Chapter Two
The Trespassery Intentional Torts

A. INTRODUCTION

The intentional torts involve conduct by the defendant that was done with the intent to interfere with the person, property or other legally protected interest of another. Unlike the negligence action, which is a single cause of action that is broadly applicable to a wide range of accidental injuries, in the common law countries there is no general intentional tort action. Instead, there are a number of discrete intentional tort actions, each with a different name—for example, “battery” or “trespass to land”—that are distinguished from one another by the specific type of legal injury that was intentionally caused by the defendant.

One occasionally sees references to a generic “prima facie intentional tort” that may be recognized, regardless of the specific type of injury, when the defendant acted maliciously for the sole purpose of injuring the plaintiff. See, e.g., Restatement Second § 870. The idea of this generic prima facie intentional tort seems to have underlaid the English courts’ initial recognition, in 1897, of the tort of intentional or reckless infliction of severe emotional distress, which is discussed in chapter 9. While some jurisdictions explicitly recognize the existence of this prima facie intentional tort, others instead impose liability in appropriate cases by relaxing the requirements of the most analogous discrete intentional tort. For example, as is discussed in chapter 8, courts have held defendants liable in a private nuisance action for erecting “spite” fences—fences maliciously erected for the sole purpose of adversely affecting a neighbor’s view, rather than for any independent legitimate purpose of the defendant—even though a private nuisance action ordinarily requires an invasion of the plaintiff’s property by light, odor, fumes or some other intangible entity.

In this chapter, we discuss the oldest and most basic intentional torts, those involving a trespass on (physical interference with) the person or property of the plaintiff. We also examine the concepts of intent and consent. In the analysis of legal claims, it is essential to understand and apply the legal meanings of these and other concepts, which sometimes vary significantly from the ordinary language meanings. In the final section of this chapter, we discuss the defenses that may be used by a defendant to avoid liability despite having trespassed on the person or property of the plaintiff.

B. THE PRIMA FACIE CASE

1. THE BASIC ELEMENTS

We begin our study of the intentional torts with a well-worn case, Vosburg v. Putney. The opinion in Vosburg I contains the more complete description of the facts, to which the court refers in Vosburg II. A much fuller description of the facts and the history of the case appears in the History Note following Vosburg II. While reading the opinions and history, consider the following questions: Who is the plaintiff? Who is the defendant? What specific intentional tort is at issue? What must be established to make out a prima facie case for that tort? What is the required legal injury? What makes the defendant’s intentional conduct civilly (as opposed to criminally) “unlawful” or “tortious”? What other issues arose at trial and on appeal?
ORTON, J. The facts of this case are briefly as follows: The plaintiff was about 14 years of age, and the defendant about 11 [actually almost 12] years of age. On the 20th day of February, 1889, they were sitting opposite to each other across an aisle in the high school of the village of Waukesha. The defendant reached across the aisle with his foot, and hit with his toe the shin of the right leg of the plaintiff. The touch was slight. The plaintiff did not feel it, either on account of its being so slight or of loss of sensation produced by the shock. In a few moments he felt a violent pain in that place, which caused him to cry out loudly.

The next day he was sick, and had to be helped to school. On the fourth day he was vomiting, and Dr. Bacon was sent for, but could not come, and he sent medicine to stop the vomiting, and came to see him the next day, on the 25th. There was a slight discoloration of the skin entirely over the inner surface of the tibia an inch below the bend of the knee. The doctor applied fomentations, and gave him anodynes to quiet the pain. This treatment was continued, and the swelling so increased by the 5th day of March that counsel [Dr. Philler] was called, and on the 8th of March an operation was performed on the limb by making an incision, and a moderate amount of pus escaped. A drainage tube was inserted, and an iodoform dressing put on. On the sixth day after this, another incision was made to the bone, and it was found that destruction was going on in the bone, and so it has continued exfoliating pieces of bone. He will never recover the use of his limb. There were black and blue spots on the shin bone, indicating that there had been a blow.

On the 1st of January before, the plaintiff received an injury just above the knee of the same leg by coasting, which appeared to be healing up and drying down at the time of the last injury. The theory of at least one of the medical witnesses was that the limb was in a diseased condition when this touch or kick was given, caused by microbes entering in through the wound above the knee, and which were revivified by the touch, and that the touch was the exciting or remote cause of the destruction of the bone, or of the plaintiff’s injury. It does not appear that there was any visible mark made or left by this touch or kick of the defendant’s foot, or any appearance of injury until the black and blue spots were discovered by the physician several days afterwards, and then there were more spots than one. There was no proof of any other hurt, and the medical testimony seems to have been agreed that this touch or kick was the exciting cause of the injury to the plaintiff.

