent to effect a battery. If the defendant intends to kick a box, but does not know a small child is inside, there is no intent for battery. But if the defendant intends to kick a fencepost, not knowing that the fence post is on someone else's land, then the defendant is liable for trespass to land. The defendant does not have to intend to trespass, just intend the action that constitutes the trespass.

The intent required for trespass to land is a low bar. But it's not non-existent. Even under the doctrine's expansive view of intent, not every entry will be actionable. Suppose the defendant is pushed by someone else onto the plaintiff's land. There's no intent for a trespass action against this defendant. Similarly, suppose the defendant stumbles and falls onto the plaintiff's land. There is no trespass to land liability here either, since the defendant did not intend the action that constitutes the trespass.

B.4. Element: Entry

There are many ways an entry can be accomplished.

The first thing that comes to mind is an entry by the defendant walking across the surface of the Earth and over the border of the plaintiff's property. That counts, of course. But that sort of **horizontal** entry is merely one sort of entry. As indicated by the above discussion and the example of the building divided into loft apartments, an entry can be **vertical** (as with a person trespassing into an apartment immediately above theirs).

An "entry" does not need to be a transit into some volume of space, however. Entry isn't limited to location within three-dimensional spatial coordinates. Importantly, **acting on** a portion of the real property can constitute a trespass.

Suppose the defendant is on the plaintiff's property with the plaintiff's permission. There is no trespass to land at this point. If, however, the defendant interacts with the land or fixtures in a way that is beyond the scope of that permission, that will count as an entry. A house guest could be in the host's bathroom with permission, but rummaging through built-in drawers and installed shelving behind the mirror – if that is beyond the scope of the permission to use the bathroom – would be a trespass. Or even in the great room, where the defendant is authorized to be, a trespass could be accomplished by jumping onto a table and swinging from the chandelier.

An actionable entry on land may, of course, be made by the defendant personally or by the defendant causing an object to enter. But, importantly, the defendant can be liable by **inducing** a third party to enter or by inducing a third party to cause an object to enter. Let's suppose you inveigle your friend to enter a neighbor's yard to retrieve an errant ball. That is your entry. (And it is your friend's entry too.)

The trespass need not be an affirmative act. It can be an omission as well. That is to say that **failure to leave or remove** constitutes an entry for purposes of the tort of trespass to land. A party guest who refuses to leave when asked commits a trespass by remaining. And if you tell some friends they can park a boat in your driveway for a week, your friends commit a trespass if they do not return when agreed to drive the boat trailer away.

B.5. Not an Element: Damage

No damage is required for a trespass to land case. Entry without any damage is actionable. If there are no actual damages to recover, a plaintiff is entitled to nominal damages. And even without actual damages, courts will award injunctions and punitive damages to the extent those remedies are appropriate under the circumstances. The tort of trespass to land exists in large part to protect the rightful possessor of real property to the exclusive possession of that real property. So damages are not and never have been an element of the claim.

The South Carolina Court of Appeals put it this way:

> "˜The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. The entry itself is the wrong. Thus, for example, if one without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure.˜ The mere entry entitles the party in possession at least to nominal damages."

Snow v. City of Columbia, 305 S.C. 544, 552-53 (S.C. App. 1991)

In the case of *Harrington v. McCarthy*, 169 Mass. 492 (Mass. 1897), the defendant constructed a building with a cornice that projected over the plaintiff's land a mere eighteen inches. And some window sills projected over the land even more slightly. The Massachusetts Supreme Judicial Court approved an injunction requiring the defendant to remove the offending portions of the wooden building. "The fact that the plaintiff's land is now used as a driveway does not affect his rights. He may at any time desire to erect a building upon it. Nor is it material that he has not yet suffered any actual damage in the use of his property." *Harrington*, 169 Mass. at 94.

The *Harrington* court mentioned in particular that the plaintiff needs the right to sue over trespass to land in a no-damages circumstance to prevent a future loss of property rights by way of the defendant eventually, with the passage of time, obtaining a legal right to an easement. That is something that can happen through a property doctrine known as "adverse possession."

B.6. Damages and Scope of Recovery for Trespass to Land

If the trespasser does no damage, the plaintiff will at least receive nominal damages. But if the trespasser does cause damage, then damages are recoverable. A trespass-to-land plaintiff can recover compensatory damages based on property damage, personal injury, and even mental distress.

The scope of recoverable damages in a trespass to land case can be breathtaking. Any damages caused by the trespasser – even if highly unpredictable and even if the trespasser was exercising due care – can be recovered. This is quite extraordinary when compared to the negligence cause of action. In negligence, the requirement of a breach of the duty of care and the application of proximate causation doctrine would foreclose many damages claims that are perfectly viable in a trespass-to-land case.

Suppose an innocent trespasser – with a reasonable belief she or he is not trespassing – consistently undertakes every reasonable precaution while on the plaintiff's land, but nonetheless does some damage to the property in an utterly unforeseeable manner. The trespass-to-land tort can be used to make the defendant liable for the full extent of the damage.

B.7. Where Things Get Hazy: Pollution, Particles, and the Entry/Damage Intersection

There are two aspects of the doctrine of trespass to land that seem to cause recurrent dyspepsia for courts. And, interestingly, they can get tangled together. So these two facets of the law – dealing with entry and damage in the trespass context – are worth talking about together. Also, there's a particular factual context where this doctrinal maelstrom tends to form: pollution in the form of something invisible, like tiny particles or gas or the like.

A warning: This matter might seem like – and perhaps is – a detour from basic tort doctrine, a trip that takes us into the weeds. Nevertheless, for whatever reason, it has become an area of interest for torts casebooks and treatises, and it has been a focal point of the bar exam in the past.

So here we go. As mentioned, there are two bits of trespass-to-land doctrine that come into this.

The first bit of the doctrine that troubles some judges is the idea that a plaintiff really can win a lawsuit for trespass to land even if absolutely no damage is done whatsoever. That's the longstanding and widely recognized rule. But despite its sturdy pedigree, the doctrine doesn't sit well with everybody.

The other place where trespass doctrine gets prickly for courts is when the thing entering onto the plaintiff's property is not a conventional "thing." Consistent with its pre-modern origins, the law of trespass to land tends to regard the world as consisting of things you can see and hold. Entry by invisible airborne toxins, for instance, is not something that trespass law can easily wrap its mind around. Put differently, the law of trespass to land grew up, attended graduate school, and authored many books all without having advanced its science education beyond the third grade. When forced out of the comfort zone it has made for itself, trespass doctrine has struggled.

To unpack this, we'll look at some specific cases from Oregon and Washington. But this doctrinal drama involving entry, damage, and barely corporeal substances is not limited to the Cascadian corner of the country.

In *Martin v. Reynolds Metals Co.*, 221 Or. 86 (Ore. 1959), a farmer sued the proprietor of an aluminum plant whose fluoride particulate emissions caused his land to be unfit for raising cattle. The Supreme Court of Oregon upheld the cause of action, creating authority for the proposition that entry can be accomplished even by minute particles. Oregon's high court wrote:

> "If, then, we must look to the character of the instrumentality which is used in making an intrusion upon another's land we prefer to emphasize the object's energy or force rather than its size. Viewed in this way we may define trespass as any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces

> of matter or by energy which can be measured only by the mathematical language of the physicist."

Hmmm. Seems good as far as that farmer goes. But are we sure we want to commit to the thing about bits of matter "which can be measured only by the mathematical language of the physicist"? Physicists are really into tiny stuff and mathematical stuff. Physics textbooks talk about something called a "Planck length," a unit of measurement so small that the head of a pin is about 70,000,000,000,000,000,000,000,000,000,000 of them across. So matter can be *very* small.

And then the Oregon Supreme Court wants to include *energy* also?!?

Well, we probably don't have to take what the Oregon court said literally. This is the common law, after all, not a statute. (This is the kind of issue that caused this book to spill so much ink about facts and outcomes of cases being more important to legal doctrine than the words courts actually use in the cases to describe the doctrine. See, *eodem*, Chapter 1, § F.3.)

At any rate, the message of *Martin v. Reynolds Metals Co.* is clear enough: A defendant can't escape liability for a trespass to land by pointing to the invisibility of the entering substance. That does seem sensible. But wait a minute. What if the minute particles don't make the land unfit for raising cattle or otherwise do any damage? Damage isn't a requirement for trespass to land, after all. So if you can sue for entry of an invisible particle that does no damage, aren't we headed to some problems?

Apparently the Pacific Northwest has its share of metal-producing industry, because a different metal manufacturing operation would eventually force a confrontation with the puzzling questions left over from *Martin v. Reynolds Metals*.

In *Bradley v. American Smelting and Refining Company*, 104 Wn.2d 677 (Wash. 1985), the Supreme Court of Washington sought to follow *Martin* without causing mass chaos in the manufacturing sector. In accordance with *Martin*, the court held that airborne particles can constitute an entry for trespass to land. But unlike the court in *Martin*, the *Bradley* court sought to head off the trouble that could be caused when invisible particle entry was paired with the lack of a requirement for any injury. Thus, the Washington court evolved the common law of its state to add a new element to a prima facie case of trespass to land: a damages requirement.

> "When airborne particles are transitory or quickly dissipate, they do not interfere with a property owner's possessory rights˜. When, however, the particles or substance accumulates on the land and does not pass away, then a trespass has occurred.˜ *Martin v. Reynolds Metals Co.,* 221 Or. 86 (Ore. 1959). While at common law any trespass entitled a landowner to recover nominal or punitive damages for the invasion of his property, such a rule is not appropriate under the circumstances before us. No useful purpose would be served by sanctioning actions in trespass by every landowner within a hundred miles of a manufacturing plant. Manufacturers would be harassed and the litigious few would cause the escalation of costs to the detriment of the many. The elements that we have adopted for an action in trespass˜ require that a plaintiff has suffered actual and substantial damages. Since this is an element of the action, the plaintiff who cannot show that actual and substantial damages have been suffered should be subject to dismissal of his cause upon a motion for summary judgment."

Bradley v. American Smelting, 104 Wn.2d at 691-692 (Wash. 1985) (citations restyled).

Solving one problem, however, can sometimes cause a new problem to pop up. In *Orvold v. Mershon*, No. 86628-1-I (Wash. App. Dec. 16, 2024), a Washington appeals court upheld the dismissal of a trespass to land claim on summary judgment for failure to show "actual and substantial damages," citing to *Bradley v. American Smelting*.

The *Orvold v. Mershon* court approved this dismissal notwithstanding the fact that the circumstances of the case were an age-old pattern, one approved by courts going back to antiquity: Plaintiffs were using a trespass to land claim in order to head off the future loss of their property rights through application of the adverse possession doctrine. *Orvold,* Slip Op. at 9.

The facts of *Orvold v. Mershon* are as complicated as they are dispiriting, but the gist is two neighbors fighting over a cul-de-sac easement and an alleged pattern of parking cars in a purposefully provoking way.

The doctrine of adverse possession, you see, is a rule of property law that can – to the habitual shock of one-L students – allow landowners to gain permanent rights to their neighbor's property. Being able to sue an intruder for trespass to land, even in cases where there are no damages, has long been respected as a legitimate legal tool for interrupting an entrant's adverse possession by which an intrusion might ripen into a right. (Such as, allegedly, in a case like this: a perpetual property right to park, annoyingly and intrusively, on a neighbor's land.)

To judge by the plaintiffs' loss in *Orvold*, the Washington Supreme Court's *Bradley* opinion appears to have had unintended consequences.

In pursuit of making trespass to land work in the context of entry by invisible particles, it seems that the *Bradley* opinion stopped trespass to land from working in one of its most ancient contexts.

Or at least sometimes.

In *Lavington v. Hillier*, 22 Wash. App. 2d 134 (Wash. App. 2022), a different Washington appeals court went a different way. Factually, *Lavington v. Hillier* features another complicated dispute between neighbors over vehicles and ingress/egress easements. Compared to the *Orvold* case, the *Lavington* court reached a result more consonant with longstanding common-law doctrine. *Lavington* held that physical damage to property was not required for a trespass-to-land claim.

But to get there, the *Lavington* court had to rely on the existence of emotional damages and go through some jurisprudential and grammatical gymnastics in interpreting *Bradley v. American Smelting*.

Now, as a reminder, in most jurisdictions, a court could allow a trespass-to-land claim to succeed with mere nominal damages of $1. But in Washington, that would be inconsistent with *Bradley v. American Smelting.*

What the *Lavington* court did to hew closer to common-law bedrock without going rogue was to hold that physical damage to property was unnecessary where emotional distress could be the basis for "actual and substantial damages." *Lavington v. Hillier*, 22 Wash. App. 2d at 151-152. To get there – i.e., to reach a result more aligned with age-old common law while maintaining obedience to binding precedent from the state's highest court – the intermediate appeals court relied on finely parsing the Washington Supreme Court's words. The *Lavington* court pointed to the fact that the *Bradley v. American Smelting* case mostly used the word "damages" as opposed to "damage." That tendency – toward the plural as opposed to the singular – signalled, in the appeals court's view, that the Washington Supreme Court must have meant "compensation a person can recover in a lawsuit for an injury or a loss" as opposed to "some physical harm to a person or property." *Lavington v. Hillier*, 22 Wash. App. 2d at 149. And in *Lavington*, the emotional distress could be the alleged injury or loss.

So the *Lavington* court illuminated a way for plaintiffs to vindicate private property rights through a trespass action even where the land is undamaged – at least so long as the plaintiff can allege emotional harms. And the emotional-harm hook, by the way, might mean the plaintiff will need to turn over their private mental health records (see *Lavington* at ¶39 et seq.).

Also interesting, *Lavington* was a 2-1 split, and the dissenter insisted that trespass to land in the state of Washington required damage "*to the property.*" 22 Wash. App. 2d at 158 (Lee, J., dissenting) (italics original).

The Washington Supreme Court, for its part, elected to keep things interesting in the Evergreen State by declining to take review.

Putting all of this together, the metal-maker pollution-particle trespassing saga of the Pacific Northwest, including its B-plot about neighbors feuding over parking, is a true-to-life exemplum of common law torts. Wonky cases can make for wonky law. Here, hazy entry makes for hazy doctrine. And haziness is an inevitable feature of our common law. Courts decide cases one at a time. They pay attention to precedent but try to reach just and logical results with respect to the parties before them.

As far as the entry/damage/tangible/invisible issue goes for trespass to land, we can synthesize *Martin v. Reynolds Metals* and *Bradley v. American Smelting* down to a quick blackletter-type takeaway:

> For trespass to land, no physical damage is required, only an intentional physical entry upon one's real property by something visible and tangible; though some courts will allow a trespass-to-land claim without a tangible entry so long as there is physical damage.

That synthesis is the kind of thing you might see, perhaps in slightly different wording, in a commercial outline, a concise treatise, or a restatement of the law. And it wouldn't be wrong. It wouldn't even be inaccurate. But it would necessarily be glossing over a great deal of complexity, jurisprudential struggle, and even – not to put too fine a point on it – confusion among courts.

A student cannot hope to learn tort law in all its chaotic, nuanced, wibbly-wobbly actuality. It is not possible to read all the cases – not even edited down. Nor is it even possible to read *about* all the cases in a condensed, synopsized form as above. That is why learning law calls for some mixture: Committing to mind a large amount of simplified blackletter rules, reading exposition that wrangles with much of the nuance and complications, and reading a number of cases that show the raw stuff itself. And, insofar as that goes, it is often the messiest, most convoluted, and most cripplingly flawed cases that are the most illuminating.

More of those coming up.

B.8. Keep in Mind: There's Always Nuisance

If someone is doing something that is messing with your interest in real property, trespass to land is not the only game in town. Real property has another great champion in the common-law cause of action of nuisance.

Trespass to land, by doctrinal design, is focused on protecting the possessor's right to exclusive use. The nuisance cause of action, by contrast, is centered around the idea of preserving one's right to the use and enjoyment of their property. A neighbor's production of noise, odors, water pollution, smoke, dust, vibrations and shocks, danger from explosive materials, and danger from a fire hazard, as well as the attraction of noisome crowds, are among the sorts of things that can be remedied through an action for nuisance. Nuisance is often a subject of coverage in the law school Property course.

C. Trespass to Land: Exploration

C.1. Case: *Hannabalson v. Sessions* (Iowa 1902)

C.1.a. Advance Notes

Reading very old cases, with their convoluted prose, is usually a burden on the modern legal brain. But every once in a while, it's delicious. This next case, *Hannabalson v. Sessions*, is precisely such a jewel.

Don't get bogged down with worry about what all you must retain from this case. The rule of law is straightforward and already covered by the preceding expository text of this chapter. If you have the habit of briefing cases, at least allow yourself one pleasure read first before you start parsing *Hannabalson* for its constituent briefable bits.

If you allow yourself to imagine the judge writing it with a wink, which, while remaining jurisprudentially serious, Judge Weaver surely did, then *Hannabalson v. Sessions* will give you a memorable example of basic trespass-to-land doctrine that you won't soon forget.

C.1.b. Opinion

Hannabalson v. Sessions

Supreme Court of Iowa
April 12, 1902

ANNA C. HANNABALSON, Appellant, v. GEORGE M. SESSIONS, Appellee. 116 Iowa 457; 90 N.W. 93. Appealed from Pottawattamie District Court, Hon. N.W. MACY, Judge, presiding. Supreme Court of Iowa, Des Moines. Judges: WEAVER, J. Decided: Saturday, April 12, 1902.

WEAVER, J.

Plaintiff and defendant live upon adjoining lots. There is frequent war between the families. The *casus belli* in the present instance is to be found in the following circumstances: Upon the boundary line between the lots is a tight board fence, a part of which was built by plaintiff's husband; but, unfortunately, this barrier, while all sufficient to prevent the passage of the dove of peace, is neither high enough nor tight enough to prevent the interchange of brick bats or the bandying of opprobrious epithets.

On May 30, 1898, the defendant, while at work in his garden, claimed to have narrowly escaped a brick hurled in his direction by one of plaintiff's children, and in his indignation at the unprovoked bombardment threatened the lad with arrest. Plaintiff and her husband, being at work near by, hear the threat and took up the quarrel. About this time plaintiff's husband discovered that a ladder belonging to defendant was hanging upon a peg or block attached to the partition fence, and, conceiving this to be a cloud upon his title, he forthwith attempted to remove it, while defendant, seeing the peril in which his property was placed, rushed to its defense. Whether plaintiff herself laid violent hands on the ladder is a matter of grave dispute. She denies it, and says that the height and depth of her offending consisted in her leaning up against the fence with one arm quietly hanging over the top thereof, and in stimulating her husband's zeal by audible remarks about the "crazy fool" who was bearing down upon them from the other side. She further avers that while occupying this position of strict neutrality, the defendant assaulted her *vi et armis,* and with his clenched fist struck the arm which protruded over the fence top into his domain. Defendant denies the striking, and says that plaintiff, instead of being a peaceable and impartial observer of the skirmish, was herself a principal actor, and that in aid of her husband she climbed upon some convenient pedestal, and, hanging herself across the fence, reached down, and with malice aforethought seized the ladder and wrenched it from its resting place. Thereupon, actuated by a natural and lawful desire to protect his property from such ravishment, and being goaded on by statements from the other side of the fence reflecting upon his mother and casting doubt upon his proper rank in the animal kingdom, he gently, and without unreasonable force, laid his open hand upon plaintiff's arm, and mildly but firmly suggested the propriety of her "keeping on her own side of the fence." As is usual in cases of this kind, the testimony of the principal parties is entirely irreconcilable, and, as is also usual, each is supported by partisan witnesses in a very emphatic manner. More than a year after this alleged assault this action for damages was begun, and plaintiff swears that, as a result of the blow upon her arm, she has during all that time been sick, weak, nervous, suffering great pain and anguish, and is to a great extent, a physical and nervous wreck. On the other hand, some of the defendant's witnesses testify, in effect, that, whatever may be plaintiff's bodily ills, they have existed for many years, while others tell us that since the alleged assault they have seen her performing outdoor labor with all the apparent strength of an athlete. Her physician, who was a witness in her behalf, says that, "while she is not quite so fleshy as she was a year ago, she is still fleshy enough," and the jury, who saw her at the trial, seem to have adopted his conservative estimate.˜

It is˜ said that the court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from his premises.˜ The general doctrine announced in the instruction is, in our judgment, correct. The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the center of the earth, but upward *usque ad coelum,* although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction.˜

This case is one with which the courts ought not to be burdened, and we can justify giving it the serious attention we have only in the hope that an exhibition of its petty and ridiculous features may tend to check such litigation.

The judgment of the district court is AFFIRMED.

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C.2. Case: *Cleveland Park Club v. Perry* (D.C. 1960)

C.2.a. Advance Notes

Ah, the joys of children! Just kidding! Children hold a very special place in tort law thanks to their enduring and unrelenting nature as engines of liability. In this next case, *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. 1960), a 9-year-old, frolicking in a club swimming pool, raised a metal drain cover and inserted a tennis ball. When the boy came back to get his ball, it had vanished. Uh oh! It turns out the ball was sucked into the pool's drain.

Sadly, for the child, this lawsuit was not about getting his ball back. Quite to the contrary. The club was suing the child.

It seems the ball, when sucked into the drain, lodged in a critical place. The pool had to be closed down for extensive – and expensive – repairs. Club management sued to recover the costs. Handing a victory to the club, the court noted that under negligence, the child's age would be a mitigating factor, since a minor's age adjusts the standard of care in the child's favor. But no such amelioration was available with the trespass-to-land action: "{S}ince recovery under {trespass to land} is based on force and resultant damage regardless of the intent to injure, a child of the most tender years is absolutely liable to the full extent of the injuries inflicted."

C.2.b. Opinion

Cleveland Park Club v. Perry

District of Columbia Court of Appeals
November 16, 1960

165 A.2d 485. CLEVELAND PARK CLUB, a District of Columbia corporation, Appellant, v. Scott PERRY, Appellee. No. 2619. Argued September 12, 1960. Counsel for appellant Cleveland Park Club: James E. Hogan, Washington, D. C., with whom Arthur J. Hilland and Ferdinand J. Mack were on the brief. For appellee Scott Perry: Sol Friedman, Washington, D. C., with whom Leonard L. Lipshultz, and Hyman L. Rosenberg were on the brief. Before ROVER, Chief Judge, and HOOD and QUINN, Associate Judges. Opinion by ROVER.

Chief Judge ROVER:

The Cleveland Park Club, a private social club which operates a swimming pool for the benefit of its members, sued a nine-year-old boy for damages caused by him. While playing in the water the child swam to the bottom of the pool, a depth of seven feet, and according to his own testimony raised a metal cover over a drain opening and thinking that there was no suction at the time, inserted a tennis ball into the pipe, then replaced the cover. When he returned to get the ball it was gone. As it developed, the ball passed into a critical part of the pipe and caused failure of proper drainage, forcing the club to close the pool and make repairs. The club sued for the cost of these repairs, and from an adverse judgment brings this appeal.

The suit was based on the theory of trespass and the club requested a directed verdict, maintaining that from the child's own admissions a trespass had been committed and that he should be held liable without regard to his age. Counsel for the child resisted that contention by stating he was not willing to concede the right of the club to proceed on a willful tort theory as distinguished from negligence where the age of the child would have a direct bearing on the applicable law. The court ruled that it believed the age of the child was a factor to be considered in the case and denied the club's motion for a directed verdict.

It was also the position of the child's counsel that the boy could not have been a trespasser because the club's lifeguards had on occasion seen boys playing with the drain cover and had failed to take adequate steps to prevent this. The argument advanced was that failure to keep children away from the drain constituted an implied consent to the child's act, and if the child did not act beyond the scope of the club's invitation then he could not be classified a trespasser.

In submitting the case to the jury the court stated that the issue was whether or not the child was a trespasser. The instructions given to the jury were primarily concerned with the scope of the invitation and whether the club had consented to the purported trespass, except that in discussing the question of trespass it used the following language:

> 'In determining whether or not the defendant is a trespasser, you shall also keep in mind the rule that in cases of tort, ... liability attaches regardless of age, where the nature of the act is such that children of like age would realize its injurious consequences.'

Before commenting on the sufficiency of the instructions we believe that the applicable law, supported by the authorities, is that a child is liable for his torts as if he were an adult, except where his tender years preclude him from framing the mental attitudes necessary to complete the tort in question. (Annotation, 67

A.L.R.2d 570; 1 Harper & James, Torts, § 8.13; Prosser, Torts, § 109; 27 Am.Jur., Infants, §§ 90, 91.) In cases of tort which require malice as an essential element, for example, a very young child may be considered as a matter of law incapable of entertaining the requisite evil intent and no liability would attach to his act. (*Munden v. Harris*, 153 Mo.App. 652; Annotation, 67 A.L.R.2d 570, 575; 27 Am.Jur., Infants, § 91.) Also, in the broad area of negligent torts, the age of a child may prove to be a mitigating factor for he is there held liable only where he has failed to exercise a degree of care equal to that which governs the ordinary child of comparable age, knowledge and experience. (*Singer v. Marx*, 144 Cal.App.2d 637; *Ellis v. D'Angelo*, 116 Cal.App.2d 310; *Kuhns v. Brugger*, 390 Pa. 331.)

