

# Torts Readings

## Fall 2026, Eric E. Johnson

### Bundle #1

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# Packet #1

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

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

**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. Loyacombo*, 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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## Packet #2

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

### **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 insultfulness.” 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 intentional 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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Case: *Bohrmann v. Maine Yankee Atomic Power*  
(D. Me. 1996)

**Note about editing marks:** The superscript angle brackets <sup> 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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## Packet #3

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

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

## **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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Regulation: 14 C.F.R. § 121.533

**§ 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 redispaching 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).