The jury rendered a verdict for the plaintiff of $2,800. The learned circuit judge said to the jury: 'It is a peculiar case, an unfortunate case, a case, I think I am at liberty to say that ought not to have come into court. The parents of these children ought, in some way, if possible, to have adjusted it between themselves.' We have much of the same feeling about the case. It is a very strange and extraordinary case. The cause would seem to be very slight for so great and serious a consequence. And yet the plaintiff’s limb might have been in just that condition when such a slight blow would excite and cause such a result, according to the medical testimony. That there is great uncertainty about the cause cannot be denied. But perfect certainty is not required. It is sufficient that it is the opinion of the medical witnesses that such a cause even might produce such a result under the peculiar circumstances, and that
the jury had the right to find, from the evidence and reasonable inferences therefrom, that it did. We will refrain from further comment on the case, as another trial will have to be had in it.

There were two errors committed on the trial, and in the admission of testimony, too important and material to be overlooked.

I. [The court held that it was a material error to allow the plaintiff, over objection by the defendant, to ask Dr. Philler for his judgment of “the exciting cause of the condition of this leg as you found it.”] The witness had no personal or professional knowledge of the case until the 6th day of March, about two weeks after the injury. His answer shows his incompetency to answer the question. He answered it “under the history he learned at the time” [about “a certain injury received while at school, from the foot of another classmate”]. What facts about the case did he learn, and from whom did he learn them? Were they true or false? He does not even give his opinion upon the testimony of other witnesses in court, and no hypothetical statement was submitted to him. . . .

II. The father of the plaintiff, Seth B. Vosberg [sic], as a witness on behalf of the plaintiff, was asked in relation to his circumstances and concerning his employment and the number of his children, and answered that his business was that of teamster for the Barker Lumber Company, and that he had three children. This was objected to by the learned counsel of the defendant. The learned counsel of the plaintiff stated that he wanted to show the situation of the family, . . . and, if the plaintiff has a rich father who could take care of him and provide for and educate him, he did not think the jury would be warranted to give as large a verdict. The court overruled the objection. This occurred in the presence of the jury, and the learned counsel of the [plaintiff] commented on it to the jury by permission of the court against the further objection of the defendant, so that the jury must have considered themselves instructed to give the plaintiff greater damages in consequence of the poverty of his father. He was a hired man, and therefore could not have been rich. This was not a case for exemplary or punitive damages, and the plaintiff was entitled only to strict compensatory damages in case he recovered in the action. In such a case it would not have been proper even to prove the defendant rich or poor. . . . The plaintiff, if he recovered, was entitled to full compensation for his injury, no less and no more, whatever his pecuniary circumstances or those of his father. . . . On account of these two errors, the judgment will have to be reversed. The judgment is reversed, and the cause remanded for a new trial.

Vosburg v. Putney [Vosburg II]
Supreme Court of Wisconsin
80 Wis. 523, 50 N.W. 403 (1891)

LYON, J. The action was brought to recover damages for an assault and battery, alleged to have been committed by the defendant upon the plaintiff on February 20, 1889. The answer is a general denial. At the date of the alleged assault the plaintiff was a little more than 14 years of age, and the defendant a little less than 12 years of age. The injury complained of was caused by a kick inflicted by defendant upon the leg of the plaintiff, a little below the knee. [Both Andrew and the teacher, Miss More, testified in both trials that George had stood and kicked across the aisle, hitting Andrew’s leg.] The transaction
occurred in a school-room in Waukesha, during school hours, both parties being pupils in the school. A former trial of the cause resulted in a verdict and judgment for the plaintiff for $2,800. The defendant appealed from such judgment to this court, and the same was reversed for error, and a new trial awarded. The case has been again tried in the circuit court, and the trial resulted in a verdict for plaintiff for $2,500. The facts of the case, as they appeared on both trials, are sufficiently stated in the opinion by Mr. Justice ORTON on the former appeal, and require no repetition. On the last trial the jury found a special verdict, as follows: "(1) Had the plaintiff during the month of January, 1889, received an injury just above the knee, which became inflamed, and produced pus? Answer. Yes. (2) Had such injury on the 20th day of February, 1889, nearly healed at the point of injury? A. Yes. (3) Was the plaintiff, before said 20th of February, lame, as the result of such injury? A. No. (4) Had the tibia in the plaintiff’s right leg become inflamed or diseased to some extent before he received the blow or kick from the defendant? A. No. (5) What was the exciting cause of the injury to the plaintiff’s leg? A. Kick. (6) Did the defendant, in touching the plaintiff with his foot, intend to do him any harm? A. No. (7) At what sum do you assess the damages of the plaintiff? A. Twenty-five hundred dollars.” The defendant moved for judgment in his favor on the verdict, and also for a new trial. The plaintiff moved for judgment on the verdict in his favor. The motions of defendant were overruled, and that of the plaintiff granted. Thereupon judgment for plaintiff, for $2,500 damages and costs of suit, was duly entered. The defendant appeals from the judgment.