Where, however, the cause of action is based on trespass the cases hold unequivocally that since recovery under that theory is based on force and resultant damage regardless of the intent to injure, a child of the most tender years is absolutely liable to the full extent of the injuries inflicted. (*Huchting v. Engel*, 17 Wis. 230; *Scott v. Watson*, 46 Me. 362; Annotation, 67 A.L.R.2d 570. See also *Munden v. Harris*, supra.) The rationale of this position is that the purpose of civil law looks to compensation for the injured party regardless of the intent on the part of the trespasser. While the age of the child will not protect him from liability if his act is denominated a trespass, yet as trespass is an intentional tort (52 Am.Jur., Trespass, § 7; Restatement, Torts, § 158) an initial determination must be made whether the child concerned formed the intent to do the physical act which released the harmful force. It cannot be said as a matter of law that a child of any age is incapable of intending to do a physical act, and whether he had such intent or whether his action was the result of negligence is a factual question where the child's age, experience and knowledge may also be taken into consideration. (*Ellis v. D'Angelo*, supra; *Seaburg v. Williams*, 16 Ill.App.2d 295; *Garratt v. Dailey*, 46 Wash.2d 197.)

Returning to the instructions given in this case, we believe that two distinct factual issues were intended to be submitted to the jury. The first was whether the child was capable of forming the necessary intent to perform the physical act that released the harmful force, and thus be classified as a trespasser. According to the authorities, this question, which is basically a determination of whether the tort was intentional or negligent, takes into account the child's age. The second factual question, assuming that the first was resolved by a finding that the tort was intentional, was whether the consent of the club vitiated the effect of the intentional act; and the outcome of this issue cannot depend in any way on the age of the child. We are of the opinion that the instructions of the court did not distinguish for the benefit of the jury the duality of these issues, and when age may be considered in one and not the other. The instructions began with a definition of a trespasser and the effect of consent, continued with the quoted instruction which is erroneous in itself as it does not point out to the jury that they are merely to ascertain if the child possessed the capability to perform the physical act intentionally without regard to knowledge of possible injurious consequences, and blended back to instructions concerning the scope of the invitation.

On the ambiguity and error in the instructions alone we believe that the club is entitled to a new trial, but we think an additional comment must be made in view of the circumstances of this case. In a case where plaintiff relies on a theory of intentional tort in order to avoid the age factor of the child which would weigh heavily in a negligence case, we have noted that the courts refuse to find as a matter of law that a child of tender years is incapable of committing the physical act which caused the injury, and generally leave the presence or absence of such intent to be resolved by the jury. Such cases usually involve a simple, uncomplicated act on the part of the child. We do not think the converse of the rule necessarily follows, that is, we do not think that it could never be held as a matter of law that a particular child was not fully capable of entertaining the requisite intent where the evidence was overwhelming. Where, as here, the act of the child is comprised of several rather difficult interrelated steps, having but one obvious objective in mind we think it unrealistic to suppose such behavior could be the result of negligence. Again we should point out that the intent controlling is the intent to complete the physical act and not the intent to produce injurious consequences, for in relying on the intentional tort of trespass the latter is irrelevant. (See *Baldinger v. Banks*, Sup., 201 N.Y.S.2d 629, for a recent application of this theory.)

We conclude that the court was correct in not directing a verdict for the club as the issue of consent was properly a jury question. But insofar as the nature of the child's act is concerned we hold it was clearly intentional, and this issue should not have been submitted to the jury at all. Therefore, retrial of this cause should be confined to the issue of consent. We approve of the disposition made by the court on other issues assigned by the club as error.

Reversed for further proceedings not inconsistent with this opinion.

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C.3. Case: *Boring v. Google* (3d Cir. 2010)

C.3.a. Advance Notes

Technology is always testing the established rules of the common law. In this next case, roaming dot-com camera cars come up against private property rights.

In *Boring v. Google,* homeowners allege Google trespassed when it drove a data-gathering car onto their private property. A federal district court gave the complaint short-shrift and dismissed it. Here, the Third Circuit appeals court is asked to consider the complaint with a more patient temperament – and thus uphold centuries' worth of precedent against a titan of the internet age.

C.3.b. Opinion

Boring v. Google Inc.

U.S. Court of Appeals for the Third Circuit
(from Pennsylvania)
January 25, 2010

AARON C. BORING; CHRISTINE BORING, husband and wife respectively, Appellants, v. GOOGLE INC. No. 09-2350. Before: RENDELL and JORDAN, Circuit Judges, and PADOVA, Senior District Judge. Marked as "not precedential."

Judge KENT A. JORDAN:

Aaron C. Boring and Christine Boring appeal from an order of the United States District Court for the Western District of Pennsylvania dismissing their complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, we affirm in part and reverse in part.

On April 2, 2008, the Borings commenced an action in the Court of Common Pleas of Allegheny County, Pennsylvania against Google, Inc., asserting claims for invasion of privacy, trespass, injunctive relief, negligence, and conversion. The Borings sought compensatory, incidental, and consequential damages in excess of $25,000 for each claim, plus punitive damages and attorney's fees.

The Borings' claims arise from Google's "Street View" program, a feature on Google Maps that offers free access on the Internet to panoramic, navigable views of streets in and around major cities across the United States. To create the Street View program, representatives of Google attach panoramic digital cameras to passenger cars and drive around cities photographing the areas along the street. According to Google, "[t]he scope of Street View is public roads." Google allows individuals to report and request the removal of inappropriate images that they find on Street View.

The Borings, who live on a private road in Pittsburgh, discovered that Google had taken "colored imagery of their residence, including the swimming pool, from a vehicle in their residence driveway months earlier without obtaining any privacy waiver or authorization." They allege that their road is clearly marked with a "Private Road, No Trespassing" sign, and they contend that, in driving up their road to take photographs for Street View and in making those photographs available to the public, Google "disregarded [their] privacy interest."

On May 21, 2008, Google invoked diversity jurisdiction, removed the action to the United States District Court for the Western District of Pennsylvania, and filed a motion to dismiss.˜

On February 17, 2009, the District Court granted Google's motion to dismiss as to all of the Borings' claims.˜ In dismissing the trespass claim, the Court held that "the Borings have not alleged facts sufficient to establish that they suffered any damages caused by the alleged trespass."

The Borings filed a timely notice of appeal from both the District Court's order granting the motion to dismiss and the subsequent denial of their motion for reconsideration.

The District Court dismissed the Borings' trespass claim, holding that trespass was not the proximate cause of any compensatory damages sought in the complaint and that, while nominal damages are generally available in a trespass claim, the Borings did not seek nominal damages in their complaint. While the District Court's evident skepticism about the claim may be understandable, its decision to dismiss it under Rule 12(b)(6) was erroneous.

Trespass is a strict liability tort, "both exceptionally simple and exceptionally rigorous." Prosser on Torts at 63 (West, 4th ed. 1971). Under Pennsylvania law, it is defined as an "unprivileged, intentional intrusion upon land in possession of another." *Graham Oil Co. v. BP Oil Co.*, 885 F. Supp. 716, 725 (W.D. Pa. 1994) (citing *Kopka v. Bell Tel. Co.*, 91 A.2d 232, 235 (Pa. 1952)). Though claiming not to have done so, it appears that the District Court effectively made damages an element of the claim, and that is problematic, since "[o]ne who intentionally enters land in the possession of another is subject to liability to the possessor for a trespass, although his presence on the land causes no harm to the land, its possessor, or to any thing or person in whose security the possessor has a legally protected interest." RESTATEMENT (SECOND) TORTS § 163.

Here, the Borings have alleged that Google entered upon their property without permission. If proven, that is a trespass, pure and simple. There is no requirement in Pennsylvania law that damages be pled, either nominal or consequential. It was thus improper for the District Court to dismiss the trespass claim for failure to state a claim. Of course, it may well be that, when it comes to proving damages from the alleged trespass, the Borings are left to collect one dollar and whatever sense of vindication that may bring, but that is for another day. For now, it is enough to note that they "bear the burden of proving that the trespass was the legal cause, i.e., a substantial factor in bringing about actual harm or damage" *C&K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480, 511 (W.D. Pa. 1982), if they want more than a dollar.˜

We reverse˜ with respect to the trespass claim, and remand with instructions that the District Court permit that claim to go forward.

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C.3.c. Postscript About *Boring v. Google*

On remand, Google accepted a consent judgment whereby they agreed to pay $1. As part of the deal, Google admitted that it trespassed. While that might sound like a loss for Google, the company claimed victory. In a statement, Google said, "We are pleased that this lawsuit has finally ended with plaintiffs' acknowledgment that they are entitled to only $1."

The Borings issued their own statement, saying, "This is one sweet dollar of vindication. Google could have just sent us an apology letter in the very beginning, but chose to try to prove they had a legal right to be on our land. We are glad they finally gave up."

C.3.d. Strict Liability?

The court says "Trespass is a strict liability tort{.}" But that's not quite right. "Strict liability," as the term is generally used, means liability that is imposed on a person without proof of either intent or a breach of a duty to undertake some level of effort or care. But trespass to land absolutely *does* require intent, as the Third Circuit ends up saying in the next sentence.

What the Third Circuit perhaps should have said – and probably meant to say – was something along the lines of "Trespass is a tort that applies liability without respect to social or moral culpability." That would be very accurate.

There is, indeed, much about trespass to land that is akin to strict liability. Trespass to land has the capacity to snare wholly innocent conduct. A person will be liable for trespass to land by walking on another's land though believing it to be their own based on careful and thorough research and measurement. That feels like strict liability.

And in practical effect, trespass to land can work like strict liability insofar as the tort has a powerful capacity to assign damages to a defendant that negligence couldn't reach. That potentiality is exemplified by the case of *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. 1960) (*eodem*, § C.2.) where a child inserted a ball behind a pool's drain cover and incurred massive damages when the pool plumbing ingested the ball.

Nevertheless, trespass to land is not a strict liability tort, as such.

It can be frustrating for the new student of the law that even a federal appeals court can be too hasty with its words. When is a law student able to place absolute reliance on particular words? The answer, realistically, is pretty much never. The common law is about doctrinal concepts that are ultimately delineated by facts and outcomes, not particular words. And probably no judicial text is perfect. But don't worry about it too much. The more you read, the more your mind will learn its way through the words to the concepts and arguments beyond the text.

C.3.e. Questions to Ponder About *Boring v. Google*

A. Who won? Can either side really call this a win? Can both?

B. Did the strictness of trespass to land and the availability of nominal damages serve their purpose in this case?

C. Do you think Google would be likely to change any of their practices because of this litigation and its outcome?

D. New technologies are often fraught with potential legal liabilities. At one time, it was an open question as to whether a search engine like Google would violate copyright by caching copies of websites and linking to them with a snippet of representative text. Instead of seeking permission from relevant parties or lobbying for a change in the law, many technology companies follow an unwritten motto of, "Innovate first, beg for forgiveness later." Did that work here? What do you think would have happened if, prior to launching its Street View service, Google had lobbied Congress for a statute specifically providing for the service's lawfulness? What if Google had sent letters out to municipalities and residents letting them know that the Street View imaging vehicle was coming, and asking them to flag potential issues for them?

E. Do you think the last name of the plaintiffs in this action matters at all? When this case surfaced in the media, poking fun at the name Boring was one of the first things that pundits and bloggers did. Could it have an effect on the margins of how one frames the case mentally before getting into the facts – at least among the news-browsing public, if not the courts?

F. Cases usually become known by the names of the first listed plaintiff and the first listed defendant. Suppose Aaron and Christine Boring had different last names – say one was Davis and the other was Boring. If you were their attorney, whose name would you list first in the caption? Consider the other side of the caption as well: Suppose you were suing Google Inc. and a subsidiary named Map Data Services LLC. Which defendant would you want to list first?

C.4. Problem: Champagne Whooshes

Suppose you are an attorney for the Wang family. The Wangs own a spacious ranch in the high desert of the Southwest. Lately, hot-air ballooning has become a major tourist attraction in the area, with romantic champagne breakfasts being a particular favorite. But they are becoming a major pain for the Wangs.

Hot-air balloons cannot be directly steered in any direction. The only control the pilot has is whether to ascend or descend by firing the propane burner or pulling a cord that lets hot air out the top. The unsteerability of the balloons is a particular problem for the Wangs. The prevailing winds and the happenstance of some hilly topography conspire to lead balloons right over the Wangs' ranch house several days a week.

On a typical morning, when the Wangs are still fast asleep, and as the first rays of dawn are gently kissing the high desert sagebrush, a balloon will glide in absolute silence until it comes within 20 or 30 feet of the Wangs' bedroom patio, and RFRFRFRFRFRPPPPHHHHT!! The sudden roar of the propane burner has the Wangs bolting straight up in bed – disoriented with racing hearts. Sometimes the Wangs are lucky and the balloons pass over at a higher altitude – maybe 100 feet. But even at that distance, the whoosh of the burning gas can nonetheless wake up the baby and terrorize the two-year-old. On the other hand, some balloons have been even lower –

close enough to the ground that a standing person could touch the basket. On one occasion, a balloon touched the ground lightly before bouncing back into the air.

Questions:

A. What do you recommend the Wangs do about their problem? Do they have a viable lawsuit against anyone?

B. Suppose Air Adventures, Buoyant Breakfasts, and Champagne Celebrations are the three companies that operate balloon charters that frequently end up over the Wangs' house. Imagine that Buoyant Breakfasts offers to stop flying Mondays through Wednesdays and to pay the Wangs a token license fee for all other days. What should the Wangs do with the offer?

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9. Trespass to Chattels and Conversion

"Okay, here's the situation:
My parents went away on a week's vacation and
They left the keys to the brand new Porsche
Would they mind? Umm, well, of course not!
I'll just take it for a little spin
And maybe show it off to a couple of friends … "

– The Fresh Prince (Will Smith), performing
"Parents Just Don't Understand" (1988)

A. Basics

A.1. Lead-in

The torts of trespass to chattels and conversion provide ways to sue people who "mess with your stuff." Both torts are causes of action to use against persons who take or damage your chattels.

Some may think trespass to chattels and conversion are relics of an era of horse thieves and cattle rustlers. But both causes of action are highly relevant to the contemporary world. As we'll see in this chapter, these torts can play a starring role in thoroughly modern lawsuits – including fights over biomedical research and internet communications.

A.2. Land versus Chattels

The universe of tangible property is divided into two categories: chattels and realty (or real property). The difference between a chattel and realty is whether it is movable or whether it is fixed to the Earth.

In some other languages, there's no need to memorize the definitions – they are clear on their face. In French, the words for chattels and realty are, respectively, *mobiliers* and *immobilier*. Mobile things and immobile things. The German language is similarly transparent: Chattels are *Mobilien*, and real property is *Grundstück* – a word which helpfully looks exactly like it means "stuck to the ground." (Although in terms of word roots, it's something like "piece of land.")

A.3. Trespass to Chattels versus Conversion

Whether or not something can be carted off drives a big legal distinction. While merely touching someone's real property is actionable as trespass to land, merely touching someone's movable property is not actionable. Instead, there's a higher bar.

How high is that bar?

With trespass to chattels, an actionable tort requires something that rises to an *interference*. That could be "borrowing" something for a short time or doing some minor damage to it.

The more potent tort of conversion has an even higher bar. Something more than mere interference is required. For instance, absconding with a chattel for a lengthy period of time could get to the requisite threshold for conversion. Or doing damage to the chattel so extensive that it could be described as "damaged beyond repair" – that would certainly cross the line for conversion.

Corresponding to its higher-threshold requirement of interference, the tort of conversion has a special remedy unavailable for trespass to chattels – the forced purchase. A victorious conversion plaintiff can force the defendant into a sale in which the defendant must pay the full market value of the chattel before the defendant took it or damaged it.

A.4. Old Words: Detinue, Replevin, Trover

For your knowledge of legal trivia and to forefend feelings of despair when you see strange words used with regard to a subject you thought you'd studied, let's take a moment to discuss three words that sometimes appear in the vicinity of cases and discussions concerning trespass to chattels and conversion. Those three words are *detinue*, *replevin*, and *trover*.

At one time, the action of "trespass" with regard to chattels was a legal action based on the wrongful *taking* of a chattel, while "detinue" was a legal action for the wrongful *detention* of the chattel. Meanwhile, the word "replevin" referred to a remedy of getting the chattel turned over to the plaintiff's rightful possession. Contrasted with replevin was "trover," a remedy whereby the defendant, having taken and still being in possession of the chattel, was given title to the chattel but was forced to pay to the plaintiff the full worth of the chattel when it was taken from the plaintiff's possession. The modern tort known as "conversion" evolved from and displaced trover.

The word "replevin" survives into today's usage particularly in the phrase "writ of replevin," which is a term used in many jurisdictions for a court order requiring someone to turn over possession of a chattel to someone else. In this sense, a writ of replevin is something a plaintiff might seek – in addition to or in lieu of – money damages in a lawsuit.

B. Trespass to Chattels: Explanation

B.1. The Elements of Trespass to Chattels

Here is the blackletter formulation of trespass to chattels:

> A plaintiff can establish **a prima facie case for trespass to chattels** by showing: the defendant (1) intentionally (2) interfered with the (3) plaintiff's right of possession in a chattel.

As was the case with trespass to land, it makes sense to take these elements slightly out of order, starting with the last.

B.2. Trespass to Chattels: Plaintiff's Right of Possession in Chattel

There is no requirement that the plaintiff be the owner of the chattel – merely that the plaintiff have a current right of possession. This mirrors the requirement of trespass to land. Thus, a defendant who takes a baseball bat to the plaintiff's leased car is not protected from liability by the fact that the plaintiff does not hold the car's title.

B.3. Trespass to Chattels: Intent

The intent requirement for trespass to chattels is somewhat analogous to that for trespass to land. Assuming the defendant does not have permission to touch or use the chattel, the defendant need only intend to act upon the chattel. There is no requirement that the defendant intend to invade any legal right of the plaintiff or intend to harm the chattel. Nor is the defendant excused by way of honest mistake. For instance, if the defendants, innocently believing they are using their own mule, mistakenly use the plaintiff's mule to plow their field, then the defendants are liable for trespass to chattels for the value of the plowing. If the mule is injured despite defendants' best efforts to treat it properly, the defendants are on the hook for that damage as well.

It is important here to distinguish situations where the defendant is using the chattel with permission. Suppose Paul gives Dara permission to drive his car to the neighborhood store. While going to the store, Dara accidentally drives off the road and hits a tree. Paul has no cause of action against Dara for trespass to chattels. If he is going to recover, it will have to be through a negligence action. There is no trespass, because Dara was using the chattel with permission.

Now let's tweak the hypothetical: Dara has permission to drive Paul's car to the neighborhood store, but on a lark, she decides to drive the car out of town to see her mother. Leaving the city limits, she accidentally drives off the road into a tree. Dara has committed trespass to chattels, since her taking the car out of town exceeded the scope of her consent. In this situation, Paul will not need to prove negligence to recover – he can use a trespass-to-chattels action to get damages for the cost of repairs to the car, regardless of whether Dara was careless in her driving.

B.4. Trespass to Chattels: Interference

It is in the interference element that trespass to chattels differs most starkly from trespass to land.

Merely touching a chattel does not create liability. For liability to arise, the defendant must "interfere" with the plaintiff's possession. Interference generally can be established by any of the following:

(1) actual damage to the chattel,

(2) actual dispossession of the chattel,

(3) loss of use of the chattel for some appreciable amount of time, or

(4) harm to the plaintiff, or to something or someone in whom the plaintiff had a legal interest, on account of the defendant's action.

An observation we can make here is that, in contrast to battery, assault, false imprisonment, and trespass to land, it is not possible to get nominal damages for a trespass-to-chattels action that is truly trivial in nature. Suppose a busybody is upset that a motorcycle enthusiast has parked a bike over a crosswalk. Too annoyed to walk away, the busybody moves the motorcycle a few feet away so that it is out of the crosswalk. Actionable? No. There is no trespass to chattels because there is no interference. Look back over the list, and you'll see that nothing fits: The moving of the motorcycle effected no damage, no dispossession, no loss for an appreciable time, nor harm to anything or anyone connected with the plaintiff. Thus, there is no interference.

Let's try a different motorcycle hypothetical to illustrate a case where there is an interference: Suppose the defendant takes a motorcycle, parked in front of a diner, and drives it a couple of miles away to visit a nail salon, returning it a couple of hours later. This counts as a dispossession, so it creates liability for trespass to chattels.

C. Trespass to Chattels: Exploration

C.1. Case: *Intel v. Hamidi* (Cal. 2003)

C.1.a. Advance Notes

The following case explores trespass to chattels in a 21st Century context. Silicon Valley titan Intel, a world-leading manufacturer of microprocessors, found itself highly annoyed by a disgruntled former employee, Kourosh Kenneth Hamidi. After separating from Intel, Hamidi sent a large volume of email to people still working at Intel. Hamidi was a would-be rabble rouser, and, many would say, a spammer.

Intel sued for trespass to chattels – the chattels in question being Intel's servers which handled Intel's email traffic. The California Supreme Court dealt a defeat to Intel. Causing Intel's computers to deal with Hamidi's emails did not, as the court interpreted the law, amount to an interference.

The case could have gone the other way. As you will see in this reading, the case attracted legal scholars arguing both sides – either as, or on behalf of, amici.

Today, we live in a world of spam. Before electronic communications, there was junk mail. But the expense of paper, printing, and postage made for a natural limit. Nearly costless emailing and texting changed the economic proposition entirely. Today, all of us must spend considerable time filtering out communications we don't want or need, in order to get to those we do. And while tech and algorithms filter out the bulk, they also can be costly in filtering out exactly the wrong thing.

Intel v. Hamidi and other cases of its era are part of the explanation for today's world. But going back and changing those cases – and thus allowing tort law and common law conceptions of property to play a heavy hand with regard to email and text message spam – would only do so much. Much of our world of spam today is a reflection of evolving software technology, business practice, and industry structure, as well as political choices made by regulators, legislators, and government enforcers. And then, what about those spammers – the indefatigable fraudsters – who refuse to be held back by law?

Because it comes from a now by-gone era, this case provides a powerful opportunity to consider – with 20-20 hindsight – the role of the law with regard to emerging technologies. In 2003, email was not completely novel, but it was still some years from reaching the dominant, normalized, and central place it holds today as a medium of correspondence. Thus, from today's perspective, we can look back at *Intel v. Hamidi* and ask whether the court got things right or wrong – on balance, and in the details – in applying the common law in the context of a new technology.

C.1.b. Opinion of the Court

Intel Corp. v. Hamidi

Supreme Court of California
June 30, 2003

30 Cal.4th 1342. INTEL CORPORATION, Plaintiff and Respondent, v. Kourosh Kenneth HAMIDI, Defendant and Appellant. No. S103781. Opinion by WERDEGAR, in which KENNARD, MORENO and PERREN, JJ. concur. Concurring opinion by KENNARD, J, omitted. Dissenting opinion of BROWN, J. Dissenting opinion by MOSK, J., in which GEORGE, C.J. concurred.

Associate Justice KATHRYN WERDEGAR:

Intel Corporation (Intel) maintains an electronic mail system, connected to the Internet, through which messages between employees and those outside the company can be sent and received, and permits its employees to make reasonable nonbusiness use of this system.˜ Kourosh Kenneth Hamidi, a former Intel employee, sent e-mails criticizing Intel's employment practices to numerous current employees on Intel's electronic mail system.˜

Hamidi,˜ together with others, formed an organization named Former and Current Employees of Intel (FACE-Intel) to disseminate information and views critical of Intel's employment and personnel policies and practices. FACE-Intel maintained a Web site (which identified Hamidi as Webmaster and as the organization's spokesperson) containing such material. In addition, over a 21-month period Hamidi, on behalf of FACE-Intel, sent six mass e-mails to employee addresses on Intel's electronic mail system. The messages criticized Intel's employment practices, warned employees of the dangers those practices posed to their careers, suggested employees consider moving to other companies, solicited employees' participation in FACE-Intel, and urged employees to inform themselves further by visiting FACE-Intel's Web site. The messages stated that recipients could, by notifying the sender of their wishes, be removed from FACE-Intel's mailing list; Hamidi did not subsequently send messages to anyone who requested removal.

Each message was sent to thousands of addresses (as many as 35,000 according to FACE-Intel's Web site), though some messages were blocked by Intel before reaching employees.~ When Intel, in March 1998, demanded in writing that Hamidi and FACE-Intel stop sending e-mails to Intel's computer system, Hamidi asserted the organization had a right to communicate with willing Intel employees; he sent a new mass mailing in September 1998.

The summary judgment record contains no evidence Hamidi breached Intel's computer security in order to obtain the recipient addresses for his messages; indeed, internal Intel memoranda show the company's management concluded no security breach had occurred.~ Nor is there any evidence that the receipt or internal distribution of Hamidi's electronic messages damaged Intel's computer system or slowed or impaired its functioning.~

Intel sued Hamidi and FACE-Intel~ for trespass to chattels~.

{T}he tort of trespass to chattels allows recovery for interferences with possession of personal property~.

{T}he defendant's interference must, to be actionable, have caused some injury to the chattel or to the plaintiffs rights in it. Under California law, trespass to chattels "lies where an intentional interference with the possession of personal property *has proximately caused injury.*" (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal. App.4th 1559, 1566, italics added.)

The Restatement, too, makes clear that some actual injury must have occurred in order for a trespass to chattels to be actionable. Under section 218 of the Restatement Second of Torts, dispossession alone, without further damages, is actionable (see *id.*, par. (a) & com. d, pp. 420-421), but other forms of interference require some additional harm to the personal property or the possessor's interests in it. (*Id.,* pars, (b)-(d).) "The interest of a possessor of a chattel in its inviolability, unlike the similar interest of a possessor of land, is not given legal protection by an action for nominal damages for harmless intermeddlings with the chattel. In order that an actor who interferes with another's chattel may be liable, his conduct must affect some other and more important interest of the possessor. *Therefore, one who intentionally intermeddles with another's chattel is subject to liability only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest of the possessor is affected as stated in Clause (c).* Sufficient legal protection of the possessor's interest in the mere inviolability of his chattel is afforded by his privilege to use reasonable force to protect his possession against even harmless interference." (*Id.,* com. e, pp. 421-422, italics added.)˜

The dispositive issue in this case, therefore, is whether the undisputed facts demonstrate Hamidi's actions caused or threatened to cause damage to Intel's computer system, or injury to its rights in that personal property, such as to entitle Intel to judgment as a matter of law. To review, the undisputed evidence revealed no actual or threatened damage to Intel's computer hardware or software and no interference with its ordinary and intended operation. Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any measurable length of time. Intel presented no evidence its system was slowed or otherwise impaired by the burden of delivering Hamidi's electronic messages. Nor was there any evidence transmission of the messages imposed any marginal cost on the operation of Intel's computers.˜

While one may have no *right* temporarily to use another's personal property, such use is actionable as a trespass only if it "has proximately caused injury." (*Thrifty-Tel, supra,* 46 Cal.App.4th at p. 1566, 54 Cal.Rptr.2d 468.)˜ Short of dispossession, personal injury, or physical damage (not present here), intermeddling is actionable only if "the chattel is impaired as to its condition, quality, or value, or [¶] ... the possessor is deprived of the use of the chattel for a substantial time." (Rest.2d Torts, § 218, pars, (b), (c).) In particular, an actionable deprivation of use "must be for a time so substantial that it is possible to estimate the loss caused thereby. A mere momentary or theoretical deprivation of use is not sufficient unless there is a dispossession...." (*Id.,* com. i, p. 423.) That Hamidi's messages temporarily used some portion of the Intel computers' processors or storage is, therefore, not enough; Intel must, but does not, demonstrate some measurable loss from the use of its computer system.˜

We next consider whether California common law should be *extended* to cover, as a trespass to chattels, an otherwise harmless electronic communication whose contents are objectionable. We decline to so expand California law.˜

Writing on behalf of several industry groups appearing as amici curiae, Professor Richard A. Epstein of the University of Chicago urges us to excuse the required showing of injury to personal property in cases of unauthorized electronic contact between computers, "extending the rules of trespass to real property to all interactive Web sites and servers." The court is thus urged to recognize, for owners of a particular species of personal property, computer servers, the same interest in inviolability as is generally accorded a possessor of land. In effect, Professor Epstein suggests that a company's server should be its castle, upon which any unauthorized intrusion, however harmless, is a trespass.

˜Professor Epstein argues that a rule of computer server inviolability will, through the formation or extension of a market in computer-to-computer access, create "the right social result." In most circumstances, he predicts, companies with computers on the Internet will continue to authorize transmission of information through e-mail, Web site searching, and page linking because they benefit by that open access. When a Web site owner does deny access to a particular sending, searching, or linking computer, a system of "simple one-on-one negotiations" will arise to provide the necessary individual licenses.

Other scholars are less optimistic about such a complete propertization of the Internet. Professor Mark Lemley of the University of California, Berkeley, writing on behalf of an amici curiae group of professors of intellectual property and computer law, observes that under a property rule of server inviolability, “each of the hundreds of millions of [Internet] users must get permission in advance from anyone with whom they want to communicate and anyone who owns a server through which their message may travel.” The consequence for e-mail could be a substantial reduction in the freedom of electronic communication, as the owner of each computer through which an electronic message passes could impose its own limitations on message content or source. As Professor Dan Hunter of the University of Pennsylvania asks rhetorically: “Does this mean that one must read the ‘Terms of Acceptable Email Usage’ of every email system that one emails in the course of an ordinary day? If the University of Pennsylvania had a policy that sending a joke by email would be an unauthorized use of their system, then under the logic of [the lower court decision in this case], you commit ‘trespass’ if you emailed me a … cartoon.” (Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons* (2003) 91 Cal. L.Rev. 439, 508-509.)˜

We discuss this debate among the amici curiae and academic writers only to note its existence and contours, not to attempt its resolution. Creating an absolute property right to exclude undesired communications from one’s e-mail and Web servers might help force spammers to internalize the costs they impose on ISP’s and their customers. But such a property rule might also create substantial new costs, to e-mail and e-commerce users and to society generally, in lost ease and openness of communication and in lost network benefits. In light of the unresolved controversy, we would be acting rashly to adopt a rule treating computer servers as real property for purposes of trespass law.

[W]e are not persuaded that these perceived problems call at present for judicial creation of a rigid property rule of computer server inviolability.˜

The judgment of the Court of Appeal is reversed.

C.1.c. Dissent of Justice Brown

Justice JANICE ROGERS BROWN, dissenting:

Candidate A finds the vehicles that candidate B has provided for his campaign workers, and A spray paints the water soluble message, "Fight corruption, vote for A" on the bumpers. The majority's reasoning would find that notwithstanding the time it takes the workers to remove the paint and the expense they incur in altering the bumpers to prevent further unwanted messages, candidate B does not deserve an injunction unless the paint is so heavy that it reduces the cars' gas mileage or otherwise depreciates the cars' market value. Furthermore, candidate B has an obligation to permit the paint's display, because the cars are driven by workers and not B personally, because B allows his workers to use the cars to pick up their lunch or retrieve their children from school, or because the bumpers display B's own slogans. I disagree.

Intel has invested millions of dollars to develop and maintain a computer system. It did this not to act as a public forum but to enhance the productivity of its employees. Kourosh Kenneth Hamidi sent as many as 200,000 e-mail messages to Intel employees. The time required to review and delete Hamidi's messages diverted employees from productive tasks and undermined the utility of the computer system. "There may … be situations in which the value to the owner of a particular type of chattel may be impaired by dealing with it in a manner that does not affect its physical condition." (Rest.2d Torts, § 218, com. h, p. 422.) This is such a case.˜

Because I do not share the majority's antipathy toward property rights and believe the proper balance between expressive activity and property protection can be achieved without distorting the law of trespass, I respectfully dissent.˜

C.1.d. Dissent of Justice Mosk

Justice STANLEY MOSK, dissenting:

˜In my view, the repeated transmission of bulk e-mails by appellant Kourosh Kenneth Hamidi (Hamidi) to the employees of Intel Corporation (Intel) on its proprietary confidential email lists, despite Intel's demand that he cease such activities, constituted an actionable trespass to chattels. The majority fail to distinguish open communication in the public "commons" of the Internet from unauthorized intermeddling on a private, proprietary intranet. Hamidi is not communicating in the equivalent of a town square or of an unsolicited "junk" mailing through the United States Postal Service. His action, in crossing from the public Internet into a private intranet, is more like intruding into a private office mailroom, commandeering the mail cart, and dropping off unwanted broadsides on 30,000 desks.˜ Hamidi's repeated intrusions˜ constituted a misappropriation of Intel's private computer system contrary to its intended use and against Intel's wishes.

The law of trespass to chattels has not universally been limited to physical damage. I believe it is entirely consistent to apply that legal theory to these circumstances – that is, when a proprietary computer system is being used contrary to its owner's purposes and expressed desires, and self-help has been ineffective.˜

For these reasons, I respectfully dissent.

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C.1.e. Questions to Ponder About *Intel v. Hamidi*

1. Online as on land

What do you think of Professor Richard A. Epstein's idea, discussed in the case, of applying property rights to the internet similar to how they are applied to land? What effect would that have? Would it be positive, negative, or neutral?

2. Water-soluble spray paint analogy

Do you think Justice Brown's analogy to water-soluble spray paint is an apt one? Why or why not?

3. Intel law vs. blackletter law

In the text prior to the case, a prima facie trespass to chattels was said to require showing that the defendant (1) intentionally (2) interfered with the (3) plaintiff's right of possession in a chattel. Interference, we said, could include any of the following:

> (1) actual damage to the chattel, (2) actual dispossession of the chattel, (3) loss of use of the chattel for some appreciable amount of time, (4) harm to the plaintiff, or harm to something or someone in whom the plaintiff had a legal interest, on account of the defendant's action.

Does the majority in *Intel* reject this conception of the blackletter law? In other words, in the view of *Intel*, is that an accurate description of the law in California? What differences are there, if any?

D. Conversion: Explanation

D.1. The Elements of Conversion

Trespass to chattels has a big sibling – the tort of conversion. Here's a blackletter formulation of the conversion tort:

> A plaintiff can establish **a prima facie case for conversion** by showing: the defendant (1) intentionally (2) interfered with (3) the plaintiff's right of possession in a chattel (4) in so substantial a manner as to warrant the remedy of a forced sale.

D.2. Conversion: Intent

The intent requirement for conversion works like that for trespass to chattels. **Conversion requires only that the defendant intend the actions that constitute conversion.** There is no requirement of bad motive, nor is there a requirement that the defendant intend to effect a conversion.

An example that is used in the Restatement concerns an auctioneer who takes a fine-art painting from a third party, honestly and reasonably believing that the third party is the true owner of the painting. If the auctioneer sells the painting, as instructed by the third party (the intended act), the auctioneer is liable for conversion to the painting's actual owner.

As loose as the intent element may be, it is still there. If a person does not intentionally exercise unpermitted dominion over the property, then there is no conversion. Suppose a museum is given artifacts on loan, and the museum negligently loses them. There may be a good negligence case here, but there is no conversion, because the intent element is unsatisfied.

D.3. Conversion: Interference and Substantiality to Warrant Remedy

For an interference with a chattel to qualify as a conversion, the defendant must exercise dominion over the chattel in a way that is so substantial that it warrants the remedy of the forced sale. There is no way to precisely delineate the threshold – it's a matter of degree.

Let's extend the example of the borrowed motorcycle that we used to illustrate trespass to chattels: The defendant borrows a motorcycle for a couple of hours to go to a nail salon a couple of miles away and then returns the bike to where it was originally parked. That is a trespass to chattels, since it constitutes a dispossession. Yet it is not conversion. Why not? The defendant has not exercised dominion over the chattel so seriously as to force the defendant to purchase the motorcycle. Now, if we change the hypothetical so that, instead of going to the nearby nail salon, the defendant drives the motorcycle from Milwaukee to South Dakota, then the dispossession unquestionably qualifies as a conversion.

D.4. Conversion: The Remedy of Forced Purchase (or Forced Sale)

The sine qua non of the conversion action is the availability of the remedy of a **forced purchase** (also called "forced sale"). **With this remedy, the defendant is ordered to pay full value for the converted chattel, after which the defendant takes title to the chattel.** So if someone takes a joyride in your car and drives it into a lake, you can get the court to order the joyrider to pay the full fair market value of the car at the time it was taken, with the joyrider then taking title to the waterlogged car.

Pursuing the tort of conversion is a choice. No plaintiff can be required to sue for conversion rather than trespass to chattels. Because of this, conversion cannot be used to require an unwilling plaintiff to sell their goods. For this reason, the terminology of "forced sale" is confusing.

Unfortunately, though confusing, the "forced sale" phraseology has long been more prevalent than "forced purchase." Thus, torts students will need to recognize the phrase "forced sale" as signifying the remedy for conversion, but students must be sure to bear in mind that the doctrine of conversion doesn't force anyone to sell anything. Instead, conversion can only be used to force the defendant to buy something – archetypally a smoldering wreck at the bottom of a swamp or the like.

An example will help make this clear – and, hopefully, susceptible of being remembered. Suppose you want your roommate's signed first edition of *Harry Potter and the Sorcerer's Stone*, but your roommate won't sell it. It is not possible to game the conversion tort so that you wind up getting what you want. If you take the book and your roommate wants it back, your roommate can choose to sue for trespass to chattels. (Also, fwiw, using something called a writ of replevin, your roommate can get a court order, even before trial, compelling you to return the book.) Alternatively, your roommate can choose to sue for conversion, yet elect the trespass-to-chattels remedy of compensatory damages for the dispossession. The remedy of the forced sale (or forced purchase) is something plaintiffs seek when they no longer want the chattel at issue.

D.5. Slang and Signage – Getting at the Nub of Conversion

Slang and signage provide another way to conceive of and remember conversion doctrine.

Consider that there's a sense in which the nub of the conversion idea is reflected in our non-legal language. People often say when a car or other thing is wrecked beyond repair that it is "totaled" – suggesting that the cost of repairing it exceeds the market value the object had before it was damaged. And many a retail outlet selling antiques or tchotchkes has displayed a sign reading "You break it, you buy it." Whether they've ever heard of the legal doctrine of conversion, it seems they know it.

D.6. Conversion: Intangibles and Capturing Increased Value

Beyond the forced-sale remedy, conversion has some other superpowers that the tort of trespass to chattels lacks. For one, conversion can be used with many intangible assets that are tied to tangible artifacts, such as stock certificates. And conversion can be used by the plaintiff to capture the benefit of increased market values.

Suppose the defendant steals certificates for 100 shares of stock on Monday, when they are worth $100,000. On Tuesday, the price of the stock skyrockets, and the shares are worth $200,000. At that point, the plaintiff can use conversion to get a judgment of $200,000. Now suppose the plaintiff waits to sue, and on Wednesday morning, the value of the stock plummets to $50,000, at which point the defendant sells the shares for a loss. The plaintiff can still use conversion to get a judgment of $200,000. In this way, conversion can be used like a ratchet to capture increases in value without a possibility of slippage to a lower value.

E. Conversion: Exploration

E.1. Case: *Moore v. U.C. Regents* (Cal. 1990)

E.1.a. Advance Notes

John Moore learned he had cancer. He took his terrifying diagnosis of hairy-cell leukemia to the world-renowned UCLA Medical Center. There, he saw Dr. David W. Golde. After withdrawing "extensive amounts" of Moore's bodily substances, Dr. Golde persuaded Moore that his spleen should come out.

Instead of disposing of all of these bits of Moore in a biohazard waste bag, Dr. Golde and UCLA – unbeknownst to Moore – began cultivating them in the lab. Thanks to Moore's peculiar strain of cancer, it seems Moore's cells had rare and valuable qualities of self-replication and overproduction of certain immune-regulating proteins known as lymphokines. Dr. Golde and a fellow researcher coaxed some of Moore's material into a cell line with the commercially valuable capacity for manufacturing prodigious quantities of immune-regulating proteins. Moore and UCLA obtained a patent, and made a lucrative biotech industry deal. All of that wasn't explained to Moore. But Moore was instructed to have his follow-up appointments only with Dr. Golde at UCLA, despite the fact that this would involve travelling a thousand miles each way from Moore's home in Seattle. When Moore did come back for return appointments, Dr. Golde withdrew further samples – including "blood, blood serum, skin, bone marrow aspirate, and sperm."

Moore sued. His hopes for a share of the profits were pinned on his claim for conversion. The California Court of Appeals upheld it. But a divided California Supreme Court rejected the conversion claim. The court did approve Moore's pursuit of the lawsuit on the basis of "breach of the physician's disclosure obligations," though it seems that such a path may not have offered much in terms of potential monetary recovery.

In the years since it was handed down, the *Moore* case has become a modern classic. Though a torts case, it also often is assigned in property courses.

This case is valuable to students not in what it teaches about the blackletter law of conversion, but rather what it reveals about how blackletter law and precedent can be stretched, probed, worked over, and contested – particularly in a novel technological and business context where millions or even billions of dollars may be on the line.

E.1.b. Opinion of the Court

Moore v. Regents of University of California

Supreme Court of California
July 9, 1990

51 Cal.3d 120. JOHN MOORE, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; Dr. David W. Golde; Shirley G. Quan; Genetics Institute, Inc.; Sandoz Pharmaceuticals Corporation and related entities, Defendants and Repondents. No. S006987.

Justice EDWARD A. PANELLI:

I. Introduction

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission.˜

II. Facts

˜The plaintiff is John Moore, who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr. David W. Golde, a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc.; and (5) Sandoz Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and "withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances," Golde confirmed that diagnosis. At this time all defendants, including Golde, were aware that "certain blood products and blood components were of great value in a number of commercial and scientific efforts" and that access to a patient whose blood contained these substances would provide "competitive, commercial, and scientific advantages."

On October 8, 1976, Golde recommended that Moore's spleen be removed. Golde informed Moore "that he had reason to fear for his life, and that the proposed splenectomy operation … was necessary to slow down the progress of his disease." Based upon Golde's representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan "formed the intent and made arrangements to obtain portions of [Moore's] spleen following its removal" and to take them to a separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities "were not intended to have … any relation to [Moore's] medical … care." However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore's spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde's direction and based upon representations "that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship ....” On each of these visits Golde withdrew additional samples of “blood, blood serum, skin, bone marrow aspirate, and sperm.” On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because he had been told that the procedures were to be performed only there and only under Golde’s direction.

“In fact, [however,] throughout the period of time that [Moore] was under [Golde’s] care and treatment, ... the defendants were actively involved in a number of activities which they concealed from [Moore] ....” Specifically, defendants were conducting research on Moore’s cells and planned to “benefit financially and competitively ... [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde’s] ongoing physician-patient relationship ....”

Sometime before August 1979, Golde established a cell line from Moore’s T-lymphocytes.

A T-lymphocyte is a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value. If the genetic material responsible for producing a particular lymphokine can be identified, it can sometimes be used to manufacture large quantities of the lymphokine through the techniques of recombinant DNA. (See generally U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells [hereinafter “OTA Rep.”] (1987) at pp. 31-46)

While the genetic code for lymphokines does not vary from individual to individual, it can nevertheless be quite difficult to locate the gene responsible for a particular lymphokine. Because T-lymphocytes produce many different lymphokines, the relevant gene is often like a needle in a haystack. Moore’s T-lymphocytes were interesting to the defendants because they overproduced certain lymphokines, thus making the corresponding genetic material easier to identify.˜

Cells taken directly from the body (primary cells) are not very useful for these purposes. Primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a “cell line," a culture capable of reproducing indefinitely. This is not, however, always an easy task. "Longterm growth of human cells and tissues is difficult, often an art," and the probability of succeeding with any given cell sample is low, except for a few types of cells not involved in this case.

On January 30, 1981, the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. "[B]y virtue of an established policy ..., [the] Regents, Golde, and Quan would share in any royalties or profits ... arising out of [the] patent." The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell line and the Regents as the assignee of the patent. (U.S. Patent No. 4,438,032 (Mar. 20, 1984).)

The Regent's patent also covers various methods for using the cell line to produce lymphokines. Moore admits in his complaint that "the true clinical potential of each of the lymphokines ... [is] difficult to predict, [but] ... competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately $3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] ...."

With the Regents' assistance, Golde negotiated agreements for commercial development of the cell line and products to be derived from it. Under an agreement with Genetics Institute, Golde "became a paid consultant" and "acquired the rights to 75,000 shares of common stock." Genetics Institute also agreed to pay Golde and the Regents "at least $330,000 over three years, including a pro-rata share of [Golde's] salary and fringe benefits, in exchange for ... exclusive access to the materials and research performed" on the cell line and products derived from it. On June 4, 1982, Sandoz "was added to the agreement," and compensation payable to Golde and the Regents was increased by $110,000. "[T]hroughout this period, ... Quan spent as much as 70 [percent] of her time working for [the] Regents on research" related to the cell line.

Based upon these allegations, Moore attempted to state 13 causes of action: (1) "Conversion"; (2) "lack of informed consent"; (3) "breach of fiduciary duty"; (4) "fraud and deceit"; (5) "unjust enrichment"; (6) "quasi-contract"; (7) "bad faith breach of the implied covenant of good faith and fair dealing"; (8) "intentional infliction of emotional distress"; (9) "negligent misrepresentation"; (10) "intentional interference with prospective advantageous economic relationships"; (11) "slander of title"; (12) "accounting"; and (13) "declaratory relief."

Each defendant demurred to each purported cause of action. The superior court, however, expressly considered the validity of only the first cause of action, conversion.˜ Reasoning that the remaining causes of action incorporated the earlier, defective allegations, the superior court sustained a general demurrer to the entire complaint˜.

With one justice dissenting, the Court of Appeal reversed, holding that the complaint did state a cause of action for conversion.˜ The Court of Appeal also directed the superior court to decide "the remaining causes of action, which [had] never been expressly ruled upon."

III. Discussion

A. Breach of Fiduciary Duty and Lack of Informed Consent

{The court discussed Moore's claims for breach of fiduciary duty and lack of informed consent. The court then ordered lower courts to allow these claims to go ahead, holding that a physician who is seeking a patient's consent for a medical procedure must, in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgment. – Ed. (compiled from clerk's case summary)}

B. Conversion

Moore also attempts to characterize the invasion of his rights as a conversion – a tort that protects against interference with possessory and ownership interests in personal property. He theorizes that he continued to own his cells following their removal from his body, at least for the purpose of directing their use, and that he never consented to their use in potentially lucrative medical research. Thus, to complete Moore's argument, defendants' unauthorized use of his cells constitutes a conversion. As a result of the alleged conversion, Moore claims a proprietary interest in each of the products that any of the defendants might ever create from his cells or the patented cell line.

No court, however, has ever in a reported decision imposed conversion liability for the use of human cells in medical research. While that fact does not end our inquiry, it raises a flag of caution. In effect, what Moore is asking us to do is to impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research. To impose such a duty, which would affect medical research of importance to all of society, implicates policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose.˜

Invoking a tort theory originally used to determine whether the loser or the finder of a horse had the better title, Moore claims ownership of the results of socially important medical research, including the genetic code for chemicals that regulate the functions of every human being's immune system. Moore alleges, for example, that "genetic sequences … are his tangible personal property …."˜

We have recognized that, when the proposed application of a very general theory of liability in a new context raises important policy concerns, it is especially important to face those concerns and address them openly. Moreover, we should be hesitant to "impose [new tort duties] when to do so would involve complex policy decisions", especially when such decisions are more appropriately the subject of legislative deliberation and resolution.˜

1. Moore's Claim Under Existing Law

"To establish a conversion, plaintiff must establish an actual interference with his *ownership* or *right of possession*. … Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion." Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore's claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents' patent – the patented cell line and the products derived from it – cannot be Moore's property.

Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property.

{The court provided footnotes for the foregoing list as follows:}

human tissues – *{No footnote.}*

transplantable organs – <See the Uniform Anatomical Gift Act, Health and Safety Code section 7150 et seq. The act permits a competent adult to "give all or part of [his] body" for certain designated purposes, including "transplantation, therapy, medical or dental education, research, or advancement of medical or dental science." (Health & Saf. Code, §§ 7151 , 7153.) The act does not, however, permit the donor to receive "valuable consideration" for the transfer. (Health & Saf. Code, § 7155.)>

blood – <See Health and Safety Code section 1601 et seq., which regulates the procurement, processing, and distribution of human blood. Health and Safety Code section 1606 declares that "[t]he procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same … is declared to be, for all purposes whatsoever, the rendition of a service … and shall not be construed to be, and is declared not to be, a sale … for any purpose or purposes whatsoever.">

fetuses – <See Health and Safety Code section 7054.3 : "Notwithstanding any other provision of law, a recognizable dead human fetus of less than 20 weeks uterogestation not disposed of by interment shall be disposed of by incineration.">

pituitary glands – <See Government Code section 27491.46 : "The coroner [following an autopsy] shall have the right to retain pituitary glands solely for transmission to a university, for use in research or the advancement of medical science" (id., subd. (a)) or "for use in manufacturing a hormone necessary for the physical growth of persons who are, or may become, hypopituitary dwarfs ..." (id. , subd. (b)).>

corneal tissue – <See Government Code section 27491.47 : "The coroner may, in the course of an autopsy [and subject to specified conditions], remove ... corneal eye tissue from a body ..." (id. , subd. (a)) for "transplant, therapeutic, or scientific purposes" (id. , subd. (a)(5)).>

dead bodies – <See Health and Safety Code section 7000 et seq. While the code does not purport to grant property rights in dead bodies, it does give the surviving spouse, or other relatives, "[t]he right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent ...." (Health & Saf. Code, § 7100.)>

It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.~

The next consideration that makes Moore's claim of ownership problematic is California statutory law, which drastically limits a patient's control over excised cells. Pursuant to Health and Safety Code section 7054.4, "[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety." Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute's practical effect is to limit, drastically, a patient's control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to "property" or "ownership" for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

Finally, the subject matter of the Regents' patent – the patented cell line and the products derived from it – cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body.˜ Human cell lines are patentable because "[l]ong-term adaptation and growth of human tissues and cells in culture is difficult – often considered an art … ," and the probability of success is low. (OTA Rep., *supra* , at p. 33˜.) It is this *inventive effort* that patent law rewards, not the discovery of naturally occurring raw materials.˜

The distinction between primary cells (cells taken directly from the body) and patented cell lines is not purely a legal one. Cells change while being developed into a cell line and continue to change over time. "[I]t is clear that most established cell lines … are not completely normal. Besides [an] enhanced growth potential relative to primary cells, they frequently have highly abnormal chromosome numbers …." (2 Watson et al., Molecular Biology of the Gene (4th ed. 1987) p. 967.)˜

2. Should Conversion Liability Be Extended?

˜While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.˜

Of the relevant policy considerations, two are of overriding importance. The first is protection of a competent patient's right to make autonomous medical decisions. That right, as already discussed, is grounded in well-recognized and long-standing principles of fiduciary duty and informed consent. This policy weighs in favor of providing a remedy to patients when physicians act with undisclosed motives that may affect their professional judgment. The second important policy consideration is that we not threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against a donor's wishes.