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

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

II. [The court once again found a material error, “necessarily fatal to the judgment,” in allowing Dr. Philler, over the defendant’s objection, to give his opinion of the “exciting cause” of the injury, when the foundation that was laid for the question only referred to the
B.1 The Prima Facie Case: Basic Elements

[108x669]doctor’s hearing the plaintiff’s and the teacher’s testimony about the kick in the school, and
did not also explicitly refer to the plaintiff’s testimony about the prior wound received in
January, while sledding.]

III. Certain questions were proposed on behalf of defendant to be submitted to the
jury, founded upon the theory that only such damages could be recovered as the defendant
might reasonably be supposed to have contemplated as likely to result from his kicking the
plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The
rule of damages in actions for torts was held in Brown v. Railway Co., 54 Wis. 342, 11 N.W.
Rep. 356, 911, to be that the wrongdoer is liable for all injuries resulting directly from the
wrongful act, whether they could or could not have been foreseen by him. The chief justice
and the writer of this opinion dissented from the judgment in that case, chiefly because we
were of the opinion that the complaint stated a cause of action
ex contractu,
and not
ex
delicto,
and hence that a different rule of damages—the rule here contended for—was
applicable. We did not question that the rule in actions for tort was correctly stated. That case
rules this on the question of damages. . . .

The judgment of the circuit court must be reversed, and the cause will be remanded
for a new trial.

HISTORY NOTE

The Wisconsin Law Review published a special issue to commemorate the centennial
of the Vosburg v. Putney dispute. The issue contains a thorough history of the dispute,
researched and written by Professor Zigurds L. Zile, entitled Vosburg v. Putney: A
Centennial Story, 1992 Wis. L. Rev. 877 (1992). Zile reports that Andrew Vosburg was of
slight build, not particularly robust, and was frequently bedridden with a succession of
childhood illnesses and mishaps. Id. at 879. He seems to have been the object of
mistreatment by other children, including physical attacks by other children, including an
attack while sledding on January 1st that caused the wound (abrasion) on his leg above the
knee. He also had previously had a run-in with George, when George attempted to prevent
Andrew from reclaiming his textbook from a pile after a closed-book exam. Id. at 880-85.
After the kicking incident on February 20th, while Andrew was bedridden at home with a
high fever and a greatly swollen, inflamed and painful right leg and receiving medical
treatment, George allegedly boasted to others at the school that he “would give . . . [Andrew]
more when he came back.” Id. at 890. George “may have been small for his age but
nonetheless a scrappy youngster. . . . [His stepmother’s brother] was alleged to have said that
he ‘was real sorry for . . . [his] sister having the George Putney in charge,’ that George ‘was
a sucker of a boy and . . . had a bad temper.’” Id. at 882.

Seth Vosburg, Andrew’s father, was a nonunion teamster for a local lumber
company. Henry Putney, George’s father, was a prominent, well-to-do merchant. Id. at 880-
82, 892, 903, 976-77. After being contacted by the Vosburgs’ attorneys, the Putneys offered
to pay Dr. Bacon’s bills (which eventually came to $125) plus $125 towards medical and
other needs in return for releasing George from any liability. The Vosburgs refused to settle
for less than $700, “which to them was a paltry sum” in light of their incurred and projected
medical and legal expenses, Andrew’s potential loss of his leg and permanent disability, and the suffering they had incurred and would continue to incur. Id. at 893-94.

On October 19th, Seth Vosburg swore out a criminal assault and battery complaint against George Putney, alleging that George “did with force and arms assault, beat, bruise and otherwise ill-treat Andrew Vosburg against the peace and dignity of the state of Wisconsin.” The statutory penalty was fixed at imprisonment for ten days to six months, or a fine of one to one hundred dollars, or both. George pled not guilty. This criminal case was tried October 22nd with the Vosburgs’ attorneys acting as prosecutors. The Vosburgs’ attorneys introduced evidence to establish the deliberate and unprovoked nature of the kick, and that it had been sufficiently hard to cause a serious injury to Andrew’s leg. The justice of the peace found George guilty and ordered him to pay a fine of $10 and costs of $18.19, or in default of such payment to serve 30 days in jail. This criminal conviction was immediately appealed to the circuit court (the trial court of general jurisdiction), for retrial de novo. Id. at 895-901, 904.

On October 24, 1889, Seth Vosburg filed a civil assault and battery action on behalf of Andrew against George Putney, seeking $5000 in damages plus costs. Two days later, Seth filed a civil action on his own behalf against George, seeking $2500 for his and his wife’s trouble and costs in caring for his son and for the loss of his son’s services. The Putneys’ attorney filed a general denial in each civil action. Both civil actions and the criminal action were on the docket of Circuit Judge Andrew Scott Sloan for the December 1889 term. Judge Sloan, upon the motion of the Putneys’ attorney, dismissed the criminal action against George “on account of his tender years,” and, upon the motion of the Vosburgs’ attorney, continued (postponed consideration of) Seth’s civil action. Id. at 904-909, 954-55.