To reach an appropriate balance of these policy considerations is extremely important. In its report to Congress, the Office of Technology Assessment emphasized that "[u]ncertainty about how courts will resolve disputes between specimen sources and specimen users could be detrimental to both academic researchers and the infant biotechnology industry, particularly when the rights are asserted long after the specimen was obtained.˜ Since inventions containing human tissues and cells may be patented and licensed for commercial use, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists."˜

We need not, however, make an arbitrary choice between liability and nonliability. Instead, an examination of the relevant policy considerations suggests an appropriate balance: Liability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patients' rights of privacy and autonomy without unnecessarily hindering research.˜

The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. Thousands of human cell lines already exist in tissue repositories˜. These repositories respond to tens of thousands of requests for samples annually.˜ This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit.˜

E.1.c. Dissent of Justice Broussard

Justice ALLEN BROUSSARD, concurring and dissenting:

˜When it turns to the conversion cause of action,˜ the majority opinion fails to maintain its focus on the specific allegations before us. Concerned that the imposition of liability for conversion will impede medical research by innocent scientists who use the resources of existing cell repositories – a factual setting not presented here – the majority opinion rests its holding, that a conversion action cannot be maintained, largely on the proposition that a patient generally possesses no right in a body part that has already been removed from his body. Here, however, plaintiff has alleged that defendants interfered with his legal rights before his body part was removed. Although a patient may not retain any legal interest in a body part after its removal when he has properly consented to its removal and use for scientific purposes, it is clear under California law that before a body part is removed it is the patient, rather than his doctor or hospital, who possesses the right to determine the use to which the body part will be put after removal. If, as alleged in this case, plaintiff's doctor improperly interfered with plaintiff's right to control the use of a body part by wrongfully withholding material information from him before its removal, under traditional common law principles plaintiff may maintain a conversion action to recover the economic value of the right to control the use of his body part. Accordingly, I dissent from the majority opinion insofar as it rejects plaintiff's conversion cause of action.˜

E.1.d. Dissent of Justice Mosk

Justice STANLEY MOSK, dissenting:

I dissent.˜

The majority˜ cite several statutes regulating aspects of the commerce in or disposition of certain parts of the human body, and conclude in effect that in the present case we should also "look for guidance" to the Legislature rather than to the law of conversion.˜ Surely this argument is out of place in an opinion of the highest court of this state. As the majority acknowledge, the law of conversion is a creature of the common law. "'The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.'~ In short, as the United States Supreme Court has aptly said, 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.'~ ... Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394.)

Especially is this true in the field of torts. I need not review the many instances in which this court has broken fresh ground by announcing new rules of tort law: time and again when a new rule was needed we did not stay our hand merely because the matter was one of first impression.~

Even if we assume that section 7054.4 limited the use and disposition of his excised tissue in the manner claimed by the majority, Moore nevertheless retained valuable rights in that tissue. Above all, at the time of its excision he at least had *the right to do with his own tissue whatever the defendants did with it*: i.e., he could have contracted with researchers and pharmaceutical companies to develop and exploit the vast commercial potential of his tissue and its products. Defendants certainly believe that their right to do the foregoing is not barred by section 7054.4 and is a significant property right, as they have demonstrated by their deliberate concealment from Moore of the true value of his tissue, their efforts to obtain a patent on the Mo cell line, their contractual agreements to exploit this material, their exclusion of Moore from any participation in the profits, and their vigorous defense of this lawsuit. The Court of Appeal summed up the point by observing that "Defendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony." It is also legally untenable.~

I would affirm the decision of the Court of Appeal to direct the trial court to overrule the demurrers to the cause of action for conversion.

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E.1.e. Postscripts on *Moore v. U.C. Regents*

1. The damages damage

A natural question to have is this: What did Moore lose through the extinguishing of his conversion claim so long as he was left to pursue claims for breach of fiduciary duty and lack of informed consent "for breach of the physician's disclosure obligations"?

Commentators on the case have had differing views.

One commentator concluded the claims offered "no real basis for compensating the patient," surmising that Moore's breach of fiduciary duty damages "would probably be nominal" and expressing doubt as to whether an informed consent theory, given its mismatch with the facts of this case, would provide any viable damages claim at all. See Anne T. Corrigan, *A Paper Tiger: Lawsuits Against Doctors for Non-Disclosure of Economic Interests In Patients' Cells, Tissues and Organs*, 42 CASE W. RES. L. REV. 565 (1992).

Another commentator was more sanguine, suggesting that damages awards in cases of denial of constitutional voting rights could be pathmarking for meaningful monetary recovery in a case like Moore's. See Linda Daniels, *Commercialization of Human Tissue: Has Biotechnology Created The Need for an Expanded Scope of Informed Consent?*, 27 CAL. W. L. REV. 209, 226 (1991).

Perhaps the best measure of what the claim would have been worth is the settlement to which the parties agreed afterward. Apparently, it was not hefty. The Los Angeles Times reported that Moore got "what he called a 'token' settlement with UCLA that covered his legal fees" on the basis of the lack of disclosure to him about the research.

2. There will always be Moore on sale

Cells from John Moore are on sale from the American Type Culture Collection (ATCC). A sample of "Mo-B" cells was priced at $877 in 2026.

ATCC maintains that any commercial use of the cells would require an additional "Commercial Use license." And ATCC's "Material Transfer Agreement" purports to obtain buyers' acquiescence to a "Property Rights" provision whereby "ATCC and/or its Contributors shall retain ownership of all right, title and interest in the ATCC Materials," including when such materials are contained or incorporated in modifications of the materials.

To say nothing of the irony of this claim in light of Moore's story, there are a host of legal issues regarding whether ATCC's asserted use restrictions and property interests could be enforceable. But – with a sigh of relief – we can stipulate that, as a matter of one-L course subject matter, those legal issues are not within the domain of Torts. They are on the Property side of the fence – near to, and maybe spilling over into, Contracts' four corners.

3. HeLa and Henrietta Lacks

The first endlessly reproducing human cell line is the "HeLa" cell line, from a patient named Henrietta Lacks. Like John Moore, Lacks was an unwitting donor and was not made aware of the commercial exploitation of what was removed from her body. The story of Lacks and the HeLa cell line is recounted in *The Immortal Life of Henrietta Lacks* by Rebecca Skloot. The book was an Oprah selection and a bestseller. It's an excellent read, and it discusses the *Moore* case along the way.

E.1.f. Ponderables About *Moore v. U.C. Regents*

1. The rival lab hypo

The court appears to say there is no support for Moore's claim that excised cells can be considered a kind of tangible property for purposes of conversion:

> "Neither the Court of Appeal's opinion, the parties' briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects sui generis, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property."

Hmmm. Has the Supreme Court taken this reasoning further than UCLA would find comfortable? Consider: Does the court's holding mean that no one could convert the cells from UCLA?

Suppose researchers from a rival lab at USC managed to surreptitiously take some excised human cells from UCLA's lab, and USC subsequently patented them, selling them for billions of dollars. Would UCLA have a claim for conversion against USC?

2. About that forced purchase remedy

There's a nagging question here about what happened to the forced purchase remedy that is such a central feature of the conversion tort.

The court implies there is a huge real-world practical problem to recognizing a conversion claim here – that doing so would open the floodgates to lawsuits against innocent researchers using cell lines that have existed for a long time.

Let's assume for argument's sake that if conversion applied on these facts, then some existing conversion precedent would support an injunction or a devastating award of damages against such distant parties. Even so, why extinguish Moore's entire conversion claim against Dr. Golde and UCLA? Why not hold that downstream purchasers of cells from long-established cell lines (or whomever else the court sees fit to shield) cannot be liable for conversion?

Suppose the court limited its approval to the classic conversion claim and remedy whereby Moore could obtain a forced purchase remedy against Golde and UCLA. In that event, Golde and UCLA would be compelled to pay the value of his cells at the time they were removed, which could, it seems, be reasonably measured by all the money UCLA and Golde received from its deal with Genetics Institute, Inc. and Sandoz Pharmaceuticals. In line with the way the forced purchase remedy works, Golde and UCLA would have good title to the cells, which would mean they could pass good title along to others, including Genetics Institute and Sandoz.

It's a line of questioning that calls for speculation, but potentially useful speculation for lawyers-in-training. So, why not? Did Moore's counsel ask for too much? (Genetics Institute and Sandoz were named as defendants.) Did the California Supreme Court want to make it seem like their only alternative was the sky-is-falling scenario? Are there other explanations?

3. Statutes? Abandoned?

Do you find the court's listing of California statutes persuasive on the point that human biological materials are not to be "abandon[ed] to the general law of personal property"? Arguably, as a whole, it was quite weak. And some of the examples seem particularly unhelpful in drawing any conclusions about whether the California legislature has foreclosed the common law in the realm of human biological materials. You may find that looking back through the list offers a chance to practice some argument-making on this score.

4. Social importance and claims of ownership

The court signals its disapproval that John Moore "claims ownership of the results of socially important medical research," yet the court looks approvingly on the patent that UCLA obtained on Moore's cell line. The court appears to make this differentiation on the basis that culturing a cell line is "often considered an art." (In an omitted portion of the opinion, they also hail this as a "product of 'human ingenuity.'") How persuasive is this distinction? Does it provide the needed support for the idea that Moore is incapable of owning his excised cells while UCLA can commercially exploit the cells? Where else could this line of argument go – for UCLA or for Moore?

5. Should Dr. Golde and UCLA have any regrets?

The court wrote that "a fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however,˜ is protected by the fiduciary-duty and informed-consent theories."

How well do you think these non-conversion claims protect such a right? Commentators writing about the case have certainly expressed substantial skepticism on this score.

Consider that Dr. Golde and UCLA received apparently millions of dollars by way of keeping silent about the research and commercial efforts. Suppose you were a lawyer for UCLA and Golde as they contemplated how to deal with Moore, and suppose you could accurately predict how this case would come out. Would you advise your clients to fully inform Moore about the intended research? Or would you advise them to proceed exactly as they did? And what would you advise to doctors and hospitals, as a general matter, going forward?

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Intentional Tort Defenses

10. Consent as a Defense to the Intentional Torts

"Welcome to my house. Baby, take control now. …
Play that music too loud. … We don't have to go out."

– Flo Rida,
performing "My House" (2015)

A. Lead-in

The prima facie elements of the causes of action for the intentional torts are only half the story. The intentional torts would be incomprehensible without their accompanying defenses, such as consent, self-defense, defense of others, and necessity. These are crucial to understanding the full landscape of intentional tort liability.

In the intentional torts, the defense with the leading role is consent. It is ubiquitous. Without it, every shutting of elevator doors would be actionable false imprisonment, every kiss of newlyweds would be an actionable battery, and every haunted house at Halloween would generate an avalanche of actionable assaults.

B. Consent as an Affirmative Defense Versus Lack of Consent as the Plaintiff's Burden

What is seemingly most strange about the issue of consent, right off the bat, is that the traditional common-law formulations put it on the affirmative defense side of things rather than with the prima facie case. As a result, that means that it is the defendant's burden of proof to show consent. So, technically, a person who sends out party invitations could sue everyone who came to the party for trespass to land and make out a prima facie case against each one. In court, the burden would fall on the party guests to prove that they were on the plaintiff's land with the plaintiff's consent.

At first blush, it may seem absurd that the law allows, by design, a prima facie case for intentional torts even in cases of obviously consented-to touchings, property entries, etc. Yet asking the plaintiff to prove lack of consent as a prima facie element would mean asking the plaintiff to prove a negative. And that is something most courts are unwilling to do, at least in this context.

Let's take a slightly more realistic example than the vexatiously litigious party host. Suppose that a contractor demolishes the attached garage of someone's house. Because consent is a defense, it is not the homeowner's burden to prove that the contractor did not have permission. Instead, the contractor will need to offer proof that there was consent. In this case, it seems intuitively fair to ask that the contractor be able to produce a preponderance of evidence of consent.

Considering things from that angle, it does seem thoroughly sensible that consent is a matter of affirmative defense rather than a requirement of the plaintiff's case. But hold on, because that arrangement is not, it turns out, universal.

Notwithstanding the problems of proving a negative, the courts in many states hold that lack of consent is a prima facie element for various intentional torts other than trespass to land. The plaintiff may accomplish this as an initial matter by testifying that there was no consent. Then it is up to the defendant to impeach or rebut that testimony. Yet putting the burden on the plaintiff for lack of consent is not without effect. In a close case, where the factfinder perceives the evidence to be a toss-up, the tie will go in favor of the party without the burden of proof. So, in a jurisdiction where a battery claim requires proof of a lack of consent, a tie on the consent issue means that the defendant wins.

The fact that trespass to land is the one tort for which courts seem unwilling to shift the burden on the consent issue to the plaintiff shows once again the abiding importance with which the law treats private ownership of land.

C. Express and Implied Consent

To delve further into the issue of consent, it is helpful to break it up into chunks. Courts have categorized consent as coming in two forms – express and implied.

C.1. Express Consent

Express consent is consent that is *expressed* by the plaintiff. This doesn't require anything formal. Express consent can be communicated orally, in writing, or even in gestures. Legally, any of these is just as good as the other. In terms of trespass to land, waving someone into a room is just as valid a consent as delivering a signed written document that gives someone permission to enter.

You might wonder, if gestures or spoken words are legally valid to express consent, then why would anyone ever insist on a signed document indicating consent? The reason is that parties might later disagree about what happened. In that case, a signed writing will be very credible evidence at trial.

We should acknowledge that what is credible to a jury may depend on the circumstances. If a neighbor is sued for walking into a backyard, a jury will probably readily believe testimony that there was a "come on over" gesture. But a jury would be rightfully skeptical of a demolition firm claiming it was given consent through gestures to bulldoze a garage. A document, signed by the homeowner, memorializing the consent, doesn't seem like too much of a burden for a demolition crew to keep on file.

What this all means is that the doctrine of express consent is perfectly at home in the real world. Neighbors can stay neighborly and informal. But demolition firms are well advised to get signed, written permission before they bite into the first bucketload of sheetrock.

By the way, express consent given by the plaintiff is still valid even if the plaintiff secretly intended something to the contrary. So if two co-owners of a home deliver a document purporting on its face to provide consent for demolition work on their home, the homeowners won't be able to vitiate that consent by later claiming they didn't really mean it. The consent they expressed counts as consent.

But contrast that with a situation in which a malevolent neighbor forges the consent of the home's owners – producing a fake document with forged signatures. In that case, there is no consent, period.

C.2. Implied Consent (aka "Implied-in-Fact Consent," "Implied Consent by Custom and Usage")

Implied consent is consent that, instead of being expressed, is implied. Circumstances, custom, context, and culture can all create implications of consent.

The validity of implied consent to intentional torts is crucial to how our society works. A restaurant patron takes a paper napkin out of a dispenser and uses it. This is a prima facie case of trespass to chattels. But it's not a winning case, because there is implied consent for restaurant patrons to take napkins. Of course if a restaurant patron empties all the dispensers, making off with hundreds of napkins, then the scope of the implied consent has been exceeded, and the restaurant has a good trespass-to-chattels case.

Implied consent works on an **objective standard**. **The question is whether the objectively reasonable person, standing in the shoes of the defendant, would have reasonably believed that the plaintiff consented**.

Implied consent can arise out of the particular circumstances. Climb into a boxing ring and hold up gloved hands, and you have impliedly consented to getting punched by the boxer waiting in the ring.

Implied consent can also arise by community custom. When neighborhood kids walk up to a house and ring the doorbell to sell cookies for a fundraiser, consent to come on the land is implied by community custom. If homeowners want to avoid the implication of consent, then they can post no-soliciting signs.

Notable case – O'Brien v. Cunard Steam-Ship (Mass. 1891): The implied consent defense and its objective standard is often taught through the classic case of *O'Brien v. Cunard Steam-Ship Co.*, 28 N.E. 266 (Mass. 1891). Mary O'Brien – a young Irish immigrant on her way to Boston – sued the operator of an ocean liner for battery on account of having been given a vaccination for smallpox. The steamship line was in the practice of giving vaccinations at the time because of American immigration procedures. The evidence, according to the Massachusetts Supreme Judicial Court, showed that O'Brien stood in a line of people about to receive vaccinations and that, when her time came, she held up her arm and said nothing to the physician about a wish to not be vaccinated. According to the court:

> [T]he surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been.

28 N.E. at 266. The appellate opinion leaves it a mystery why O'Brien sued over being vaccinated – making it seem as though she had nothing of substance to complain about. Professor Ann C. Shalleck, however, looked into lower-court records in the case to find a richer version of the facts: The vaccine left O'Brien covered with blisters and sores, and the court dismissed evidence of O'Brien's desire not to be vaccinated, including her statement that she had already been vaccinated. Professor Shalleck observes that the court made assumptions about the circumstances on the ship that allowed them to "disregard or obliterate Mary O'Brien's own story." See Ann C. Shalleck, *Feminist Legal Theory and the Reading of* O'Brien v. Cunard, 57 MO. L. REV. 371 (1992).

Indeed, it is the oft-cited aim of the cause of action of battery to give people a way – by being heard in court – to vindicate and validate their interest in bodily integrity. (How else does one explain the law's provision for symbolic awards of $1 in nominal damages?) One way of looking at the *O'Brien* case, then, is that in washing away the plaintiff's story, the court undermined a central aim of the tort of battery and a main tenet of the legal system: to give an aggrieved person the right to be heard and to have their personal autonomy upheld.

Professor Shalleck points to the *O'Brien* case as an example of the importance of discovering women's stories. She explains that doing so can allow us to see how the official version of a case's facts are shaped and misrepresented. "Feminist theory does not add ideology to the curriculum," Shalleck writes about the feminist perspective in legal education, "It reveals the ideology that is already there."

Doctrinal labels, and something different distinguished: The idea with implied consent is that the consent is real – it actually exists – even though it hasn't been explicitly communicated by the plaintiff. Accordingly, implied consent is often called "implied-in-fact consent," "consent implied in fact," "consent implied by custom and usage," or something of the like. Those labels distinguish the doctrine from something entirely different – though with a similar name – called "consent implied by law" or "implied-by-law consent." The doctrine of implied-by-law consent, which is discussed further below, can apply in a situation where there is no consent in reality at all, but where the law chooses to privilege certain intrusions for the plaintiff's own good. The leading example is emergency medical treatment for an unconscious patient.

Things would be clearer if that later-to-be-discussed doctrine didn't involve the word "implied." A better name for the doctrine of implied-by-law consent arguably would be "consent *construed* by law." That's because with this doctrine the law is, for policy reasons, construing consent to exist even when it doesn't. Better still, some might argue, would have been to call this legal construct a "privilege" and never mention the word "consent" at all. More on the doctrine of implied-by-law consent is included further below. For present purposes, understand that the topic currently under discussion is real, actual consent that has not been explicitly expressed.

C.3. Case: *Florida Publishing (Florida Times-Union) v. Fletcher* (Fla. 1976)

C.3.a. Advance Notes

The following case of *Florida Publishing Co. v. Fletcher* is a fantastic one for exploring consent defenses. But it's not a great case because of its clarity, representativeness, or correctness on the law.

The real learning opportunity is in considering the issue of whether the Florida Supreme Court got the law right. But your personal bottom-line conclusion as to whether the court was right or wrong is not what's key. What is most useful is for you to consider the many ways in which the opinion can be criticized, and then to go on to consider how it might be defended from those criticisms.

Don't see reading the case in this way as a pointless academic exercise. It must be admitted, of course, that lawyers would be hard pressed to find a client willing to pay a lawyer to review judicial opinions like a movie critic reviews films. But lawyers are, in fact, paid to make arguments. And in looking for reasons why the opinion can be seen as weak and wrong, as well as defensible, you are practicing making arguments. That's not only the skill at the root of the lawyer's job, it's also among the best ways to learn the doctrine inside and out.

This case is one of a number that, over the years, have pitted the news media against the private property owners. These cases all share a fundamental tension: The media wants to get the story. The property owners want to be left alone.

The question for the court is whether camera-wielding journalists have implied-in-fact consent to enter private property after a disaster in order to capture vivid images of fresh tragedy.

In this case, the defendant is the Florida Times-Union newspaper. The plaintiff is a mother whose house burned down and whose daughter, Cindy, perished in the fire. The alleged trespass allowed a photojournalist to get a picture of the imprinted, human-shaped shadow remaining on the floor after responders removed Cindy's body.

C.3.b. Opinion

Florida Publishing Co. (Florida Times-Union) v. Fletcher

Supreme Court of Florida
October 7, 1976

340 So. 2d 914. FLORIDA PUBLISHING Company, a Florida Corporation, Petitioner (Defendant), v. Klenna Ann Fletcher, Etc., Respondent (Plaintiffs). No. 48372. Opinion by ROBERTS, J., with which OVERTON, C.J., and ADKINS, BOYD and HATCHETT, JJ., concur. SUNDBERG, J., dissented with an opinion omitted here. ENGLAND, J., did not participate.

Justice B.K. ROBERTS:

˜Respondent, Mrs. Fletcher, left Jacksonville for New York on September 15, 1972, to visit a friend. She left in Jacksonville her three young daughters, including seventeen-year-old Cindy. A "baby sitter" was to spend the nights with the children, but there was no one with them in the home during the daytime except a young man who had a room in the house and whom Mrs. Fletcher described as Cindy's "boy friend." On the afternoon of September 15, 1972, while Cindy was alone in the house, a fire of undetermined origin did large damage to the home, and Cindy died.

The fire and police departments were called by a neighbor who discovered the fire, but too late to save the child. A large group of firemen, news media representatives, and onlookers gathered at the scene and on Mrs. Fletcher's property.

When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was their standard practice. The media representatives entered through the open door; there was no objection to their entry; they entered quietly and peaceably; they did no damage to the property; and their entry was for the purpose of their news coverage of this fire and death.

The Fire Marshal desired a clear picture of the "silhouette" left on the floor after the removal of Cindy's body. He and Sergeant Short in their depositions explained that the picture was important for their respective investigations to show that the body was already on the floor *before* the heat of the fire did any damage in the room. The Fire Marshal took one polaroid picture of the silhouette, but it was not too clear, he had no further film, and he requested photographer Cranford to take the "silhouette" picture which was made a part of the official investigation file of both the Fire and Police.

This picture was not only a part of the investigation but News Photographer Cranford turned it and his other pictures over to the defendant newspaper. It and several other pictures appeared in the news story of The Florida Times-Union on September 16, 1972.

Respondent first learned of the facts surrounding the death of her daughter by reading the newspaper story and viewing the published photographs.

Respondent filed an amended complaint against petitioner alleging (1) trespass and invasion of privacy, (2) invasion of privacy,

(3) wrong intentional infliction of emotional distress – seeking punitive damages.

The trial court dismissed Count II and granted final summary judgment for petitioner as to Counts I and III. Relative to the granting of summary judgment for Petitioner as to Count I, the trial judge cogently explicated:

> "As to Count I, the question raised by the motion for summary judgment is one of law as there is no genuine issue of material fact. The question raised is whether the trespass alleged in Count I of the complaint was consented to by the doctrine of common custom and usage.
>
> "The law is well settled in Florida and elsewhere that there is no unlawful trespass when peaceable entry is made, without objection, under common custom and usage.˜
>
> "In *Martin v. Struthers* (1943) 319 U.S. 141, 149, the Court struck down an unconstitutional and 'invalid in conflict with the freedom of speech and press' a city ordinance which made it unlawful trespass to knock on doors and ring doorbells to distribute literature. In so doing, it made the far reaching pronouncement followed by the Florida Supreme Court in *Prior v. White* (Fla. 1938) 132 Fla. 1:
>
> "'Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. * * We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.'
>
> "In *McKee v. Gratz* (1922) 262 [260] U.S. 127, the Supreme Court recognized the rule that it was not trespass when under the 'habits of the country' entry was commonly made.
>
> * * * * * *
>
> "Not only did the Fire Marshal and Detective Sergeant Short testify it was common custom and usage to permit

the news media to enter under the circumstances here, and of the great number of times they had permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin.

"Similar affidavits have been filed from the Chicago Tribune; the ABC-TV News, New York; the Tallahassee Democrat; the Pensacola Journal; the Associated Press; the President of the American Newspaper Publishers Association; the President of the Radio Television News Directors Association; the Miami Herald; United Press International; The Florida Times-Union and Jacksonville Journal; The Washington Post; TV-12 at Jacksonville; TV-10 at Miami; TV-4 at Jacksonville; the New York Daily News; the Milwaukee Journal; the Birmingham Post-Herald; the Memphis Commercial Appeal; the Macon Telegraph; and the Tampa Tribune; all attesting that it is common usage, custom and practice for news media to enter private premises and homes under circumstances like those here.

"Plaintiff filed no affidavits except her own; she makes no attempt to qualify as an expert; and she simply states her personal belief generally, without going into the situation involving coverage of a news story of public interest. She shows no qualifications to make an affidavit on the custom and usage in such matters.

"In Mrs. Fletcher's deposition, she stated she was in New York at the time of the fire; there was no one at the scene who objected to the entry; and she makes it clear she does not contend there was any force used for entry, or any physical damage done to the premises.

"Plaintiff likewise concedes that it was perfectly proper for the Fire and Police to enter without permission. The Fire and Police used the picture as part of their official investigation and actually requested that such picture be taken and would have made such request even had the Plaintiff been there and objected. There is no evidence that any restriction was placed upon the Defendant's

> photographer in the use of the photographs he took at the request of the Police and Fire Marshal.
>
> "Numerous affidavits, as above set forth, have been filed by the Defendant in support of its motion for summary judgments. All these affidavits attest to the fact that it is common usage, custom and practice for news media to enter private premises and homes to report on matters of public interest or a public event. The court therefore finds that there is no genuine issue of material fact and that as a matter of law an entry, that may otherwise be an actionable trespass, becomes lawful and non-actionable when it is done under common usage, custom and practice. The court further finds that the entry complained of in Count I of the Plaintiff's complaint was one permitted by common usage, custom and practice, and that the Defendant is entitled to a summary judgment as a matter of law as to matters alleged in Count I of the Plaintiff's complaint."

On appeal, the District Court of Appeal reversed as to the granting of summary judgment on Count I, stating:

> "We do not here hold that a trespass or 'intrusion' did in fact occur sub judice: We simply find that such is alleged in Count I of the amended complaint and that the proofs before the learned trial judge are insufficient to resolve the point by summary judgment."

Although recognizing that consent is an absolute defense to an action for trespass and that the defense of custom and usage is but another way of expressing consent by implication – that is consent may be implied from custom, usage or conduct – the District Court commented that the emergency of the fire was over and that there was no contention that petitioner's employees entered the premises to render assistance, explained that respondent did not either impliedly or expressly invite petitioner's employees into her home, and concluded that the proofs before the court were not sufficient to show that there was no genuine issue of material fact as to whether implied consent by custom and usage authorized entry into the premises without invitation by appellant.˜

The District Court erred in reversing summary judgment for petitioners as to Count I. The trial court properly determined from the record before it that there was no genuine issue of material fact insofar as the entry into respondent's home by petitioner's employees became lawful and non-actionable pursuant to the doctrine of common custom, usage, and practice and since it had been shown that it was common usage, custom and practice for news media to enter private premises and homes *under the circumstances present here.*

Judge McCord in his dissenting opinion could not agree with the majority that the news photographer who entered the burned out home was a trespasser or that the photograph published by petitioner and the news story resulting from the entry were an actionable invasion of privacy. We agree with and approve the following well-reasoned explication by Judge McCord in his dissenting opinion:

> "The only photographs taken and published were of fire damage – none were of deceased or injured persons. There, is no contention that the particular photograph complained of (the silhouette picture) and the news story were in any way false or inaccurate. There could, therefore, be no recovery under the 'false-light' doctrine of invasion of privacy. See Cantrell v. Forest City Publishing Company, 419 U.S. 245 (1974). Thus, there could be no recovery from the publication if the same photograph had come from a source other than from the news photographer's entry upon the premises. Any recovery in this case must necessarily be based upon trespass, and, therefore, the only question is whether or not there was a trespass by the news photographer. The majority opinion discusses the implied consent doctrine under which a person, who does not have express consent from the owner or possessor of premises, may legally enter under circumstances which infer or imply consent (common usage, custom and practice). It is my view that the entry in this case was by implied consent.
>
> "It is not questioned that this tragic fire and death were being investigated by the fire department and the sheriff's office and that arson was suspected. The fire was

a disaster of great public interest and it is clear that the photographer and other members of the news media entered the burned home at the invitation of the investigating officers. (Numerous members of the general public also went through the burned house.) Many affidavits of news editors throughout Florida and the nation and affidavits of Florida law enforcement officials were filed in support of appellee's motion for summary judgment. These affidavits were to the general effect that it has been a long-standing custom and practice throughout the country for representatives of the news media to enter upon private property where disaster of great public interest has occurred – entering in a peaceful manner, without causing any physical damage, and at the invitation of the officers who are investigating the calamity. The affidavits of law enforcement officers indicate that the presence of the news media at such investigations is often helpful to the investigations in developing leads, etc.

"The affidavits as to custom and practice do not delineate between various kinds of property where a tragedy occurs. They apply to any such place. If an entry is or is not a trespass, its character would not change depending upon whether or not the place of the tragedy is a burned out home (as here), an office or other building or place. An analysis of the cases on implied consent by custom and usage, indicates that they do not rest upon the previous nonobjection to entry by the particular owner of the property in question but rest upon custom and practice generally. Implied consent would, of course, vanish if one were informed not to enter at that time by the owner or possessor or by their direction. But here there was not only no objection to the entry, but *there was an invitation to enter by the officers investigating the fire*. The question of implied consent to news media personnel to enter premises in a circumstance such as this appears to be one of first impression not only in this jurisdiction but elsewhere. This, in itself, tends to indicate that the practice has been accepted by the general public since it is a widespread

> practice of long-standing. Due to such widespread and long-standing custom, reason and logic support the application of implied consent to enter the premises in the case before us. It, therefore, was not a trespass, and I would affirm the trial court." (emphasis supplied)

Accordingly, that portion of the decision of the District Court of Appeal, First District, reversing summary judgment for petitioner as to Count I is quashed˜.

It is so ordered.

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C.3.c. Note: Judge Boyer's View: "no basis for the establishing of an implied consent by custom and usage"

The intermediate appeals court, which the Florida Supreme Court in the above opinion overturned, took a starkly different view. Judge Tyrie A. Boyer wrote:

> [N]o case has been cited to us by counsel, nor has independent research revealed any, in which consent by custom and usage was held to have authorized entry into the private dwelling of another.
>
> The law is so well established as to render citations superfluous that "every man's home is his castle".˜ Sub judice, it is clear that appellant did not either impliedly or expressly invite appellee's employees into her home; nor is there anything in the record to indicate that appellant (nor others like situated) had theretofore acquiesced in other persons coming into her home: Therefore there was no basis for the establishing of an implied consent by custom and usage. Though it is conceded by appellant that the fire marshal and police rightfully entered the premises for the purpose of discharging their official duties, there is nothing to indicate that those officials had, in the absence of an emergency, authority to invite others to do so. The fire had been extinguished prior to the entry complained of. The emergency was over. There is no contention that

> appellee's employee went into the premises for the purpose of rendering assistance to the occupants nor to the officials.˜ Under the authorities above cited, in the light of the affidavits filed by appellee in support of its motion for summary judgment, custom and usage implied consent to go onto the yard of appellant's home and up to the front door: However, the proofs before the trial court were not sufficient to show that there was no genuine issue as to the very material fact as to whether implied consent by custom and usage authorized entry into the premises, without invitation by appellant or someone authorized by her.

Fletcher v. Florida Publishing Co., 319 So. 2d 100, 108-09 (Fla. App. 1975).

C.3.d. Questions to Ponder About *Florida Publishing*

1. Better analysis – Boyer vs. Roberts

Whose reasoning do you find more persuasive? That of Judge Boyer of the Florida Court of Appeals or that of Judge Roberts of the Florida Supreme Court? Why? What are the weaknesses and strengths of the courts' treatment and analysis?

2. The opt-out issue

Where permission to enter land is implied by custom, there is generally a way to opt out. While custom may imply consent for sales people to walk up a driveway to ring a door bell, a no-soliciting sign will dispel the implication. A no-trespassing sign on a gate will dispel the implied custom for anyone – sales person, neighbor, or anyone else – to be able to walk up to the door. Was there a valid opt-out in *Florida Publishing*? That is, is there a way for the possessor of land to dispel the implied permission for the media to enter after a disaster? As a practical matter, how could a resident dispel the implied consent for the media to enter after a fire, hurricane, or tornado? If an opt-out of implied-in-fact consent is not practicable, should that have ramifications for the legal doctrine?

C.4. Media Trespass and Implied Consent

Implied consent for media entry on land has not found broad acceptance in the courts.

Notable case – *Anderson v. WROC-TV* (N.Y. App. 1981): In *Anderson v. WROC-TV*, 109 Misc.2d 904 (N.Y. App. 1981), an animal welfare official used a search warrant to enter a house where there was suspected animal mistreatment. The official called up multiple television stations, inviting them to come along on the search. The owner, who was at the house, objected to the entry of the news crews, but they entered with the official regardless, filming the house's interior. The footage was then used on air.

Not persuaded by the implied consent theory of *Florida Publishing v. Fletcher* (Fla. 1976) (reprinted above), which held for the newspaper defendant, Justice David O. Boehm's opinion in *Anderson v. WROC-TV* concluded the following:

> "The gathering of news and the means by which it is obtained does not authorize, whether under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice."

Id. at 907. In view of the media defendant's urgings that the First Amendment should protect them, the judge noted an irony, citing *People v. Segal*, 78 Misc.2d 944 (N.Y. City Crim. Ct. 1974), where the CBS television network used legal process to oust unwelcome protestors:

> "In a case where the factual circumstances were ironically reversed, it appears the First Amendment suffered a strange sea-change. The defendants there, without permission, entered into a studio of the Columbia Broadcasting System in an attempt to exercise their right of free speech by publicizing what they claimed was unfair and unequal treatment of homosexuals in television news broadcasts. CBS was not deterred by the First Amendment from bringing charges against them of criminal trespass and they were duly convicted."

Id. at 908.

Notable case – *Berger v. Hanlon* (9th Cir. 1997): Another case, *Berger v. Hanlon,* 129 F.3d 505 (9th Cir. 1997), also parted ways with *Florida Publishing*. In *Berger*, federal agents from the U.S. Fish and Wildlife Service entered into a written contract with CNN and Turner Broadcasting for cooperation in the production of television shows *Earth*

Matters and *Network Earth*. According to the court, the network crews wanted footage of the Berger ranch, and federal officials wanted publicity for their enforcement efforts.

Rancher Paul Berger was under suspicion for poisoning eagles that were a threat to his livestock. Agents obtained a search warrant and entered the property. The agents made no disclosure to Berger or his wife that the lead agent was wearing a microphone, nor did they disclose that the cameras brought on to the property were owned by the media.

The raid was successful – at least from a television-production perspective. Crews were able to shoot eight hours of footage, and both the footage and the audio recordings were used on television. From a law enforcement standpoint, however, the bust was a bust. The search yielded only a misdemeanor conviction against Berger for violation of 7 U.S.C. § 136j(a)(2)(G) – using a pesticide in a manner inconsistent with its labeling.

In the subsequent civil suit brought by the Bergers, the Ninth Circuit held that the Bergers had stated a claim of trespass against the broadcasters. And interestingly, the court found the media so entwined with the federal government that the court upheld a constitutional tort claim against the media defendants as well as the agents.

D. Consent Obtained By Invalid Means

D.1. Explanation

There is an unsurprising exception to consent: **If consent is obtained by fraud, duress, or a mistake induced by the defendant, then the consent will not be valid.** In a lawsuit involving this exception to the consent defense, there often will be an intense dispute over the facts regarding the alleged fraud, duress, or defendant-induced mistake.

D.2. Case: *Food Lion v. Capital Cities / ABC* (4th Cir. 1999)

D.2.a. Advance Notes

This case explores consent obtained by deception. Here, the news media is alleged to have trespassed into grocery stores to uncover facts and take hidden camera footage for an investigative report.

In this case, there was indeed consent by the property owner. Not only did the grocery store chain invite the journalists in, the company even paid them to be there. The issue in dispute is that the consent was allegedly obtained by fraud. The grocery store, you see, invited the journalists in because it had hired them as employees – without a clue that their new employees were undercover TV network reporters working up a blockbuster exposé.

Who won? This is one of those cases where both sides tried to claim victory. The court applied the blackletter doctrine: consent obtained by invalid means is not usable for the consent defense to a cause of action for trespass to land. But the grocery store's vindication was thin. When everything was finished and tallied, the television network had to pay the grocery store chain all of $2. That's one dollar in nominal damages, doubled on account of there being two reporters involved.

This case is famous in the investigative journalism community, and it is one of the leading cases in the field of mass media law. The implications of *Food Lion v. Capital Cities / ABC* for the news media and for press freedom continue to be discussed and debated today.

D.2.b. Opinion

Food Lion v. Capital Cities / ABC

U.S. Court of Appeals for the Fourth Circuit
(from North Carolina and South Carolina)
October 20, 1999

194 F. 3d 505. FOOD LION, INCORPORATED, Plaintiff-Appellee, v. CAPITAL CITIES/ABC, INC.; Lynne Litt, a/k/a Lynne Neufes; ABC Holding Company; American Broadcasting Companies, Incorporated; Richard N. Kaplan; Ira Rosen; Susan Barnett, Defendants-Appellants, Nos. 97-2492, 97-2564. Before NIEMEYER, MICHAEL, and MOTZ, Circuit Judges.

Judge M. BLANE MICHAEL:

Two ABC television reporters, after using false resumes to get jobs at Food Lion, Inc. supermarkets, secretly videotaped what appeared to be unwholesome food handling practices. Some of the video footage was used by ABC in a *PrimeTime Live* broadcast that was sharply critical of Food Lion. The grocery chain sued Capital Cities/ABC, Inc., American Broadcasting Companies, Inc., Richard Kaplan and Ira Rosen, producers of *PrimeTime Live*, and Lynne Dale and Susan Barnett, two reporters for the program (collectively, "ABC" or the "ABC defendants"). Food Lion did not sue for defamation, but focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices. Food Lion won at trial, and judgment for compensatory damages of $1,402 was entered on the various claims. Following a substantial (over $5 million) remittitur, the judgment provided for $315,000 in punitive damages. The ABC defendants appeal the district court's denial of their motion for judgment as a matter of law, and Food Lion appeals the court's ruling that prevented it from proving publication damages. Having considered the case, we (1) reverse the judgment that the ABC defendants committed fraud and unfair trade practices, (2) affirm the judgment that Dale and Barnett breached their duty of loyalty and committed a trespass, and (3) affirm, on First Amendment grounds, the district court's refusal to allow Food Lion to prove publication damages.

I.

In early 1992 producers of ABC's *PrimeTime Live* program received a report alleging that Food Lion stores were engaging in unsanitary meat-handling practices. The allegations were that Food Lion employees ground out-of-date beef together with new beef, bleached rank meat to remove its odor, and re-dated (and offered for sale) products not sold before their printed expiration date. The producers recognized that these allegations presented the potential for a powerful news story, and they decided to conduct an undercover investigation of Food Lion. ABC reporters Lynne Dale (Lynne Litt at the time) and Susan Barnett concluded that they would have a better chance of investigating the allegations if they could become Food Lion employees. With the approval of their superiors, they proceeded to apply for jobs with the grocery chain, submitting applications with false identities and references and fictitious local addresses. Notably, the applications failed to mention the reporters' concurrent employment with ABC and otherwise misrepresented their educational and employment experiences. Based on these applications, a South Carolina Food Lion store hired Barnett as a deli clerk in April 1992, and a North Carolina Food Lion store hired Dale as a meat wrapper trainee in May 1992.

Barnett worked for Food Lion for two weeks, and Dale for only one week. As they went about their assigned tasks for Food Lion, Dale and Barnett used tiny cameras ("lipstick" cameras, for example) and microphones concealed on their bodies to secretly record Food Lion employees treating, wrapping and labeling meat, cleaning machinery, and discussing the practices of the meat department. They gathered footage from the meat cutting room, the deli counter, the employee break room, and a manager's office. All told, in their three collective weeks as Food Lion employees, Dale and Barnett recorded approximately 45 hours of concealed camera footage.

Some of the videotape was eventually used in a November 5, 1992, broadcast of *PrimeTime Live*. ABC contends the footage confirmed many of the allegations initially leveled against Food Lion. The broadcast included, for example, videotape that appeared to show Food Lion employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at Food Lion stores across several states. The truth of the *PrimeTime Live* broadcast was not an issue in the litigation we now describe.

Food Lion sued ABC and the *PrimeTime Live* producers and reporters. Food Lion's suit focused not on the broadcast, as a defamation suit would, but on the methods ABC used to obtain the video footage. The grocery chain asserted claims of fraud, breach of the duty of loyalty, trespass, and unfair trade practices, seeking millions in compensatory damages. Specifically, Food Lion sought to recover (1) administrative costs and wages paid in connection with the employment of Dale and Barnett and (2) broadcast (publication) damages for matters such as loss of good will, lost sales and profits, and diminished stock value. Punitive damages were also requested by Food Lion.˜

II.

A.˜

ABC argues that it was error to allow the jury to hold Dale and Barnett liable for trespass on either of the independent grounds (1) that Food Lion's consent to their presence as employees was void because it was based on misrepresentations or (2) that Food Lion's consent was vitiated when Dale and Barnett breached the duty of loyalty. The jury found Dale and Barnett liable on both of these grounds and awarded Food Lion $1.00 in nominal damages, which is all that was sought in the circumstances.

In North and South Carolina, as elsewhere, it is a trespass to enter upon another's land without consent. Accordingly, consent is a defense to a claim of trespass. Even consent gained by misrepresentation is sometimes sufficient. See *Desnick v. American Broad. Cos.*, 44 F.3d 1345, 1351-52 (7th Cir.1995) (Posner, C.J.). The consent to enter is canceled out, however, "if a wrongful act is done in excess of and in abuse of authorized entry."˜

We turn first to whether Dale and Barnett's consent to be in non-public areas of Food Lion property was void from the outset because of the resume misrepresentations. "[C]onsent to an entry is often given legal effect" even though it was obtained by misrepresentation or concealed intentions. *Desnick*, 44 F.3d at 1351. Without this result,

> 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 a dealer's showroom.

Id.˜

We like *Desnick*'s thoughtful analysis about when a consent to enter that is based on misrepresentation may be given effect. In *Desnick* ABC sent persons posing as patients needing eye care to the plaintiffs' eye clinics, and the test patients secretly recorded their examinations. Some of the recordings were used in a *PrimeTime Live* segment that alleged intentional misdiagnosis and unnecessary cataract surgery. *Desnick* held that although the test patients misrepresented their purpose, their consent to enter was still valid because they did not invade "any of the specific interests [relating to peaceable possession of land] the tort of trespass seeks to protect:" the test patients entered offices "open to anyone expressing a desire for ophthalmic services" and videotaped doctors engaged in professional discussions with strangers, the testers; the testers did not disrupt the offices or invade anyone's private space; and the testers did not reveal the "intimate details of anybody's life." 44 F.3d at 1352-53. *Desnick* supported its conclusion with the following comparison:

> "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 [ABC's] "testers" is analogous. Like testers seeking evidence of violation of anti-discrimination laws, [ABC's] 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.

Id. at 1353 (citation omitted).˜

The jury˜ found that the reporters committed trespass by breaching their duty of loyalty to Food Lion "as a result of pursuing [their] investigation for ABC." We affirm the finding of trespass on this ground because the breach of duty of loyalty – triggered by the filming in non-public areas, which was adverse to Food Lion – was a wrongful act in excess of Dale and Barnett's authority to enter Food Lion's premises as employees.~

The Court of Appeals of North Carolina has indicated that secretly installing a video camera in someone's private home can be a wrongful act in excess of consent given to enter.~

It is consistent with that principle to hold that consent to enter is vitiated by a wrongful act that exceeds and abuses the privilege of entry.~

B.

ABC argues that even if state tort law covers some of Dale and Barnett's conduct, the district court erred in refusing to subject Food Lion's claims to any level of First Amendment scrutiny. ABC makes this argument because Dale and Barnett were engaged in newsgathering for *PrimeTime Live*. It is true that there are "First Amendment interests in newsgathering." In re Shain, 978 F.2d 850, 855 (4th Cir. 1992) (Wilkinson J., concurring). See also *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated."). However, the Supreme Court has said in no uncertain terms that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.,* 501 U.S. 663, 669 (1991); see also *Desnick*, 44 F.3d at 1355 ("the media have no general immunity from tort or contract liability").~

We are convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts.~

C.

For the foregoing reasons, we affirm the judgment that Dale and Barnett~ committed trespass. We likewise affirm the damages award against them for these torts in the amount of $2.00.

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D.2.c. Postscript on *Food Lion*

Although the grocery store won its case against ABC, it was a pyrrhic victory. The court struck down the multi-million punitive damages verdict because it was based entirely on the fraud claim, which the court found lacking. The court also struck down the compensatory damages claim based on the reputational harm that occurred from ABC's broadcast of the *PrimeTime Live* program about Food Lion. Those damages were unavailable, the court held, because "it was [Food Lion's] food handling practices themselves – not the method by which they were recorded or published – which caused the loss of consumer confidence." (internal quotes omitted).

Thus, in the end, Food Lion won only $2.

It was a technical win for the strict application of trespass law, but it was widely hailed as a victory for the news media. That said, there are indications that news media counsel became more risk-averse with undercover pieces after *Food Lion* than they had been before. After all, the court was firm that the First Amendment would not step in to shield reporters from ordinary intentional tort law, regardless of how bona fide the journalistic endeavor might be.

Before *Food Lion* and some other cases, such as *Berger v. Hanlon,* 129 F.3d 505 (9th Cir. 1997), noted above, the news media may have been more sanguine about the prospects for the First Amendment keeping tort liability at bay. In the time of the ascendant wave of civil rights and civil liberties law in the 1960s, the landmark U.S. Supreme Court case of *New York Times v. Sullivan*, 376 U.S. 254 (U.S. 1964) held that defamation law was strongly curbed by the First Amendment. Not so, however, for trespass, the *Food Lion* case seemed to confirm.

On the other hand, ABC's Food Lion exposé was a ratings bonanza and award-winning to boot. Despite the legal dangers it laid bare, *PrimeTime Live*'s undercover meat department work arguably started a trend of similar blow-the-lid-off television news reports.

The one unquestionable loser was *Food Lion*. The chain took a big hit in sales that Wall Street noticed with a debt downgrade. But as of 2026 the grocery store chain continued to maintain status as a dominating retailer throughout the Carolinas and neighboring states, including a strong presence in parts of Virginia and Tennessee.

E. Exceeding the Scope of Consent

E.1. Explanation

Often there is no question that there is consent, nor that it was obtained validly. Instead, the issue is the scope of that consent. Playing a game of tag means consenting to being touched. But does it mean consent to a powerful shove? How about consent to being hit with a ball – or a rock?

If the scope of the consent is exceeded, then it will not work as a defense. As you might imagine, scope-of-consent issues can be fact-intensive and can force courts into difficult line-drawing problems.

E.2. Case: *Koffman v. Garnett* (Va. 2003)

E.2.a. Advance Notes

This case looks at the scope-of-consent issue in the context of contact sports. From the elementary school playground to college, and from international federation sports to multi-billion-dollar professional leagues, sports has often pushed the envelope of legal doctrine – in contracts, labor law, civil rights, antitrust, and – of course – torts.

Like many cases in this book, *Koffman v. Garnett* commands wide acclaim for being a wonderful case for teaching and learning torts even as it attracts criticism for its analysis and holding. The value in *Koffman* is the opportunity it offers for deconstruction, the Monday-after look at the game film.

As has been said before, the blackletter law isn't the law, it's a simplified model of the law, synthesizing a multitude of cases that form the precedent where the real common law resides. And despite being written up and repeated over and over, the blackletter law does not have an iron grip on the cases newly entering the courts. To know tort law beyond the tidy blackletter model of it means seeing the opportunities and the arguments for an outcome that might seem to defy legal rules.

So ask: Did the court get this case right or wrong? How so? What are the weaknesses in the court's analysis? It's these questions that can help you hone the lawyer's craft of making arguments.

Students often ask why they must read dissents. *Lawyering* is the answer. Law is law. But lawyering is making arguments about the law.

One more thing: It's almost a trope, to say it, but for learning the law, the facts of a case are often much more important than what the court says about the law itself. In reading this case, don't miss the fact that the plaintiff is a third-string defensive player on his middle school's football team. Third-string means he's the backup to the backup. And defense means he's playing when his team does not have the ball – and in football, it's only the ball carrier who can be tackled.

E.2.b. Opinion of the Court

Koffman v. Garnett

Supreme Court of Virginia
January 10, 2003

265 Va. 12. Andrew W. KOFFMAN, an Infant by his Father and Next Friend, Richard Koffman, et al., v. James GARNETT. Record No. 020439.

Justice Elizabeth B. LACY:

In this case we consider whether the trial court properly dismissed the plaintiffs' second amended motion for judgment for failure to state causes of action for gross negligence, assault, and battery.

Because this case was decided on demurrer, we take as true all material facts properly pleaded in the motion for judgment and all inferences properly drawn from those facts. *Burns v. Board of Supvrs.*, 218 Va. 625, 627 (1977).