The civil action on behalf of Andrew came to trial in January 1890. The Vosburgs’ attorneys did not attempt to prove that George acted maliciously or with an intent to cause harm, being content to establish the deliberate nature of George’s kick, the physical injury Andrew had suffered, and the causal connection between the kick and the physical injury. The defense did not contest the first two of these three factual elements, but strongly contested the third. There was no specific evidence on Andrew’s damages. Andrew himself had no compensable medical expenses, since as a minor he neither paid for nor was responsible for his medical bills. He had no record of past earnings that could serve as a basis for calculating future lost earning capacity. Thus the evidence on his damages primarily related to his past and future pain and suffering and disability (including the potential loss of his right leg). Id. at 909-15, 917; see also id. at 946-47. The judge instructed the jury on the legal issues essentially along the lines of the plaintiff’s theory of the case, rejecting instructions proffered by the defendant. The jury, after being out all night, delivered a general verdict for the plaintiff in the amount of $2800. The press noted a heretofore unpublicized aspect of the case: George, the defendant, obviously could not pay the judgment and his father, Henry, not being the defendant, could not be compelled to pay it. The judgment thus “can only remain as a cloud over the lad.” Id. at 916-21, quoting The Result of Boys’ Play, Milwaukee Sentinel, Jan. 18, 1890, at 8.
In November 1890 the Supreme Court of Wisconsin, in *Vosburg I*, set aside the jury’s verdict and remanded for a new trial. Id. at 926. The case was retried in December 1890, again before Judge Sloan, with the same attorneys except for the addition of another attorney to the defense team. This time the defendant requested a special verdict. Judge Sloan composed the questions from those proposed by each side, and took it upon himself to write in the answer “No” to the sixth question, “Did the defendant, in touching the plaintiff with his foot, intend to do him any harm?” Id. at 946; see id. at 942 (Judge Sloan, in response to a defense motion, struck from the record Andrew’s testimony about “the so-called quarrel about the books” and told the jury there was “no question of that kind in the case”). Id. at 942. He also emphasized to the jury that the two boys, and not their fathers, were the only parties in the case. After eight hours of deliberation, the jury returned with the special verdict described in *Vosburg II* (with the judge having already filled in the answer to question six). The jury assessed Andrew’s damages at $2500. Judge Sloan rendered judgment for the plaintiff on February 5, 1891 for the $2500 in damages. In November 1891 the Supreme Court of Wisconsin, in *Vosburg II*, again reversed the judgment and remanded for a new trial.

Rather than retry Andrew’s action for a third time, the Vosburgs’ attorneys reactivated Seth’s action against George, which had been continued while Andrew’s action was being prosecuted. Judge Sloan being away on assignment, the case was tried before Judge Fish. Given the two prior reversals on this point, the Vosburgs’ attorneys were very careful to lay a proper foundation for the doctors’ expert opinion testimony on the “exciting cause” of Andrew’s physical injury. They submitted evidence on the approximately $425 in medical expenses and the value of the time spent by Seth and his spouse in caring for and nursing Andrew. The judge instructed the jury also to take into account Seth’s loss of Andrew’s services until Andrew came of age. Neither party requested a special verdict. After five and a half hours of deliberation (including lunch time) on December 11, 1891, the jury returned a general verdict for the plaintiff, Seth Vosburg, in the amount of $1200. In July 1893, the Putneys again appealed to the Wisconsin Supreme Court, which on October 17, 1893, affirmed the judgment below. George Putney was now nearly 17. Zile reports that Seth’s attorneys did not move to execute the judgment upon its affirmance by the Supreme Court. (Yet the Putneys could have paid up, indeed might have preferred to pay up, without such execution.) He also states, without a citation to any source, that “the Vosburgs never collected anything on the award.” Id. at 954-72; Vosburg v. Putney, 86 Wis. 278, 56 N.W. 480 (1893) (*Vosburg III*).

Meanwhile, in September 1893, pursuant to a motion made by the Putneys’ lawyers in May, Judge Sloan dismissed the complaint and vacated and set aside the two prior judgments in Andrew’s action, due to the Vosburgs’ failure to pay the taxable costs on the second reversal and to bring the case back to trial within one year from the date of reversal, as required by statute. Zile, supra, at 968-69.