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

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

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

In his second amended motion for judgment, Andy, by his father and next friend, Richard Koffman, and Andy's parents, Richard and Rebecca Koffman, individually, (collectively "the Koffmans") alleged that Andy was injured as a result of Garnett's simple and gross negligence and intentional acts of assault and battery. Garnett filed a demurrer˜, asserting that the second amended motion for judgment did not allege sufficient facts to support a lack of consent to the tackling demonstration and, therefore, did not plead causes of action for either gross negligence, assault, or battery. The trial court dismissed the action, finding that˜ the facts alleged were insufficient to state causes of action for gross negligence, assault, or battery because the instruction and playing of football are "inherently dangerous and always potentially violent."

In this appeal, the Koffmans˜ assert that they pled sufficient facts in their second amended motion for judgment to sustain their claims of˜ assault˜ and battery.˜

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

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

Reversed and remanded.

E.2.c. Dissent of Kinser

Justice Cynthia Dinah KINSER, concurring in part and dissenting in part:

˜In my view, the second amended motion for judgment filed by the plaintiffs, Andrew W. Koffman, by his father and next friend, and Richard Koffman and Rebecca Koffman, individually, was insufficient as a matter of law to state a claim for battery.

Absent fraud, consent is generally a defense to an alleged battery. In the context of this case, "[t]aking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages." However, participating in a particular sport "does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill."

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

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

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

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

In sum, I conclude that the plaintiffs did not sufficiently plead a claim for battery. We must remember that acts that might give rise to a battery on a city street will not do so in the context of the sport of football. We must also not blur the lines between gross negligence and battery because the latter is an intentional tort. I agree fully that the plaintiffs alleged sufficient facts to proceed with their claim for gross negligence.

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

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E.2.d. Questions to Ponder About *Koffman v. Garnett*

1. How far could Coach Garnett have gone?

Based on what you know of the facts, along with your common experience, where do you think the outer boundary of consent was in this case? Was Coach Garnett's tackle within it? Would it have been within the scope of consent for Garnett to have done the same thing in slow motion, such that Koffman was not hurt? What if the tackle were exactly the same as in the case, but it was carried out by another student, instead of by Coach Garnett?

2. Where's the line in the game?

Where do you think the line is drawn with student touches in a game context? Are only legal tackles within the scope of consent? How about a late hit (a tackle after the whistle is blown and the play is over)? A late hit is outside the rules, but is it outside the scope of legal consent and therefore actionable as a battery? How about tackling a player full force after that player has signaled for a fair catch? (A fair catch is when, during a kickoff or punt, the receiving player waives the ability to advance the ball in exchange for not being tackled. It is typically used when the receiving player must be looking into the sky to catch the ball and will not see an oncoming opposing player.) What about illegal spearing (an illegal tackle that has frequently caused catastrophic injury)? What about an illegal spearing late hit after a fair catch?

F. Consent Implied By Law

In addition to being implied *in fact* – that is, by circumstances or custom – consent can also be implied by law. When unconscious patients arrive in the emergency room, they have not consented to medical treatment. (How could they, being unconscious?) Consent in such a situation is implied by law for public policy reasons.

In some jurisdictions, during hunting season, consent for hunters to enter private property in rural areas is implied by law. To defeat the implication, the onus is on property owners to post no trespassing signs.

The distinction between consent implied by law and consent implied in fact can get a little blurry. One might say that the fire-ravaged home of *Florida Publishing* is analogous to the unconscious ER patient, with neither situation providing any basis for factual consent.

At least on a theoretical level, the difference between implied-in-fact and implied-by-law consent is that implied-in-fact consent is manifested, if not by the plaintiff, at least by people within the plaintiff's community. The court, through implied-in-fact consent doctrine, merely recognizes that existing implication. By contrast, implied-by-law consent doesn't exist "out there" in the real world. Instead, the court construes it – that is, acts as if it exists – because the court has decided that doing so is for the best.

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11. Defense Defenses to the Intentional Torts

"There's only one basic principle of self-defense:
You must apply the most effective weapon, as soon as possible, to the most vulnerable target."

– Bruce Lee
(approx. 1970)

A. Lead-in

Tort law guarantees citizens a civil way of settling disputes and getting justice. As such, tort law expects that people will not resort to the use of force against one another, even when their rights are being infringed upon.

Yet the law does recognize that there are some circumstances under which people cannot be expected to wait to try to vindicate their rights in court. Under these limited circumstances, people can commit prima facie intentional torts and then later escape liability, if sued, by asserting self-defense, defense of others, or defense of property.

Grouping the

It sounds a bit silly when you try to group together, under one label, the three defenses of self-defense, defense of others, or defense of property. Perhaps that's why treatise writers adopt organizational schemes that have no need of headings like "defenses of defense" or the pithier "defense defenses."

Nevertheless, here they come: the defense defenses.

B. Self-Defense

Self-defense entitles a person to use reasonable force, as apparently necessary, to prevent an imminent and unconsented-to touching that is harmful or offensive, or a confinement. In other words, you can defend yourself with reasonable force where there is an immediate threat of battery or false imprisonment.

The law puts stringent limits on self-defense. Notice that the threat must be *imminent.* In other words, the self-defense privilege arises where the defendant has an immediate choice of either engaging in self-defense or suffering the battery or false imprisonment. If there is time to call the police, or if the threat has not fully materialized, then imminence is lacking. And then, self-defense will not shield the defendant from tort liability.

Another key limitation is that only *reasonable force* is permissible. In other words, the degree of force must not be more than the force that reasonably appears necessary to thwart the threat. What's "reasonable"? That's a great question. But it's without a great answer. Tort law tends not to rely on the word for meaning, rather than the other way around. (A huge amount of negligence doctrine rests on the word "reasonable," for instance.) Ultimately, determinations about what is reasonable and what isn't will be a question for a jury. In the heat of the moment, however, you'll just have to think reasonably about what's reasonable and what's not.

The law itself has had a bit more to offer when it comes to deadly force. Generally speaking, the law is that deadly force may only be used where the defendant is faced with an extremely serious threat – such as death, rape, sodomy, loss of limb, loss of sight, etc. – and where nothing short of deadly force will stop the imminent attack.

Jurisdictions differ on whether the defendant has a *duty to retreat.* Many jurisdictions will not allow self-defense to negate tort liability where the defendant could have safely retreated to avoid the threat. Some jurisdictions, by contrast, allow a defendant to stand her or his ground and use force. In general, jurisdictions apply the same rule in torts as they do for criminal cases.

C. Defense of Others

Defense of others – that is, defense of a third party – works nearly identically to self-defense, but with an important wrinkle in some jurisdictions. **Under traditional doctrine, the third-party intervenor "stands in the shoes" of the apparent victim, so that if the apparent victim does not actually have a right of self-defense, then neither does the intervenor.** For instance, under the traditional view, if the defendant reasonably but mistakenly believes that the third party is threatened, when that person is not actually threatened, then the defendant cannot use defense of others to avoid tort liability.

Other jurisdictions follow a more modern view in which mistakes do not necessarily vitiate the defense. **The more modern doctrine is that defense of others is viable if the intervenor reasonably believed the third person was in imminent danger.**

In a number of jurisdictions, the current status of the doctrine may be unclear.

Example – YouTube Mugging Scene:

Suppose three friends are shooting a video on a public street, filming a scene of a mugging. In the scene, a man pushes down and savagely beats an elderly woman – but the blows are fake, and the woman is a young actor. To all outward appearances, the woman is being attacked. Unaware that it's all a staged scene, a passer-by stops his car, jumps out, and grabs the actor playing the thug, pushing him away from the woman.

Funny enough, this example is not a hypothetical. These are the exact facts of what happened when actor Andy Samberg – before becoming a movie/TV star – was filming a mugging scene with his friends on Olympic Boulevard in Los Angeles. The passer-by who stopped to intervene was none other than movie/TV star Kiefer Sutherland.

Famous for his television role as tough-guy-who-doesn't-play-by-the-rules counterterrorism agent Jack Bauer on *24*, Sutherland leapt to the woman's defense. Luckily, Samberg and his friends were able to quickly explain to Sutherland that they were making a video.

In jurisdictions following the traditional rule, Sutherland would be liable for battery. In other jurisdictions – following the more modern view – Sutherland's reasonable mistake would not have prevented his ability to use defense of others as a complete defense to a suit for battery. And in a number of jurisdictions, the current status of the doctrine might be unclear.

(Of course, in all jurisdictions, struggling actors are well advised to milk such a situation for publicity value rather than filing a lawsuit.)

D. Defense of Property

"This land is my land, it isn't your land
I got a shotgun, and you don't got one.
If you don't get off, I'll blow your head off.
This land was made for only me."

– Traditional,
Kingswood Elementary School playground,
Citrus Heights, California, c. 1983

D.1. Explanation

Defense of property allows the reasonable use of force to defend both land and chattels against trespass. Generally, property owners must make a verbal demand on the trespasser to stop. After that, however, property owners generally may use as much force as is necessary to prevent the trespass short of deadly force.

Whether deadly force may be used for the protection of property is a controversial issue. Most jurisdictions do not allow deadly force to be used against a trespasser merely on account of defending a property interest. (Although if there is additionally a threat to a person, then deadly force may be permissible as self-defense or defense of others.) If the property is a dwelling, and the trespasser is engaging in a breaking-and-entering felony, then many or most courts would allow deadly force if necessary – that is, if the intruder could not be evicted more safely.

D.2. Case: *Katko v. Briney* (Iowa 1971)

D.2.a. Advance Notes

The town of Readlyn, Iowa has long greeted roadtrippers with a sign reading: "867 friendly people & one old grump." And Stuart, Iowa put out a welcome sign warning: “Home of 1700 good eggs and a few stinkers.” (More people, more problems, apparently.)

Somewhere south of Readlyn and east of Stuart, there was a plot of Iowa agricultural acreage owned by Edward Briney and his wife Bertha. The land consisted of an unoccupied farm along with its dilapidated outbuildings and a run-down farm house.

Whether the Brineys were good eggs or grumps will be for you to decide.

Edward and Bertha Briney, as they explained it, were tired of people breaking in and rummaging around their property. They posted “No Trespassing” signs, but those didn’t solve their problems. So Edward and Bertha tried something different: mounting a shotgun to an old bed frame, connecting it with wire to an interior door, and setting it to discharge whenever the door next swung open.

Enter Marvin Katko, a glassware collector who, we can deduce, had more enthusiasm for old fruit jars and bottles than he did for private property rights. On his next rummaging visit to the Briney property, Katko lost a substantial portion of his right leg owing to the blast from Edward Briney’s well-oiled 20-gauge shotgun.

Katko had been on the receiving end of what could hardly be denied to be a battery – being quite clearly all of intentional, a touching, and harmful. Katko sued.

The Brineys mounted a defense based on defense of property. The judge and jury didn’t see things their way, however, and Katko was awarded damages. In the Iowa Supreme Court opinion below, Katko’s judgment was upheld on appeal. *Katko v. Briney* has become the classic exploration of the use of deadly force to defend property.

D.2.b. Opinion

Katko v. Briney

Supreme Court of Iowa
February 9, 1971

183 N.W.2d 657. Marvin KATKO, Appellee, v. Edward BRINEY and Bertha L. Briney, Appellants. No. 54169.

Chief Justice C. Edwin MOORE:

The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury.

We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer infra.

Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farm house which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had broken and entered the house to find and steal old bottles and dated fruit jars which they considered antiques.

At defendants' request plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.

Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farm land in Mahaska and Monroe Counties. Included was an 80-acre tract in southwest Mahaska County where her grandparents and parents had lived. No one occupied the house thereafter. Her husband, Edward, attempted to care for the land. He kept no farm machinery thereon. The outbuildings became dilapidated.

For about 10 years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows and 'messing up of the property in general'. The latest occurred June 8, 1967, prior to the event on July 16, 1967 herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted 'no trespass' signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967 defendants set 'a shotgun trap' in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but at Mrs Briney's suggestion it was lowered to hit the legs. He admitted he did so 'because I was mad and tired of being tormented' but 'he did not intend to injure anyone'. He gave to explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars which they took and added to their collection of antiques. On the latter date about 9:30 p.m. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window which was without glass. While McDonough was looking around the kitchen area plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off striking him in the right leg above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's assistance was plaintiff able to get out of the house and after crawling some distance was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain during this period.

There was undenied medical testimony plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

The record discloses plaintiff to trial time had incurred $710 medical expense, $2056.85 for hospital service, $61.80 for orthopedic service and $750 as loss of earnings. In addition thereto the trial court submitted to the jury the question of damages for pain and suffering and for future disability.

Plaintiff testified he knew he had no right to break and enter the house with intent to steal bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges this was plaintiff’s first brush with the law. On this civil case appeal it is not our prerogative to review the disposition made of the criminal charge against him.

The main thrust of defendants’ defense in the trial court and on this appeal is that ‘the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief’.

In the statement of issues the trial court stated plaintiff and his companion committed a felony when they broke and entered defendants’ house. In instruction 2 the court referred to the early case history of the use of spring guns and stated under the law their use was prohibited except to prevent the commission of felonies of violence and where human life is in danger. The instruction included a statement breaking and entering is not a felony of violence.

Instruction 5 stated: ‘You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the injured party is a trespasser and is in violation of the law himself.’

Instruction 6 stated: ‘An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore a person owning a premise is prohibited from setting out ‘spring guns’ and like dangerous devices which will likely take life or inflict great bodily injury, for the purpose of harming trespassers. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act.'

Instruction 7, to which defendants made no objection or exception, stated: 'To entitle the plaintiff to recover for compensatory damages, the burden of proof is upon him to establish by a preponderance of the evidence each and all of the following propositions:

> 1. That defendants erected a shotgun trap in a vacant house on land owned by defendant, Bertha L. Briney, on or about June 11, 1967, which fact was known only by them, to protect household goods from trespassers and thieves.
>
> 2. That the force used by defendants was in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property.
>
> 3. That plaintiff was injured and damaged and the amount thereof.
>
> 4. That plaintiff's injuries and damages resulted directly from the discharge of the shotgun trap which was set and used by defendants.'

The overwhelming weight of authority, both textbook and case law, supports the trial court's statement of the applicable principles of law.

Prosser on Torts, Third Edition, pages 116-118, states:

> ... the law has always placed a higher value upon human safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify a self-defense. ... spring guns and other mankilling devices are not justifiable against a mere trespasser, or even a

> petty thief. They are privileged only against those upon whom the landowner, if he were present in person would be free to inflict injury of the same kind.

˜In *Hooker v. Miller,* 37 Iowa 613, we held defendant vineyard owner liable for damages resulting from a spring gun shot although plaintiff was a trespasser and there to steal grapes. At pages 614, 615, this statement is made: "This court has held that a mere trespass against property other than a dwelling is not a sufficient justification to authorize the use of a deadly weapon by the owner in its defense; and that if death results in such a case it will be murder, though the killing be actually necessary to prevent the trespass." At page 617 this court said: "[T]respassers and other inconsiderable violators of the law are not to be visited by barbarous punishments or prevented by inhuman inflictions of bodily injuries."

The facts in *Allison v. Fiscus*, 156 Ohio 120, decided in 1951, are very similar to the case at bar. There plaintiff's right to damages was recognized for injuries received when he feloniously broke a door latch and started to enter defendant's warehouse with intent to steal. As he entered a trap of two sticks of dynamite buried under the doorway by defendant owner was set off and plaintiff seriously injured. The court held the question whether a particular trap was justified as a use of reasonable and necessary force against a trespasser engaged in the commission of a felony should have been submitted to the jury. The Ohio Supreme Court recognized plaintiff's right to recover punitive or exemplary damages in addition to compensatory damages.˜

The legal principles stated by the trial court in instructions 2, 5 and 6 are well established and supported by the authorities˜. There is no merit in defendants' objections and exceptions thereto. Defendants' various motions based on the same reasons stated in exceptions to instructions were properly overruled.

Plaintiff's claim and the jury's allowance of punitive damages, under the trial court's instructions relating thereto, were not at any time or in any manner challenged by defendants in the trial court as not allowable. We therefore are not presented with the problem of whether the $10,000 award should be allowed to stand.

We express no opinion as to whether punitive damages are allowable in this type of case. If defendants' attorneys wanted that issue decided it was their duty to raise it in the trial court.˜

Study and careful consideration of defendants' contentions on appeal reveal no reversible error.

Affirmed.

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D.2.c. Questions to Ponder on *Katko v. Briney*

A. Are you surprised by the verdict? Do you think such a verdict is more or less likely in Iowa farm country than it would be in Manhattan?

B. The court notes, "We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident … ." Do you think the result would have been different if the spring gun was set up in the house the Brineys were living in? Would it make a difference if the gun was set to fire on intruders only when the Brineys were inside, as opposed to when they were gone on errands or on vacation?

C. What if the Brineys had surrounded their property with warning signs that said "NO TRESPASSING – DEATH OR SERIOUS INJURY MAY RESULT – AUTOMATIC SHOTGUN IN USE." Would that make a difference to the outcome of the case? Why or why not?

D.2.d. Iowa Stubborn! The Remarkable Sequel of *Briney v. Katko*

In the hit Broadway musical *The Music Man* (book, music, and lyrics by Meredith Willson), Iowa townsfolk explain Iowa culture to a new visitor, in song, as follows:

There's an Iowa kind of special
Chip-on-the-shoulder attitude.
We've never been without. …
And we're so by-God stubborn
We could stand touchin' noses
For a week at a time

> And never see eye-to-eye.

"Iowa Stubborn," *The Music Man*, Meredith Willson (1957).

These words proved prophetic when, after the Brineys lost their lawsuit against Katko, they simply started a new lawsuit, asking a trial court for a court order to prevent Katko from collecting his judgment. When the lower court said no, the Brineys appealed to the – you guessed it – Iowa Supreme Court!

Instead of rigging up something with wires and pulleys to stop the Brineys' repeated intrusions into their courthouse, the Iowa Supreme Court said this:

> After the filing of our opinion in *Katko v. Briney*, 183 N.W.2d 657 (Iowa 1971), the unsuccessful defendants brought this equity action in district court. Herein they sought an injunction restraining Katko, the successful plaintiff in the earlier case, from enforcing his judgment. The facts in this appeal are of course identical to those outlined in some detail in *Katko v. Briney*, supra.˜ The trial court was asked in effect to reverse this court in the earlier case. Katko, as defendant in this case, promptly filed a motion to dismiss.˜
>
> The Brineys cite familiar and well established authority for the proposition that equity may enjoin collection of a judgment. This is citation of good law for a bad purpose. The right to injunctive relief restraining the collection or enforcement of judgments is given to protect against frauds. It has no application to cases where the judgment challenged has been affirmed on appeal.˜
>
> The trial court was manifestly right in sustaining the motion and in dismissing a transparent and wholly improper attempt to reargue and relitigate those matters settled in the earlier appeal.

Briney v. Katko, 197 N.W.2d 351, 351-52 (Iowa 1972) (paragraph break omitted).

My goodness. The Brineys must have been some very contrary Hawkeyes.

By the way, if you're an Iowan and you take offense at the "Iowa Stubborn" lyrics quoted above, then you'd be well-advised to check your chip-on-the-shoulder attitude and take note that Meredith Willson was a very proud Iowa native who was moved to write *The Music Man* to pay tribute to his beloved home state. And in a life busy with theatre and film work in New York and California, Wilson made time to write school songs for Iowa State University, the University of Iowa, and his hometown alma mater, Mason City High School.

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12. Other Defenses to the Intentional Torts

"Excuse me, I believe you have my stapler."

– Milton Waddams in *Office Space* (1999)

A. Lead-in

In terms of the defenses to the intentional torts, there is consent (the subject of its own chapter); self-defense, defense of others, and defense of property (grouped into their own chapter of "defense defenses"), and then there are yet more. Some of those others – privilege of arrest, recapture of chattels, private necessity, and public necessity – are the subject of this chapter.

A lot of this is pretty intuitive. For example:

- Someone grabs your stapler off your desk and starts to walk away with it. You let them know it's your stapler, but they don't care. So you jump up and grab it back out of their hands. The ne'er-do-well stapler stealer says, "So, I'm going to be suing you for battery." And you say, "I believe I have a defense." You do: the *recapture of chattels* defense.

It's unsurprising that tort law would recognize a defense in such a situation. But we must admit that the situation itself is a little surprising. Not among kids, of course. Kids grab toys and grab them back all the time. But in the real adult world? If someone takes your property in your presence and doesn't give it back after you say something, there's probably a strong whiff of incipient violence in the air. And thus simply grabbing back your property is unlikely to be a practical option.

This chapter is filled with tort defenses where it isn't strange that the law would recognize such a defense. What *is* strange is a real-life situation implicating one of these defenses.

Thus, this chapter is something of a weird attic of tort law. For example:

- You tie someone up with rope. They say, "I'm gonna sue you for false imprisonment!" You say, "I'm making a citizen's arrest!" That is the actual subject of the *privilege of arrest*, explored below.
- With the help of a clever distraction, you jump into a cement mixer, grab the keys from above the sun visor, and begin to drive away. "Hey, you can't do that!" someone yells. "I'm going to sue you for trespass to chattels!" You yell in response: "Might as well make it conversion, because I'm not bringing it back! I'm gonna make it drive itself off a cliff into the ocean to save the city from a terrorist bioweapon!" That is the subject of the public necessity defense, explored below. (And yes, you are entitled to complete protection from intentional tort liability in that case.)

Honestly, much of this is crazy stuff.

Who's in the habit of conducting citizen's arrests and borrowing vehicles to defeat the villainous exploits of evil masterminds? Superheroes. And mostly just them.

You might be thinking: What about law enforcement officers out of their jurisdiction who go rogue because bad guys don't always play by the rules? Or retired covert operatives called back for just one more mission? Maybe public necessity for them, but not citizen's arrest. (As you'll learn below, tying up bad guys to interrogate them doesn't qualify as a valid citizen's arrest.)

The more rare something is in real life, the *much* more rare it will be in the courts, and the *much, much* more rare it will be in published appellate opinions. And that makes for some very sparse caselaw. Add to that the fact that, in the United States, there are 50-some jurisdictions, each of which is entitled to see tort law differently. That produces a situation where there's little that can be pointed to as actual legal doctrine that can honestly be said to predominate across the American landscape.

And that's compounded by yet another problem. Broadly speaking, the law has two approaches to providing rules or doctrine with regard to a given subject: general principles and specific rules. There's a continuum between the extremes, of course, and general principles can be and often are found mixed in with specific rules. But, at any rate, the defenses in this chapter tend to fit into the specific-rules mold rather than the general-principles category. That is consistent with the subject of the intentional torts as a whole, which tends to be an area dominated by specific rules rather than general principles. The specific-rules approach of the law in this area compounds the effects, mentioned above, of the rarity of caselaw and the multi-jurisdictional aspect of American tort law. Thus, the specific-rules aspect of the defenses in this chapter exacerbates the difficulty in assembling a set of doctrines that can be set in front of the reader as "the law" that predominates across the United States.

Where there's little across-the-jurisdictions law and rare occasion for its application, you might wonder why it is worth learning. That's a very fair question. Well, much of this topic area strikes many people as extremely interesting stuff. It has stories that have proved irresistible to casebook authors over the decades, and it features puzzling situations that have enticed law-and-economics scholars. All that has contributed to a tradition of including these topics in typical law school courses on tort law. Add to that – and you can be forgiven for questioning the wisdom of those in charge of such things – these have been perennial topics for the bar exam.

Is it taboo to mention the bar exam? It does feel like a casebook is breaking the fourth wall to utter the words "bar exam." It's good to be candid – until it crosses over to *uncouth*.

There's a strong and arguably noble intuition that it's best to stay above that fray. Not "teach to the test" and all that. But here's the thing: It's hard to be intellectually honest yet practically concise about the material in this chapter without acknowledging that the engine driving the discussion is, in large part, the editorial decision-making of the bar exam people. To speak of "the law" among the 50-some jurisdictions that is based on precedent but barely ever comes up, you run a very big risk of propounding knowledge about something that doesn't actually exist.

Not to mention that, bottom line, as a lawyering matter: No, there is little to no need to learn these topics in order to competently represent ordinary sorts of clients before the courts of the United States.

All that being said, because some of you are curious, because some of you plan on taking the bar exam, and because some of you still hold out hope for becoming a superhero or, perhaps your newer daydream, becoming a superhero's attorney (and, it must be said, the outer bounds of intentional tort defenses are of unquestionable relevance to superheroes and their legal counsel), here comes a discussion of the intentional tort defenses of the privilege of arrest, recapture of chattels, private necessity, and public necessity.

B. Arrest

B.1. In General

Tort law recognizes a privilege of arrest. An arrest in accordance with the privilege entitles the arresting person, if sued by the arrestee, to a full defense against intentional torts committed in the course of the arrest. Primarily we would be talking about battery and false imprisonment as the claims brought by the arrestee.

While we can be sure there is a privilege of arrest that will serve as a defense to intentional torts, it is difficult to say much – from a broad, non-jurisdiction-specific perspective – as to what conditions will be sufficient for the privilege to arise. Much of what can be said about the privilege of arrest is when we can be sure it will *not* work. And, at any rate, the most interesting things about what is and is not permitted with arrests are not matters of common-law torts.

B.2. Narrowing the Grounds for the Tort Defense

The "law of arrest" is extraordinarily complex. Before we can say anything useful about it at all, as a practical necessity we need to pin down exactly what sort of conduct under what sort of circumstances we will be talking about in the context of intentional tort defenses. Along the way, as a side benefit, we'll take a useful peek at law-school curriculum relevant to criminal practice.

B.2.a. "Arrest" and the Arrest Purpose

First off, it is important to note that different people might mean different things by the word "arrest." Here we will confine ourselves to talking about a *lawful* arrest – the kind of thing that could potentially form a privilege and thus a defense to intentional torts. Thus, let us use the word "arrest" to mean not just detaining someone, but taking someone into custody for a very particular purpose. That purpose – the lawful-arrest purpose – is bringing the person before a court or some similar justice-administering person or entity. That's how treatise writer Dan B. Dobbs and the First and Second Restatement of Torts § 127 look at arrest. And this is substantively important, because any purported arrest that is not undertaken for the *arrest purpose* would generally not be privileged *as an arrest*.

So, when we speak of arrest, we mean putting someone in custody to bring them before the juridical apparatus of the state so they may be prosecuted as justice so requires.

Here's something we do not want to talk about: Some commentators speak of "arresting" someone to *prevent* a crime. Indeed, some commentators speak of this as a topic under the heading of the arrest privilege within the intentional tort defenses. But let us put that sort of thing aside. To speak of "arresting" someone for a future crime invites us into some weird science-fiction/fantasy-fiction territory. (Is there some technology or magic that lets us know that a crime is about to occur?) Precognition or information sent from the future is probably *not* what these legal commentators have in mind when they speak of the privilege of arrest to prevent a crime. Yet trying to pin down exactly what they *do* mean will needlessly complicate matters. So let's just sweep any "arrest for preventing crime" subject off the table. But we should keep in mind that if we apprehend that some person is about to punch us or someone else, there's already applicable doctrine under the heading of self-defense and defense of others.

B.2.b. Arrests by Regular People vs. Law Enforcement Officers

The second topic-narrowing distinction we must make concerns who is doing the arresting. When it comes to arrest, there is a huge distinction in the law between regular people and law enforcement officers. Law enforcement officers – you likely will not be surprised to hear this – have a broader privilege of arrest than is accorded to people generally.

How much broader? Let's not worry about it. When it comes to law enforcement officers, what they can and cannot do is largely enabled by state statute and constrained by federal constitutional law. And the constitutional constraints on arrest are all-important in the United States. Thus, these constitutional limitations are generally a central concern of some law school course other than Torts. Some schools pack the subject into the Criminal Law course along with substantive crimes. Some schools have a Criminal Procedure course, or more than one. If there are multiple courses, a course with a name like "Police Procedure" or "Criminal Procedure: Investigation" would likely spend substantial attention on arrest. (That is as opposed to a course named "Criminal Prosecution," "Criminal Courts," or "Criminal Procedure: Adjudication" – a course that may be nicknamed the "Bail to Jail" course.)

B.2.c. With and Without a Warrant

Next, there is a huge distinction in the law between arrests with a warrant and arrests without a warrant. There is – again, this will be no surprise – a much broader privilege of arrest with a duly issued warrant than without one. And, yet again, it is a subject that in the United States is dominated not by what is endorsed by statute or common law, but what is the maximum permissible power for arrest by the police and law enforcement officers within the constraints of the U.S. Constitution. Warrants are likely to be a substantial preoccupation, at many law schools, of some "Crim Pro" course.

B.2.d. Knowledge that Police Need

By the way, learning the broad sweep of constitutional law relevant to arrests and warrants is not just for law students. The education and training of law enforcement officers – such as at police academies, federal law enforcement training centers, and in college programs – is greatly concerned with providing officers with thorough knowledge of the constitutional doctrines. What's more, training focuses on having such knowledge committed firmly to memory – so as to be instantly in one's mind when out in the field.

B.2.e. Police Overreach and Tort Recovery; § 1983

To the extent that the police act beyond the scope of their legal or constitutional authority in confining a person and in using force to do so, then often there will be tort liability. The chief hurdle for a plaintiff succeeding in such a tort lawsuit is often immunity. The immunity covering law enforcement entities and personnel may be based in statute or the doctrine of sovereignty.

There are, however, paths to recovery despite immunities. One of the most important is the civil rights statute at 42 U.S.C. § 1983, a subject sometimes tackled in law-school courses such as Civil Rights Law or Federal Courts.

And it should be pointed out that as much as the common-law privilege of arrest *does not* come up in the real world, 42 U.S.C. § 1983 most certainly *does*.

It gets complicated in the details, but in broad strokes, 42 U.S.C. § 1983 allows a person a tort-type cause of action to sue for damages in federal court whenever a state or local official – often a police officer – acts in violation of the person's rights as guaranteed by the federal constitution or federal statute. It was enacted by Congress after the Civil War because the

Ku Klux Klan's thriving membership among state and local judges and police officers in the South was such that new federal rights guarantees to former enslaved Black persons were not reliably upheld by state and local entities.

Section 1983 has such prominence, relevance, and historical importance that if laws were anthropomorphized rolls of paper walking around talking, and if there were a bunch of them at a very fancy reception, everyone would be sneaking glances at 42 U.S.C. § 1983 in its little conversational knot where it would be basking in fame-spangled familiarity with the more elite tranche of constitutional amendments. (It's the same way that at a soirée in the 1950s all the Supreme Court justices would seek out Judge Learned Hand (of the federal lower courts).) It's like this: You're star-struck with who you've just met, but before you can spit out that story about your high-school history teacher: "Excuse me, it was wonderful meeting you," says the First Amendment, "but I see Section 1983 has just gotten here, and I need to say hi."

B.3. The Uncertain Path for the Badgeless and Warrantless

B.3.a. The Context of Citizen's Arrest

Given the concerns outlined above, what is most interesting, then, in terms of common-law torts doctrine, is the privilege of arrest for the ordinary citizen in the circumstance where there is no warrant. So let us limit our exploration, going forward, to the warrantless-and-unbadged context.

This means that we are now entering squarely into the topic of the fabled "citizen's arrest."

At the outset, it must be acknowledged that the vast bulk of the intellectual curiosity and vigorous discussion lavished on the topic of citizen's arrest is to be found not among legal scholars, but among elementary school children on the playground. More probing questions, more puzzling hypotheticals, and more reasoned analysis has been done on the topic of citizen's arrest on any given weekday in September around the kickball diamonds of the United States than any legal scholar could hope to achieve in three productive lifetimes.

The truth is, in real life, citizen's arrest just doesn't come up that often. When you become an adult, you tend to stop having such a keen interest in citizens-arresting ne'er-do-wells. In fact, no longer constantly thinking about arresting people as a citizen is one of the leading indicators that you are no longer a child. The legions of adults not citizens-arresting each other adds up to a paucity of precedent. And what little there is, of course, is spread among some 50 common-law jurisdictions.

B.3.b. Three Necessary (But Not Sufficient) Elements

For the above-described reasons and whatever others there might be, there is, from a pan-jurisdictional viewpoint, little that can be said in terms of clear rules for what will privilege a citizen's arrest. There are, however, some rules that do seem quite firm as to **necessary but not sufficient conditions** for a citizen's arrest to give rise to an intentional-torts defense.

In other words, these are three things that, if lacking, will doom the defense.

The first requirement for the privilege is that the arrest must be for the arrest purpose. As discussed above, the purpose of an arrest is bringing the person before a court or like body for the administration of justice.

The second requirement is that only reasonable force can be used in effecting the arrest and maintaining custody. (That should not be a difficult rule to remember: It would be very strange indeed if you could use unreasonable force.)

The third requirement is either that the person arrested is guilty or, otherwise, that the arresting person has probable cause for believing a crime has been committed and the plaintiff-arrestee is the one who did it. The term "probable cause" is somewhat rare in torts contexts, but it looms large in the law overall. There's no single definition of the term, but some formulations are: "the existence of such facts and circumstances as would excite belief in a reasonable mind ... that the person {is} guilty of the crime" *Wheeler v. Nesbitt*, 65 U.S. 544, 546 (U.S. 1861), *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983); "such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe" *State v. Barton*, 219 Conn. 529, 548 (Conn. 1991); "evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the accused's guilt" *Coleman v. Burnett*, 477 F.2d 1187, 1202 (D.C. Cir. 1973). One thing it is clear that probable cause is not: It's not proof beyond a reasonable doubt. That standard, required for a criminal conviction at trial, is universally understood to be different and higher than the standard of probable cause.

But, again, if those three requirements are fulfilled, that does not mean the arrest will be privileged. Rather, we can say that if even one of those three requirements is *not* fulfilled, then the arrest will generally *not* be privileged.

B.3.c. Three Odds-Improvers for the Privilege

So what else does it take for an arrest to be privileged? More headway can be made if we phrase things probabilistically.

The more serious the crime, the more likely a defendant is to be protected by the privilege of arrest. Ideally, the citizen arrestor is best served by a **felony** or a crime involving a **breach of the peace**. A "breach of the peace" is something along the lines of "an offense which tends to disturb public quiet and peace and interfere with the tranquility which the citizens of a community have a right to enjoy." *People v. Halliday*, 237 A.D. 302, 303 (N.Y. App. 1932). Or, "a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community." *People v. Most*, 171 N.Y. 423, 429 (N.Y. 1902).

The more recently in time the crime was committed, the more likely the citizen-arrestor is to be protected by the privilege. It is very helpful to effect the arrest by means of "fresh pursuit" or "hot pursuit" immediately after the crime. The best-case scenario for the defense is that the crime just happened and it was in view of the defendant citizen-arrestor.

Finally: **Informing the arrestee makes the privilege defense more likely.** That is to say, the defendant citizen-arrestor is more likely to get the benefit of the defense and avoid liability if the defendant discloses to the arrestee the purpose of their conduct ("I'm arresting you ... ") and the reason (" ... for the murder of your wealthy uncle!") Part of the idea of explaining what you are doing is to minimize the amount of force necessary. That does seem a bit aspirational. (The law seems to think the plaintiff will regard the defendant: "I was going to fight you off as a kidnapper! But if all you are doing is making a citizen's arrest, all my concerns are allayed.")

B.3.d. The Double Boil-Down

For those that still desire firm blackletter rules about the arrest privilege, let us go onward.

As said, citizen's arrest just doesn't come up that often in real life, and the resulting paucity of precedent spread among the many American jurisdictions makes synthesizing rules a dicey proposition.

But none of this is to say there's no majority rule regarding the common-law privilege of arrest. There actually is one: *There isn't any.* No, it's not that there's no majority rule. It's that the majority rule is that there is *no rule* of common law that governs. No less than the American Law Institute pronounced: "In most jurisdictions the power of an officer or a private citizen to arrest is now governed by statute." American Law Institute, Restatement 2d of Torts, § 118, comment "(a)" (1965). (You can argue about whether the American Law Institute's Restatement series is a reliable source for pronouncing the content of the common law. But when the ALI admits the common law has ceased to be in a majority of the country, that's pretty trustworthy.)

There are, however, at least three prominent secondary sources that have offered a blackletter synthesis of the common-law arrest privilege.

One is the Restatement of Torts by the American Law Institute, which offers an incredibly complex set of very particular rules. These were published in 1934 as part of the original *Restatement of the Law, Torts* and then re-upped in 1965 with minor revisions in the form of the *Restatement*

(Second) of Torts. (In both versions, the relevant rules are at §§ 112-139.) Though thoughtful and thorough, there is little to indicate the resulting schema – in the highly particularized formulation in which it was offered – corresponds to the actual state of the law in any particular place, either then or now.

Two others are treatises. The stalwart, time-honored Prosser & Keeton treatise declares a citizen may arrest a person under certain conditions. (For the details, see W. Page Keeton, et al. *Prosser and Keeton on Torts* at § 26, p. 154 (5th ed. 1984).) And the wonderful and scholarly volume by Dan B. Dobbs, *The Law of Torts*, provides a slightly broader formulation that is more favorable to the defendant-arrestor. (See Dobbs, at § 83, p. 195 (2000).)

If we take those three boil-downs, combine them, and boil everything down again, we can obtain a thick, viscid reduction that looks like the following.

A warrantless citizen's arrest will **highly likely be privileged given all of the following**:

> The arrest is (1) for a felony or breach of the peace (2) committed in the citizen's presence, in which case the citizen is making no mistake as to the fact a crime occurred and the arrestee is the perpetrator, (3) the citizen effects the arrest immediately or via fresh pursuit, (4) the arrest is for the purpose of bringing the perpetrator before a court, magistrate, or the like for the administration of justice, (5) only reasonable force is used in effecting the arrest and maintaining custody, and (6) the person arrested is informed that they are being detained by way of arrest and the reason for the arrest – i.e., the crime being attributed to them.

Note that the above is a projection of what will be *sufficient* for the arrest privilege, though in any given jurisdiction not all of it may be necessary. If the facts do not map onto such a best-case scenario for the privilege of arrest, then the arrest still might be privileged.

Notably, a warrantless citizen's arrest **might be privileged if**:

> The arrest is (1) for a felony, ***even where*** (a) more time has passed between the crime and arrest than would qualify as "fresh pursuit" and (b) the arresting person didn't witness the crime, ***so long as*** (2) the crime definitely happened, (3) there's probable cause that the arrestee is the perpetrator, (4) *same as above*, (5) *same as above*, and (6) *same as above*.

And yet even without those facts in the defendant's favor, a warrantless citizen's arrest still might be privileged in various other particular circumstances. Why? Because caselaw and secondary sources potentially support a vast and labyrinthine set of circumstances and situations where the privilege will or won't be recognized.

B.4. Case example: *Westbrook v. Hutchison* (S.C. 1940)

Pulled from the Picture Show

An illustrative and memorable case on the privilege of arrest as a defense to the intentional torts is *Westbrook v. Hutchison*, 195 S.C. 101, 10 S.E.2d 145 (S.C. 1940).

The facts:

It was the summer of 1937 in Rock Hill, a town in the Piedmont of South Carolina. On a Monday, the day after the Fourth of July, 11-year-old Jimmie Westbrook and his little brother Bobbie were at the movies. Serials they might have been watching would have included Adventures of Red Ryder, Deadwood Dick, Flash Gordon Conquers the Universe, Looney Tunes, and The Three Stooges.

Suddenly, the boys were called out of the theater.

It was the Westbrooks' across-the-street neighbor, Mrs. Eunice Hutchison. What was going on? Why'd she have the boys plucked out of the picture show? What would happen next?

The court supplies the information; you supply the *DUH-DUH!* sound effects:

> On the date in question˜, the defendant, Mrs. Kate J. Hutchison and her daughter, the defendant, Miss Kate J.

Hutchison, returned to their home after a visit to Myrtle Beach. {W}hen they got back {family member David Hutchison} told them that he had seen the plaintiff, Jimmie Westbrook, coming out of the Hutchison home that morning, and that some time after that he had discovered that $ 21.25 in money, representing rents which he had collected for Miss Kate J. Hutchison, was missing. Shortly thereafter Miss Kate J. Hutchison went over to see Mrs. Westbrook, the mother of the plaintiff, telling her that some one had cut the side screen door and got into her mother's room and had taken this amount of money out of the dresser, and that her brother David had seen Jimmie coming out of the back door. Mrs. Westbrook told Miss Hutchison that her children were at the picture show, but that as soon as they came in she would make inquiry about the matter.

Instead of waiting to hear from Mrs. Westbrook, however, the defendant, Mrs. Eunice Hutchison, drove her automobile to the picture theater where the plaintiff and his little brother Bobbie were, and had them called out, stating to Jimmie that "Kate" wished to see him. She took the children in her automobile to the Hutchison home, and they came with her through the side entrance into the bedroom of Mrs. Kate J. Hutchison. Jimmie Westbrook, the plaintiff, was then and there subjected to what might be termed an inquisition with reference to the missing money. He testified as follows: "Miss Kate Hutchison said it would be best if we would give her the money, and she would not say anything about it; and we told her we did not get the money. And they kept on asking the same questions, about twenty minutes. Later, my little brother and I started to leave, and she (Mrs. Kate J. Hutchison) told us, 'You step back there; we are not through with you yet,' and so we stepped back."

Pause for analysis:

At this point, dear reader, you might stop to try to apply the law you've learned to these facts. Does Jimmie have a good claim? Does the Hutchison family have a good defense?

The litigation:

Earlier, it was mentioned that tying up bad guys to interrogate them doesn't qualify as a valid citizen's arrest. That's true. And it is a lesson Kate, Kate, and Eunice Hutchison found out the hard way.

Jimmie Westbrook sued the Hutchisons for false imprisonment. Jimmie won in the trial court, and the Hutchisons appealed on multiple grounds. For one, they said Jimmie wasn't really confined. The Supreme Court of South Carolina held that there was sufficient evidence for the jury to conclude that Jimmie's liberty was actually restrained. No doubt the young age of the children was a factor.

As another ground for appeal, the Hutchisons argued the only reason they confined Jimmie was as a privileged arrest. *Wait! I thought you said you didn't confine Jimmie!* Yeah, the S.C. Supreme Court seemed to get a chuckle out of that, too. See 195 S.C. at 110 ("This ground is rather surprising in view of the repeated assertions by the defendants that they did not arrest the plaintiff or restrain him in any manner whatever").

But at any rate, the Supreme Court was clear that an arrest without the arrest purpose isn't an arrest:

> {T}he record shows that nothing was said at that time by any of the defendants with reference to taking the plaintiff to a magistrate or other officer. Besides,˜ Judge Bellinger charged the jury correctly˜: "I charge you further that if a person who arrests a person, with no intention of taking him to a Magistrate or Judge, it makes no difference if the arresting party was or was not acting upon information that {a} felony had been committed, for a private person can only arrest for the purpose of taking the arrested party to a Magistrate or Judge, for the purpose of having him dealt with according to law."

> {I}t would be subversive of the liberty of a citizen, for which the law is said to be very jealous, if a private person might arrest and then at his option take the law in his own hands and conduct an inquisition to determine whether he should release his prisoner or deliver him to the constituted official authorities.

After the interrogation, Jimmie and his brother were driven back to the picture show and – hilariously – "informed by Mrs. Eunice Hutchison that they could return to the show and tell those in charge that she said to let them back in."

Alas, movie theater policy was to not accept "Mrs. Hutchison said so" in lieu of payment. So the kids walked home and, a month later, had the lawsuit filed. And it worked out, money-wise. The South Carolina high court approved both the damages award and what the trial judge said about it:

> "It is true that human liberty is difficult of admeasurement in dollars and cents, but this difficulty is brought about by reason of its great value, and I cannot say that Three Thousand ($ 3,000.00) Dollars is excessive under the facts here, especially so, when I must consider the shame and humiliation that the plaintiff, a child of tender years, underwent while being accused of having broken into a residence and stealing money therefrom and as a result thereof being unlawfully restrained of his liberty by the defendants."

That was a lot of money back then. Considering Jimmie was coming up on driving age by the time appeals were done, he could have bought a new car with funds to spare – even after costs and attorney's fees. In 1940, $1,072 bought a new Pontiac Torpedo 4-door Touring Sedan. Or, if Jimmie wanted a flashier way to haul him and his friends to the picture show and back, a brand-new Buick Special Sport Phaeton 4-door convertible went for $1,355. Why, gee, Jimmie! That car looks swell!

C. Recapture of Chattels

C.1. In General

There is a privilege to recapture your chattels. That is to say, if someone grabs your chattels, and if you grab them back, then sometimes you will be protected from intentional-tort liability that you would have otherwise incurred in the grabbing-back.

This is yet another area where it is difficult to say much – from a broad, non-jurisdiction-specific perspective – on what is necessary for a valid assertion of privilege. As a first approximation: Very roughly, subject to various exceptions and nuances, you have a right to use reasonable force against a chattel-taker to recapture your chattel that was, just now, wrongfully taken from you.

But before we get too far into this particular self-help remedy realm, there are important issues of real-world and practical context that we ought to address.

C.2. The Replevin Alternative

From a real-world perspective, it is vital to understand that the law – including common law and typical state statutory law – provides judicial means for you to get your chattels back.

For one, of course, you can sue for trespass to chattels and obtain a judgment where you get, as part of your remedy, a court order for the return of your property. (And such an order could then be executed by a county sheriff.)

But if you don't want to wait that long, all jurisdictions have means by which you can get your property back quickly, on a provisional basis, pending the final result of a full litigation process. Generally, you can pursue what is commonly called a "writ of replevin," though some jurisdictions might use a different term, such as "writ of possession."

The word "writ" is a holdover from historical legal practice. It's synonymous with "written court order." (It's kind of funny if you imagine "writ" as awkward slang for judges affecting a pretense of being too busy to say "written court order." *In the judge's lounge:* "Yeah, later this afternoon I'm gonna hold a hearing. Might issue a *writ*. Maybe even two. Life on the bench, am I right?")

The word "writ" shows up today in terms for particular written court orders, including "writ of certiorari," "writ of habeas corpus," and "writ of replevin."

Replevin is a legal remedy by which chattels are ordered to be recovered from one person's possession and turned over to a person who has a superior claim to the possessory right. Notably, a writ of replevin can be obtained at the initial stages of a lawsuit, before a full trial on the merits. Thus, the apparent rightful party can get possession quickly through a writ of replevin and hold on to the property, if the other party insists on maintaining the challenge, during the pendency of the litigation.

C.3. Lots of Little Rules and Two Big Reasons They Don't Much Matter

C.3.a. Lots of Little Rules

But let's say you don't want to file a lawsuit to get your chattel back. (Really? Seems like a good learning opportunity for someone studying tort law.) Fine, fine. You want to know: What are the rules for the privilege?

A number of authors have assembled a multitude of very specific rules about exactly when, how, why, and from whom you may recapture your chattels. A principal source is the Restatement of Torts – both the original version from the 1930s and the second in the 1960s. Such rules are somewhat reminiscent of the official football rulebook's way of having crisp rules to cover all manner of bizarre contingencies. (What happens if, on a try for a two-point conversion following a touchdown, the offense fumbles the ball, the defense recovers, the recovering defender laterals the ball backward across the goal line to another defensive player, and that defensive player is then tackled by the offense inside the end zone? (It's a one-point safety. *NFL Rulebook*, R. 11, § 3 & § 6 (2026)).)

While it is worth knowing that all these little recapture-of-chattels rules have been compiled by the Restatement writers, this casebook won't attempt to convey them. Why not? All the little rules have two big problems.

C.3.b. Rules, But Not of Law

As mentioned above, rare real-world occurrence leads to very rare litigation, which leads to exceedingly rare appellate opinions, which leads to little actual common law on the topic from a USA-wide perspective.

Looking back, the Restatement authors have arguably done more collective thinking on the law in this area than all the courts combined – or at least all the courts that have published written opinions. Thus, it is not unreasonable to regard a detailed set of rules – such as those in the Restatement – as something that is entirely separate from real, actual law.

C.3.c. Recapture Doesn't Necessarily Need Privilege

The second big problem is a pragmatic one – for the studying student or practice lawyer. If you immerse yourself in these rules, about the time they are up to your waist you may find yourself thinking first and foremost about whether or not you are "entitled" to recapture a chattel. But that is putting the cart before the horse. Recapture of chattels isn't a cause of action; it's a defense.

You run the risk of making very big mistakes if you don't keep in mind that it simply does not matter what the recapture of chattels privilege is unless and until someone is asserting it as a defense to some particular intentional tort.

Consider this scenario: You own a chattel. You have the right to possess it. But someone swipes it. Now, you want to recapture your chattel! Fine, fine. You ask: *Will the doctrine of recapture of chattels allow me to do it?* Hold on a minute!

Why are you worried about recapture of chattels doctrine? Before asking about recapture of chattels doctrine, ask this question: Where is your chattel – right now, at this particular moment?

If no one's guarding your chattel, if no one's holding it, if your chattel is just sitting around by itself in a public place or on land where you have permission to be, then just take it. That's right: *Just take your chattel*. What's the chattel swiper going to do about it? Sue you for trespass to chattels? That's hilarious: It's *your* chattel. And they aren't going to sue you for battery. No, because we stipulated that no one's guarding it or holding it. So, you won't be touching anyone in getting it back.

Thus, keep in mind that the recapture privilege is only interesting, only plausibly legally relevant to analyzing a given fact situation, when the privilege is needed as a *defense* to something. Without a claim against you, you don't need to worry about a defense.

C.4. Five Common Requirements

We can provide an approximation of recapture of chattels doctrine in the form of five things that might commonly be required for at least one version of the privilege. The following are generally useful for having a framework of the sorts of things a court might require. (And they are presumably useful for things like answering bar exam questions.) Yet, it bears repeating, these five things might well not correspond to the law of any particular jurisdiction.