Court costs of $22.19 in the criminal case were charged to the county. In Andrew’s case, the court costs for the Vosburgs were $141.21 in the circuit court and $14.00 in the supreme court ($155.21 total), and for the Putneys $370.82 in the circuit court and $189.00 in the supreme court ($559.82 total), all eventually taxed to the Vosburgs as the losing party (but probably not paid by them), for a grand total of $715.03. In Seth’s case, the Vosburgs’
court costs were $61.41 in the circuit court and $46.75 in the supreme court ($108.16 total), all eventually taxed to the Putneys as the losing party (but with no record of their having paid them), and Zile estimates the Putneys’ own court costs were at least as high, for a grand total of $216.32. There was no record of the attorneys’ fees on either side, but Zile conservatively estimates the Putneys’ total fees at $560, while the Vosburgs probably had a contingent fee arrangement with their attorneys, whereby their attorneys received a certain percentage of the plaintiff’s award if the plaintiff was successful and nothing if the plaintiff was unsuccessful. Assuming the Vosburgs neither collected the judgment in Seth’s action nor paid the Putneys’ costs taxed to them in Andrew’s action, the Vosburgs and their attorneys incurred, without any monetary gain, $263.37 in court costs and approximately $560 worth of uncompensated attorney time, compared to the Putney’s settlement offer of $250, while the Putneys incurred at least $667.98 in costs and $560 in attorneys’ fees ($1228 total), after having rejected the Vosburg’s settlement offer of $700. Assuming the Vosburgs collected the $1200.00 judgment in Seth’s action (plus their $108.16 in court costs), paid the $715.03 total court costs in Andrew’s action, and paid a $240 (20%) contingency fee to their attorneys, the Vosburgs had a net monetary gain of $245 ($1200 minus $955.03), about the same as the Putney’s settlement offer of $250; the Vosburgs’ attorneys received only $260 for approximately $560 worth of work; and the Putneys paid out a total of $1976 ($1200 damages plus $216.32 total court costs in Seth’s action plus $560 attorneys’ fees), after having rejected the Vosburgs’ $700 settlement offer. The only monetary winners were the Putneys’ attorneys, who received at least $560 in attorneys fees. Id. at 972-77.

Andrew Vosburg did not lose his leg. He resumed his education and was subsequently employed briefly as an office worker, then as a utility trainman. After a few years, he moved into the supervisory ranks first as assistant yard foreman and then as yard foreman. He married and had three children. He wore a laced leather brace on his leg, which was too weak for climbing ladders. He died at the age of 64 in 1938. Id. at 992-95. George Putney graduated from high school and went on to college, but left during or after his sophomore year to return to work as a clerk in the family store. He married and moved to Milwaukee to work in a men’s clothing store. He had two children, switched to selling cars, and received $349 as his share of the Putney family patrimony upon his stepmother’s death in 1924. He died at the age of 63 in 1940.

NOTES

1. Parties. Who is suing whom in the Vosburg civil actions? Were there other possible defendants? Other possible plaintiffs? How likely is/are the plaintiff(s) in Vosburg to recover any actual damage payments from the defendant(s)?

2. Cause of action. What specific intentional tort is at issue in Vosburg?

3. Prima facie case: legal injury. What was deemed to constitute the required legal injury for this intentional tort in Vosburg? What interest of the plaintiff(s) is deemed to have been wrongfully infringed by the defendant(s)? See William Blackstone, Commentaries on the Laws of England *120 (1st ed. 1765): “The least touching of another’s person wilfully, or in anger, is a battery, for the law cannot draw the line between different degrees of
violence, and therefore totally prohibits the first and lowest stage of it; every man’s person being sacred, and no other having a right to meddle with it, in any the slightest manner.”

4. **Tortious conduct: intent (to do what?)**. According to the Wisconsin Supreme Court, what sort of intent must exist for this intentional tort? The mere intent to act—e.g., to move your foot? The intent to cause harm? Or the intent to cause a particular consequence (which?) regardless of any resulting harm? In *Vosburg II*, the court states: “If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.” What does the court mean by “act”? Is its use of “act” consistent with the Restatement, which states that “the word ‘act’ is used . . . to denote an external manifestation of the actor’s will and does not include any of its results, even the most direct, immediate, and intended”? Restatement Second § 2. Does the court agree with the Restatement that “intent” refers “to the consequences of an act rather than the act itself”? Id. § 8A comment a; see id. (“When an actor fires a gun in the midst of the Mojave Desert, he intends to pull the trigger; but when the bullet hits a person who is present in the desert without the actor’s knowledge, he does not intend that result. ‘Intent’ is limited, whenever it is used, to the consequences of the act.”); Restatement Third: Intentional Torts § 102 comment a (approved May 2015) (“the intention requirement must . . . specify the particular consequence that the actor must intend”).

5. **“Unlawful” (tortious) injury/intent.** According to the court, what made the defendant’s intentional conduct civilly “unlawful” (tortious)? Was it “necessarily unlawful” because it was “a violation of the order and decorum of the school”? What if George had tapped Andrew’s shoulder, to return an answer to a note passed from Andrew through George to someone else, contrary to school rules, and by doing so had unexpectedly caused injury to Andrew? What if George and his girlfriend had been kissing each other in the cloakroom, contrary to school rules, and they lost their balance and fell over and she was injured? In either case, would or should there be a valid tort cause of action? If not, what factually distinguishes these situations from the situation in *Vosburg*? Is the distinction the same as the one the court makes when it refers to the “implied license of the playgrounds”? What does the court mean by an “implied license,” why should it be relevant, and what differences in the settings would permit inferring such a license in the playground setting but not in the classroom setting? What seems more important (and why?), the formal classroom rules per se or the generally accepted behavior or practices among the students themselves?

6. **Actual causation.** The actual causation inquiry is a purely factual inquiry regarding empirical contribution to the injury. The tortious aspect of the defendant’s intentional conduct—his conduct (act or omission) done with the intent to cause the specific consequence that constitutes the required legal injury—must have been an actual cause of the required legal injury. The required legal injury for a battery is the (unauthorized) physical contact with the plaintiff’s person. Thus, to establish a prima facie case of battery, the Vosburgs did not have to prove that George intended to cause or actually caused Andrew’s serious physical injury. They only had to prove that George intentionally caused a physical contact with Andrew’s person (that was not authorized)—an issue that was never in dispute.
However, to recover for the actual damages resulting from Andrew’s acute osteomyelitis, the Vosburgs had to establish that George’s battery of Andrew was an actual cause of (contributed to the occurrence of) the osteomyelitis. This actual causation issue, regarding actual damages, was the only contested factual issue in the Vosburgs’ battery actions. As this causal issue was examined and reexamined in the successive trials, the Putneys produced an ever-increasing roster of lay witnesses with increasingly better memories (mostly relatives and friends) who claimed to have seen Andrew lamely limping in the weeks prior to the kick. The Vosburgs’ attorneys pointed out discrepancies in these claims and produced witnesses who testified that Andrew had been engaged in vigorous activities and had not been limping.

In each trial, the Vosburgs relied on the expert testimony of doctors Bacon and Philler, Andrew’s attending physicians. Doctors Bacon and Philler were both adherents of the germ or microbe theory of disease, then “still but grudgingly received by American medical science,” and thus “stood out as well informed.” They summarized what was then known about osteomyelitis (inflammation of the bone and bone marrow), which was believed to occur only if there was both a bacterial infection and some “exciting cause.” The “exciting” or “triggering” cause could be physical trauma, exposure to severe cold, improper nutrition, great fatigue, or rapid bone growth. They concluded that Andrew’s leg had previously been infected, most likely by germs entering through the severe abrasion received during the sledding incident in January, which however was healing up at the time of the kick. They also concluded that, given the physical and temporal correlation between the kick and the onset of the osteomyelitis, and the lack of any evidence of the other possible exciting causes such as rapid bone growth, the kick was the “exciting cause” of the osteomyelitis.

The Putneys’ lawyers did not call any medical witnesses in Vosburg I, attempting instead to discredit the Vosburgs’ expert witnesses, but called two in Vosburg II and four in Vosburg III. Most of the Putneys’ medical witnesses argued that the temporal time frame between the kick and the onset of the osteomyelitis was too short (a contention rejected by doctor Philler, based on his reading and his experience as a Union doctor during the Civil War), and suggested that the “exciting cause” was some cause other than the kick, such as rapid bone growth. Yet the most qualified medical expert, Dr. Mackie, brought in to the last trial (Vosburg III) by the defense, ended up agreeing with the Vosburgs’ experts that the kick was the exciting cause of the osteomyelitis, which had not previously existed. Zile, supra, 1992 Wis. L. Rev. at 910-14, 933-42, 956-64.

According to Zile, although there have been advances in the diagnosis and treatment of osteomyelitis, its etiology (specific causal mechanism) is no better known today than it was 100 years ago. “A recent laboratory study with rabbits demonstrated that the animals which received a bone fracture only did not develop AHO [acute hematogenous osteomyelitis]; the animals with induced bacteremia (from intravenously injected staphylococcus aureus) only had occasional small foci of osteomyelitis; and the animals with both fracture and bacteremia developed significant osteomyelitis in almost all cases. Yet the otherwise significant study left a related and important question unanswered. ‘What does the injury [in this case, the fracture] do to localize the infection in that area only? The concept of “locus minoris resistentiae” states that in some ways an injury lowers the resistance of the tissue to infection . . . . However, no good explanation for the observed relationship between
injury and infection is yet available.”’’ Id. at 912-13 & nn.108 & 109, quoting Raymond T. Morrissy & Darrell W. Haynes, Acute Hematogenous Osteomyelitis: A Model with Trauma as an Etiology, 9 J. Pediatric Orthopaedics 447, 455 (1989). Zile submitted a summary of the Vosburg evidence to a number of Wisconsin orthopedic surgeons in 1991, for evaluation in the light of current medical knowledge. Of the five that replied, all agreed with the Vosburgs’ medical experts’ theory of causation: that the kick was the exciting cause of the osteomyelitis, which previously had not existed. See Zile, supra, at 964 n.267. For Zile’s doubts about the Wisconsin Supreme Court’s technical evidentiary rulings on doctor Philler’s testimony in Vosburg I & II, see id. at 927-29, 953-54.