A person **might have a defense to the use of force in recapturing chattels based on a recapture privilege if:**

> (1) The privilege is asserted against the wrongdoer who took the chattel or some non-innocent party.
>
> (2) The chattel was wrongfully taken from the defendant's possession. And fraud may count as a wrongful taking. (Things excluded by the wrongful taking requirement are, for instance, situations where the defendant willingly lent the chattel to someone who then didn't give it back when they were supposed to. A failure to return is not the same thing as a wrongful taking.)
>
> (3) The recapture attempt is immediately after the chattel has been wrongfully taken. In other words, the recapture action is

> prompt – as in upon the occasion of the wrongful taking or in fresh pursuit thereafter.
>
> (4) The rightful chattel possessor first makes a demand that the chattel be returned, unless a demand would be futile or dangerous.
>
> (5) Only reasonable force is used. (It's only a chattel, so deadly force or force of the type that causes serious bodily injury would not be reasonable.)

If those five conditions are met, then there is a good chance that the recapture-of-chattels privilege will apply as a complete defense.

But if those five conditions are *not* met, that does not necessarily mean there is no privilege.

Notably, some sources speak of a privilege to recapture chattels that allows entry onto the land of an innocent party. And everywhere there are statutes that allow for "repo" actions. If a loan is secured by a chattel, and the chattel possessor defaults on the loan, then there are legal means for taking possession of the chattel. The big example would be a car you bought with a car loan and you fall behind in your payments to the bank. The bank can repo the car. (Loans "secured" by chattels – i.e., loans guaranteed by a chattel that can be taken in the case of non-repayment – are the focus of the Secured Transactions course in law school and Section 9 of the Uniform Commercial Code, which is statutory law enacted by the various state legislatures).

C.5. Case example: *Hodgeden v. Hubbard* (Vt. 1846)

Bill & Gus's Retail Recapture: The Case of the Cast Iron Con

One of the leading cases in the area, perhaps *the* leading case, is *Hodgeden v. Hubbard,* 18 Vt. 504 (Vt. 1846). It's a good example of precedent so old and desiccated that when you take it out to use it, it is likely to crumble in your hands.

We will avoid re-printing the case here because it is a morass of bygone judicial vocabulary, antiquated procedure, and particularly turbid prose.

Instead, we can just summarize the facts and quote the pithiest parts of the court's holding.

The case involves a stove purchased on credit by an allegedly sketchy customer.

The facts take place in Montpelier, the state capital of Vermont, on September 19, 1842.

Today's Montpelier – the Vermont Capital Region Visitors Center would want you to know – is a fantastic fall foliage destination boasting a downtown chockablock with locally owned shops and farm-to-table restaurants.

At the time of the facts of the case, we can surmise that the sugar maple forests on the high hills are commencing to enfold Montpelier in vibrant reds, oranges, and yellows (because it's September 19). And we can surmise that downtown has farm-to-table restaurants, called "restaurants" (because it's 1842). Finally, we can surmise there is at least one locally owned stove retailer (because instead of having a catchy national-chain name like "Stove City," it is identified simply as "the Tyson ware house").

Tyson is apparently nowhere nearby – nor is anyone else with a shred of business acumen – when stove customer Aaron Hodgeden comes around. They might all be out leaf peeping. (The case doesn't say.) The sales floor is manned by two clerks, Gustavus A. Hubbard and William Ayres.

If they could see two centuries into the future, Gus and Bill would be astonished to catch a glimpse of something called "consumer protection law," which worries incessantly about slick merchants using a combination of flattery, flimsy promises, and fine print to screw over unsophisticated consumers. In 1842, Montpelier – quaint then as ever – is gripped by the exact reverse: An urgent need for "merchant protection law" – to keep the charms of customers at a safe distance from the likes of Gus Hubbard and Bill Ayres, who are the greenest rubes ever to get a job in the stove sector.

Something like the following unfolds:

"These are some nice-looking stoves," Aaron Hodgeden says, drawing his fingers admiringly across an expanse of cast iron.

"Well, you're in luck," Gus responds, "because we're having a sales event."

"How much are you looking to spend?" Bill asks cleverly.

"Oh, price is of little concern to me," Hodgeden perhaps says at this point – a seeming tactical negotiating blunder, but, in fact, a sly gambit in the game of 10-dimensional chess he's playing.

According to the court, Hodgeden proceeds to let loose a hot pack of lies about how rich and financially responsible he is: He owns the team of draught animals he's got with him. Even better, he owns a whole farm in Cabot with "considerable" livestock on it. But that's not the half of it, because he's in the cask game, with "a large business manufacturing butter firkins." (A firkin is a cask for butter. It holds about 11 gallons.)

Sure, sure. Hodgeden's the Butter Firkin King of Montpelier! Well, Gus Hubbard and Bill Ayres are helpless prey to Aaron Hodgeden's charm and guile. Before you know it, Gus and Bill close the deal to sell Hodgeden a stove. On credit. No money down. Just a signature on a promissory note. Payment due in six months. Hodgeden loads up the stove and carts it away.

As Gus and Bill are presumably sitting around congratulating themselves on how great they are at this retail stove racket, along comes an intermeddling townsperson. That townsperson, unnamed by the case, propounds a full-on philippic against Hodgeden, which can be fairly reconstructed as follows:

"Hodgeden?!? You sold a stove to Aaron Hodgeden *on credit?!?* That guy is entirely irresponsible and everything he said about his property was wholly false!"

Gus Hubbard and Bill Ayres at this point presumably look at each other as they realize they've been had. Surely eager to avoid an early and ignominious end to their careers in retail stove sales, Gus and Bill set off in hot pursuit.

Only two miles away, they catch up to Hodgeden. They demand the stove back. At this point, having signed the papers and all, Aaron Hodgeden presumably regards the stove as in his rightful possession – and thus regards Bill and Gus as robbers. So, in self-defense, as he sees it, he pulls a knife.

Gus Hubbard and Bill Ayres, no doubt eager to use youthful brawn to make up for a deficiency of brains, overpower Hodgeden and take back the stove.

As Hodgeden and his lawyer come to see it, Gus Hubbard and Bill Ayres have committed a whole slew of intentional torts. So Hodgeden sues. He wins. On appeal, the Supreme Court of Vermont issues a decidedly pro-business, anti-consumer opinion that, in this casebook's view, looks as if it has been custom-ordered by Big Stove:

> In the present case the defendants had clearly a right to retake the property, thus fraudulently obtained from them, if it could be done without unnecessary violence to the person, or without breach of the peace.˜ In the case before us it is stated, that it did not appear "how much force was used, or its character," before the defendants were assaulted by the plaintiff. To obtain possession of the property in question no violence to the person of the plaintiff was necessary, or required, unless from his resistance.˜ The plaintiff had no lawful possession, nor any right to resist the attempt of the defendants to regain the property, of which he had unlawfully and fraudulently obtained the possession. By drawing his knife he became the aggressor, inasmuch as he had no right thus to protect his fraudulent attempt to acquire the stove, and the possession of the same, and it was the right of the defendants to hold him by force, and, if they made use of no unnecessary violence, they were justified; if they were guilty of more, they were liable.˜
>
> The resistance of the plaintiff was unlawful, in regard to the particular species of property, which was then the subject of controversy, under the facts claimed by the defendants, and which must have been found to the satisfaction of the jury, as would seem from their verdict.˜
>
> The judgment of the county court is reversed.

18 Vt. at 507-508. (Like we said, turbid prose. And that was the most comprehensible part of it.)

It is not at all clear that *Hodgeden v. Hubbard* would come out the same way today. For one, courts today might well take a dimmer view of the use of force to recapture chattels. But additionally, in the modern business context, one imagines an intuition of "seller beware" would make a court less sympathetic to retailers who turn over expensive goods to a customer in exchange only for a signature, the value of which is backed solely by oral bluster about the signer's financial wherewithal.

But the case's biggest puzzler may be this: It is reasonable for Bill and Gus to take Hodgeden at his word that the butter firkin biz put him in the wealthy elite, *and it is also reasonable for Gus and Bill to take the unnamed intermeddler at their word that Hodgeden is actually a penniless cheat?* Nothing is halfway with these guys. They're either selling a stove on credit, no-money-down to an unknown stranger, or they're hitting the open road cruising for a bruising.

They say bad facts make for bad law. If that is so, Gus and Bill are a walking, talking common-law catastrophe waiting to happen.

Alas, however, in that, Gus and Bill aren't the first. And they are far from the last.

D. Private Necessity and Public Necessity

D.1. Explanation: Private Necessity and Public Necessity

The defense of necessity allows a defendant, in emergency circumstances, to escape tort liability for committing an intentional tort against an innocent person. The defense of necessity is similar to self-defense or defense of others, except that it does not require the plaintiff to have been an aggressor.

As a practical matter, necessity is a defense that applies only to torts against property – that is, trespass to land, trespass to chattels, and conversion. Theoretically, necessity could apply to the personal torts. A battery effected by shoving an uncooperative person out of the way in order to trip a fire alarm, one imagines, would be justified on account of a necessity defense. But such cases, to the extent they come up at all, are no doubt rare.

There are two brands of necessity – public necessity and private necessity.

Public necessity is when the tort is committed in order to protect the public as a whole from some danger. The defense of public necessity is a total defense, voiding all liability.

Private necessity is when the tort is committed to help one or a few people. Private necessity works the same as public necessity, except that private necessity is only a partial defense: **The defendant who successfully interposes a defense of private necessity is still liable for compensatory damage for any actual harm suffered.** So if a person commits a trespass to chattels by absconding with someone's cell phone to call for emergency help, then the phone snatcher is liable to the phone's owner for damage to the phone. If the phone owner has not suffered any actual loss, however, there is no claim.

So, what good is the defense of private necessity if the trespasser is still liable for the cost of any damage done? For one thing, it means that the trespasser cannot be held liable for punitive damages. But it also means that the property owner does not have the right to self-help measures that would defeat the trespasser. Suppose a landowner uses force against a trespasser who enters by reason of private necessity. Let's say the landowner shoves the trespasser away, off of the property. The trespasser will have a good battery claim against the landowner, and the landowner will not be able to sustain a defense based on defense of property.

D.2. Case: *Ploof v. Putnam* (Vt. 1908)

D.2.a. Advance Notes

The following is the classic case on private necessity. The case is written in that old-style thick judicial prose that can be a hindrance to quick comprehension. So here's a preview of the facts written for a more modern sensibility:

A family is on a sailboat on a large lake when there is a sudden huge storm. To save the boat and themselves, they put in and tie up at a nearby dock on a private island.

You know that property owners hate it when cars park on or even in front of their property. Well, owners of private islands are, we must assume, more indignant by a factor of *rich*. Private island owners presumably are of the mind: *Why did I go through the trouble of getting my own private island if I wanted to be bothered by the riffraff?*

It turns out private island owners of TV, movies, and cartoons behave similarly to private island owners in real life (at least in turn-of-the-century Vermont). Here, a servant on the island promptly unties the ropes to let the boat go back into the lake and the storm.

As a result, the boat is destroyed, and the family is injured.

Sailor Sylvester Ploof sued private-island owner Henry Putnam for trespass to his boat. Putnam claimed Ploof had trespassed on his private island by tying up at his dock. Ploof countered with necessity. The Supreme Court of Vermont sided with Ploof.

D.2.b. Opinion

Ploof v. Putnam

Supreme Court of Vermont
October 30, 1908

81 Vt. 471; 71 A. 188. SYLVESTER A. PLOOF v. HENRY W. PUTNAM. Judges: ROWELL, C. J., TYLER, MUNSON, and WATSON, JJ.

Justice MUNSON:

˜It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that to save these from destruction or injury the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant by his servant unmoored the sloop, whereupon it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and his wife and children cast into the lake and upon the shore, receiving injuries.

This claim is set forth˜ in trespass, charging that the defendant by his servant with force and arms wilfully and designedly unmoored the sloop˜.

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine.

In *Miller* v. *Fandrye*, Poph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that as soon as the sheep were off his land he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground. But the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that as the defendant had done his best to recall the dog trespass would not lie.˜

A traveller on a highway, who finds it obstructed from a sudden and temporary cause, may pass upon the adjoining land without becoming a trespasser, because of the necessity. *Henn's Case*, W. Jones 296; *Campbell* v. *Race*, 61 Mass. 408, 54 Am. Dec. 728; *Hyde*

v. *Jamaica*, 27 Vt. 443 (459); *Morey* v. *Fitzgerald*, 56 Vt. 487, 48 Am. Rep. 811.

An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII, 27; Vin. Ab. Trespass, H. a. 4, pl. 24, K. a. pl. 3. In *Proctor* v. *Adams*, 113 Mass. 376, 18 Am. Rep. 500, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore and was in danger of being carried off by the sea; and it was held no trespass. See also *Dunwich* v. *Sterry*, 1 Barn. & Adol. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows.¶

In *Mouse's Case*, 12 Coke 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took forty-seven passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge˜ .

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof and need not be alleged. {T}he question must be left for adjudication upon proceedings had with reference to the evidence˜.˜

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D.2.c. Historical and social context of *Ploof v. Putnam*

It's easy to see *Ploof v. Putnam* as a case of wealthy vs. wealthy. You may be thinking: There's sailboat rich, and then there's *private island* rich.

Enter Vermont legal scholar Joan Vogel, who was trained in anthropology before she went to law school. Vogel was dismayed during her one-L year at the uninformed nature of the classroom discussions about the cases. She wrote: "Despite the reputation law training had for rigorous analysis, many of my professors made statements about human behavior with little or no empirical foundation, failed to examine many of their assumptions that underlay doctrinal statements and provided little or no social context for many of the cases we read or studied in class." See Joan Vogel, *Cases in Context: Lake Champlain Wars, Gentrification and* Ploof v. Putnam, 45 St. Louis U. L.J. 791 (2001).

Vogel ended up becoming a law professor in Vermont teaching Torts. Thus, it was probably inevitable that she was drawn to unearthing the story behind Lake Champlain's legendary lawsuit. Vogel poured through dusty records and talked with local historians stewarding community annals.

It turns out that if you assumed the Ploofs were rich folks on a leisure outing, your assumptions were wrong. Very wrong.

"The Ploofs were a poor, landless family who lived and worked on their boat," Vogel writes. "They earned their living transporting firewood and other goods on the lake and were well known and disliked by the lakeshore inhabitants." In fact, the Ploofs were frequently accused of stealing from lakeshore vacation homes, according to Vogel, and were sometimes chased off by homeowners brandishing firearms.

"Henry Putnam's caretaker untied the Ploofs' boat because he knew them and he was aware of their reputation as thieves," Vogel relates, "not simply because the Ploofs were using the dock without the owner's permission."

And if you assumed Putnam was rich? Well, it turns out you were spot-on right about that. Putnam was, by all accounts, *super* rich. Henry W. Putnam, known as "Will," was a millionaire back in a day when being a thousandaire wasn't nothing. Will Putnam wasn't even at his private island vacation home at the time of the fateful storm. He was in New York City, where he apparently lived at the ritzy Savoy Plaza Hotel overlooking Fifth Avenue.

According to Vogel's historical digging, Ploof sued for $3000 and was awarded $650 – though Putnam made it difficult for Ploof to collect. Ploof went on to obtain a replacement boat, apparently continuing on with work and life as he had before the storm and the unkind cast-off line.

Vogel writes:

> "The dispute that gave rise to *Ploof v. Putnam* can be only fully understood by first examining the growth of tourism and vacation homes on Lake Champlain in the late nineteenth and early twentieth centuries and then, the prevailing bigotry against French Canadians in Vermont and elsewhere in the northeast where they immigrated in the nineteenth and twentieth centuries. Gentrification of lakeshore properties made poorer Vermonters unwelcome in places where they may have worked for centuries. The case is a story about gentrification of local communities that often resulted in driving out or marginalizing local people whose lifestyles were often at odds with their new and wealthier neighbors."

Vogel, 45 ST. LOUIS U. L.J. at 799.

D.3. Case: *Vincent v. Lake Erie* (Minn. 1910)

D.3.a. Advance Notes

This next case is another necessity classic, like *Ploof v. Putnam*, which was filed two years earlier. But *Vincent v. Lake Erie Transportation Co.* is about the counterfactual: What does the court do to right the situation if the vessel stays tied to the dock?

The facts of *Vincent v. Lake Erie* are similar to *Ploof*, but with a much bigger vessel (the steamship *Reynolds*) and a much bigger lake (the biggest, in fact: Lake Superior).

Instead of the boat being set adrift as it was in Ploof, in this case the ship is tied to the wharf throughout the storm. Big ship that it is, and given the motion imparted to it by way of the wind and waves, the *S.S. Reynolds* damages the wharf. The resolution, as determined by the Supreme Court of Minnesota, is that the steamship's owners must pay for the damage done to the dock.

D.3.b. Opinion of the Court

Vincent v. Lake Erie Transportation Co.

Supreme Court of Minnesota
January 14, 1910

109 Minn. 456. VINCENT et al. v. LAKE ERIE TRANSP. CO.

Justice THOMAS D. O'BRIEN:

The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiff's dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about 10 o'clock p. m., when the unloading was completed, had so grown in violence that the wind was then moving at 50 miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the 29th, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of $500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift a way from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating properly rights were suspended by forces beyond human control, and if, without the direct intervention of some act by the one sought to be held liable, the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if which attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In *Depue v. Flatau,* 100 Minn. 299, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In *Ploof v. Putnam,* 71 Atl. 188, the Supreme Court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

This is not a case where life or property was menaced by any object or thing belonging to the plaintiff, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

D.3.c. Dissent of Lewis

Justice CHARLES L. LEWIS, dissenting:

I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondent's dock pursuant to contract, and that the vessel was lawfully in position at the time the additional cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor at the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

JAGGARD, J., concurs herein.

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D.4. Questions to Ponder about Economic Analysis vis-à-vis *Vincent* and *Ploof*

A. The cases of *Vincent* and *Ploof* are favorites of law-and-economics scholars. They ask whether it makes a difference what the rule is. Suppose that a dock owner and boat owner have a chance to negotiate before the boat is tied up. A storm is raging, and the boat has no place else to go. The boat owner and dock owner begin negotiating over permission to moor – shouting to each other over the howling wind and spray. What will be the outcome of their negotiations? Will the outcome change depending on the legal rule regarding private necessity? Is one version of the rule more economically efficient than another?

B. Economists use the label "transaction costs" to refer to the time, effort, expense, and overall inconvenience that must be endured to conclude a transaction. How does the concept of transaction costs apply to the analysis of whether one rule is more economically efficient than another?

C. Economic efficiency, of course, isn't the only way to think about whether a legal rule is a good one. One might also think along the lines of intuitive notions of justice and fairness. Do those notions lead to a different conclusion than the economic analysis in the cases of *Vincent* and *Ploof*?

D.5. Case: *Surocco v. Geary* (Cal. 1853)

D.5.a. Advance Notes

The following is the classic case on public necessity. The facts occurred during San Francisco's Great Fire in 1849, at the height of the Gold Rush. In order to save property still at a distance from the advancing flame front, Geary blew up Surocco's home and business.

With private necessity, being that it is only a partial defense, the tortfeasor still owes compensatory damages to reimburse the plaintiff for what they lost. But with public necessity, the rule is that the defendant is entitled to be fully relieved of all liability. Thus, since his place was blown up to save the neighborhood, all Surocco got was the thanks of a grateful city. (If they even bothered to say thanks, that is.)

Surocco v. Geary is a good case to read critically – even skeptically. Did the case have to come out the way that it did? Did the court sufficiently justify its decision? What can be argued to be weaknesses in the court's analysis?

D.5.b. Opinion

Surocco v. Geary

Supreme Court of California
January 1853

3 Cal. 69. PASCAL SUROCCO et al. v. JOHN W. GEARY. Supreme Court of California. MURRAY, Chief Justice, delivered the opinion of the Court. HEYDENFELDT, Justice, concurred.

FACTS:

This was an action brought in the Superior Court of the City of San Francisco, by the plaintiffs, against the defendant, for the recovery of damages for the blowing up with gunpowder, and destroying their house and store, with the goods therein, on the 24th December, 1849. Damages laid at $65,000.

The defendant answered, that the said building was, at the time of the entry upon the same and of the destruction thereof, certain to be consumed by a public conflagration then raging in the city of San

Francisco, and to communicate the said conflagration to other adjacent buildings in the said city. That defendant was at the time First Alcalde of the said city, and did, by the advice and command of divers members of the then Ayuntamiento, enter into and destroy the said building, as for the cause stated he lawfully might do, the same being then and there a public nuisance, and denies the damage, and asks to be dismissed, with costs, &c.

There was a good deal of testimony given as to the value of the buildings and goods contained in it, and as to the necessity for its destruction at the time. The proof was, however, that the fire in a very few minutes reached the site of the building, and extended beyond it, and that its destruction would have been certain if it had not been blown up.

On the 25th October, 1850, the court in banc, sitting as a jury, on a reargument of the case, found for the plaintiffs in the sum of $7500, and ordered judgment accordingly.

Chief Justice HUGH MURRAY:

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiffs' house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had the authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs', and that at the time said building was destroyed, they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more, if not all of their goods.

The cause was tried by the court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

This point has been so well settled in the courts of New York and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, Necessitas inducit privilegium quod jura privata."

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. (See *American Print Works v. Lawrence*, 1 Zab. 258, 264, and the cases there cited.)

This principle has been familiarly recognized by the books from the time of the saltpetre case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes belongs to the State, by virtue of her right of eminent domain, and is said to be justified on the ground of state necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons, but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact, that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved; they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.

The court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.

Judgment reversed.

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D.5.c. Historical Note on *Surocco v. Geary*

The Great Fire started around 6 a.m. on Christmas Eve 1849 in Dennison's Exchange – a gambling parlor located on Kearny Street across from Portsmouth Square. (The site is about a block west of the present-day Transamerica Pyramid skyscraper.) The fire rapidly grew into an inferno, feeding on homes made of wooden frames covered with painted- or papered-over cotton cloth. John W. Geary, the head municipal official – who, in the Spanish tradition, was called the "alcalde" – created a firebreak by demolishing buildings in the way of the fire.

The city responded to the disaster the next month by organizing a volunteer fire department, the forerunner of today's S.F.F.D. But building standards remained the same. And because of the economic pressure of the Gold Rush, new buildings were hastily erected on burned-out lots within days. These poorly constructed new buildings were no less flammable than those they replaced. Another fire soon followed, marking the first of multiple burn-build-burn cycles that continued through 1851.

Alcalde Geary went on to become San Francisco's first mayor, territorial governor of Kansas, a colonel in the Union Army during the Civil War, and eventually a two-term governor of Pennsylvania. Today, Geary Boulevard, a major east-west thoroughfare in San Francisco, is named after him.

The Supreme Court of California was established by the California Constitution in the fall of 1849. The court convened for the first time on March 4, 1850 in San Francisco at a former hotel at the corner of Kearny Street and Pacific Avenue. The California Supreme Court's first building was just two and a half blocks north on Kearny from where the Great Fire started at Kearny and Portsmouth Square. Although the state's legislature and executive are based in the Capitol in Sacramento, the California Supreme Court continues to reside in San Francisco. Today it's at Civic Center, 1.3 miles southwest of its original home.

D.5.d. Questions to Ponder on *Surocco* and Common Law Jurisprudence

A. In what ways might it be said that the court in *Surocco v. Geary* did not make appropriate and convincing use of precedent to reach its holding and decision?

B. Assuming the California Supreme Court could have done a better job citing specific precedent, what practical, real-world reasons do you think might help explain the court's shortcomings in that regard?

D.5.e. Questions to Ponder on *Surocco* and Economic Analysis

A. How would you analyze the case of *Surocco v. Geary* in economic terms? Is it economically efficient for Surocco to shoulder the entire loss? Why not have the public treasury reimburse Surocco?

B. Suppose in this situation Surocco tried to enter into a negotiation with Geary over the subject of blowing up Surocco's building. What would be the outcome? Would the outcome change if the legal rule were different? What legal rule would be more economically efficient, or does the legal rule make any difference?

C. Where do your intuitive notions of justice and fairness lie in a case like this? Do those notions lead to a different conclusion than the economic analysis? Does your intuitive sense of justice lead you to perceive that a different rule should be applicable in cases like *Surocco* as opposed to *Vincent* and *Ploof*?

E. Yet More

You should know that all of the defenses covered in this and the other chapters are nowhere close to forming a comprehensive list. Others lurk. There is, for instance, a traditionally recognized privilege for discipline (such as spanking your kids, or maybe even spanking someone else's kids). There is a privilege to abate nuisances (perhaps, for instance, pulling out the wires to your neighbor's car alarm that has been going off every five minutes since your neighbor left town on an extended vacation).

Suffice it to say that if you are convinced of there being a scenario in which, as you see it, it is highly justified to touch someone, confine them, go on their property, or take their stuff, then it is certainly plausible that some court somewhere has recognized a privilege that fits exactly what you are thinking of.

On the other hand, maybe not. You may be very convinced of having just and noble cause in taking liberties with others or their property, and yet be surprised to learn the tort defenses in your jurisdiction won't back you up.

Before you thwack someone else's child with a ruler or disassemble someone else's vehicle, or, for that matter, citizen's arrest someone or pin them down to take back something that's yours: Stop. Take a breath. Ask yourself how important it really is to you. If you still want to go forward, then you are well advised to first spend some hours of intense legal research focused on the law of your particular jurisdiction. But remember that precedent needs application, application depends on argument, and your argument might not, when all is said and done, prevail.

For a general principle or bottom-line takeaway, here's one: The law poses its greatest peril for those afflicted with the most self-righteousness.

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