The actual causation issues and evidence in Vosburg, a “simple” battery case, are quite similar to the causation issues and evidence in many modern medical malpractice, toxic chemical, and product liability tort actions, where complex causal issues are disputed by conflicting experts under conditions of considerable scientific uncertainty about the precise nature of the causal processes involved. Professor Rabin (through the hypothetical “Professor Kalvenian”) states that the experts’ testimony in Vosburg was “undermined by conflicting interpretations,” while Professor Henderson states that the court allowed the Vosburgs “to rely on medical speculations regarding the issue of causation” and notes that some modern observers refer to such speculative technical evidence as “junk science.” See James A. Henderson, Jr., Why Vosburg Comes First, 1992 Wis. L. Rev. 853, 854 n.6; Robert L. Rabin, Vosburg v. Putney in Three-Part Disharmony, 1992 Wis. L. Rev. 863, 865. Given Zile’s discussion of the medical testimony and the state of medical knowledge then and now, do you agree with Henderson’s and Rabin’s comments?

7. Attributable responsibility (“proximate” causation) : eggshell plaintiffs. The so-called “proximate causation” inquiry is a normative inquiry into the proper extent of legal responsibility for tortiously caused consequences. In the Vosburg actions, the defendant made a common liability limitation argument: that a defendant should not be liable for an injury that was an unforeseeable consequence of the defendant’s tortious conduct. The court rejects the argument in this type of situation, based on the universally accepted “thin-skulled” or “eggshell” plaintiff rule that applies to all tort actions. Assuming that tortious actual causation of the required legal injury has been established, the defendant is liable for resulting harm even if it occurred only because of the plaintiff’s extrasensitive condition, regardless of whether the damages are much greater than anticipated or foreseeable. In such circumstances the defendant must “take the plaintiff as she finds him.”

8. Remedies. Intentional unauthorized trespasses to the plaintiff’s person or property are considered to be invasions of the plaintiff’s dignity or autonomy, which justify an award of “nominal” damages (e.g., a few dollars) if no actual compensable harm was suffered. Nominal damages are in lieu of actual damages; they are not awarded if actual damages can be proved, as in the Vosburg case. If the defendant’s conduct was sufficiently morally blameworthy (e.g., malicious, or a reckless disregard of the plaintiff’s rights), punitive damages may also be available. The Vosburgs apparently never sought to obtain punitive damages, although there was some evidence of malicious intent by George: the prior quarrel over the textbook, his alleged boast that he “would . . . give [Andrew] more when he came back” to school, and his acknowledgment in the last trial that he had known for some time “when I kicked him” that George’s leg had been bandaged (but allegedly “didn’t think of it”
on the fateful day). In the tort actions, the court excluded any evidence of malicious intent, stating that was not an issue in the case. Although George was found guilty by the justice of the peace in the initial criminal action, that action was dismissed by the trial judge “on account of [George’s] tender years.” See the History Note above and Zile, supra, 1992 Wis. L. Rev. at 958.

9. Parental vicarious liability. “Vicarious liability” is liability for torts committed by someone else. The most common form of vicarious liability, which is often referred to as respondeat superior (“let the master answer”), is liability for torts committed by one’s employees or agents while they are acting as one’s employee or agent. As Zile’s history indicates, under Wisconsin law Henry Putney could not be held vicariously liable for his son George’s battery of Andrew. In most states, parents cannot be held vicariously liable for torts committed by their children, but rather can only be held liable if they themselves tortiously contributed to the plaintiff’s injury—for example, by a negligent failure to properly supervise their child. See, e.g., Illinois Forms of Jury Instruction § 43.41 (Matthew Bender 1993).

10. Interests protected and underlying principles. Professor Zile asks, “Did the trial judges and the jurors in Vosburg, all of whom had observed the litigants at close range, approach the case primarily in terms of corrective [interactive] justice, while the appellate judges, removed from the impressions that immediacy engenders, [feel] more comfortable with dispensing distributive justice?” By “distributive justice,” Zile seems to mean attempting to discourage the expenditure of public and private resources on costly litigation over such “minor” “faultless” incidents, especially where the prospect of ultimate recovery from the child defendant was dim. See Zile, supra, 1992 Wis. L. Rev. at 978-79. Are these supposed concerns based on distributive justice considerations or rather on efficiency considerations? Professor Rabin’s hypothetical Professors “Radreform” and “deBunker” argue that the Vosburg dispute demonstrates the “total bankruptcy of the tort system,” not only in its complete failure as a means of addressing the allegedly critical issues of efficient compensation and efficient deterrence, but also in its failure to satisfactorily implement tort law’s traditional yet “archaic” rationale—the “bizarre interpersonal morality play” or psychological desire for retribution that is the “cornerstone of the notion of corrective [interactive] justice.” See Rabin, supra, 1992 Wis. L. Rev. at 866-73. What do the verdicts, opinions, processes, litigation costs, and ultimate outcomes in Vosburg imply to you regarding the goals of tort liability and its success in furthering those goals, at least in this instance?

2. INTENT

a. THE TWO TYPES OF INTENT

In ordinary language, a person’s “intent” in engaging in some conduct refers to her purpose or objective in engaging in the conduct—what she hoped to accomplish by means of that conduct. The concept of intent in tort law (and other areas of law) includes not only this ordinary language meaning, but also a different meaning that has to do with what the person knew or believed would happen as a result of her engaging in the conduct. When you read the following case, carefully identify the intentional tort at issue and what precise
knowledge the defendant must have had to satisfy the intent requirement for that tort. According to the court, must the defendant have actually had this knowledge, or is it sufficient that the “ordinary person” would have had this knowledge in the particular circumstances? Also pay careful attention to the procedural history of the case as it progressed up and down and back up again through the Washington courts. What facts were found or assumed to exist at each stage in the case? What legal issues were raised? How should those legal issues have been resolved based on the facts that were found or assumed to exist? How were they resolved, and why?

**Garratt v. Dailey (Garratt I)**
Supreme Court of Washington
279 P.2d 1091 (1955)

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

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

“IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question he did not have any wilful or unlawful purpose in doing so; that he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff.” (Italics ours, for a purpose hereinafter indicated.)
It is conceded that Ruth Garratt’s fall resulted in a fractured hip and other painful and serious injuries. To obviate the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of her damage was found to be eleven thousand dollars. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

The authorities generally, but with certain notable exceptions, see Bohlen, “Liability in Tort of Infants and Insane Persons,” 23 Mich. L. Rev. 9, state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be. . .

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 . . . , 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.

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

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

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

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

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

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

It is argued that some courts predicate an infant’s liability for tort upon the basis of the existence of an estate in the infant; hence it was error for the trial court to refuse to admit as an exhibit a policy of liability insurance as evidence that there was a source from which a judgment might be satisfied. In our opinion, the liability of an infant for his tort does not depend upon the size of his estate or even upon the existence of one. That is a matter of concern only to the plaintiff who seeks to enforce a judgment against the infant.
The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

**GARRATT V. DAILEY (GARRATT II)**

Supreme Court of Washington
304 P.2d 681 (Wash. 1956)

**ROSELLINI, J.** . . . Upon remand for clarification on the issue of the defendant’s knowledge, the superior court reviewed the evidence, listened to additional arguments and studied briefs of counsel, and entered a finding to the effect that the defendant knew, with substantial certainty, at the time he removed the chair, that the plaintiff would attempt to sit down where the chair had been, since she was in the act of seating herself when he removed the chair. Judgment was entered for the plaintiff in the amount of eleven thousand dollars, plus costs, and the defendant has appealed. . . .

The substance of the remaining assignments is that the evidence does not support the additional finding. The record was carefully reviewed by this court in Garratt v. Dailey, supra. Had there been no evidence to support a finding of knowledge on the part of the defendant, the remanding of the case for clarification on that issue would have been a futile gesture on the part of the court. As we stated in that opinion, the testimony of the two witnesses to the occurrence was in direct conflict. We assumed, since the trial court made a specific finding that the defendant did not intend to harm the plaintiff, that the court had accepted the testimony of the defendant and rejected that of the plaintiff’s witness. However, on remand, the judge who heard the case stated that his findings had been made in the light of his understanding of the law, i.e., that the doctrine of constructive intent does not apply to infants, who are not chargeable with knowledge of the normal consequences of their acts.

In order to determine whether the defendant knew that the plaintiff would sit in the place where the chair had been, it was necessary for him to consider carefully the time sequence, as he had not done before; and this resulted in his finding that the arthritic woman had begun the slow process of being seated when the defendant quickly removed the chair and seated himself upon it, and that he knew, with substantial certainty, at that time that she would attempt to sit in the place where the chair had been. Such a conclusion, he stated, was the only reasonable one possible. It finds ample support in the record. Such knowledge, we said in Garratt v. Dailey, supra, is sufficient to charge the defendant with intent to commit a battery.

The judgment is affirmed.

**NOTES**

1. *The required legal injury.* What constituted the required physical contact with the person of the plaintiff, Ruth Garratt, in *Garratt v. Dailey*? What was she hit or touched by? Did that physical contact come about as a result of any conduct on the part of the defendant, Brian Dailey? Although primarily of interest for its discussion of the tortious intent element,
Garratt v. Dailey demonstrates that the defendant need not herself directly hit or touch the plaintiff; she need only put in motion a sequence of events that is intended to bring about, directly or indirectly, a physical contact with the person of the plaintiff, for which there was no consent.

2. The two types of intent: purpose/desire versus knowledge/belief. As Garratt v. Dailey demonstrates, tort law recognizes two different types of intent. The first type encompasses the common ordinary-language meaning of intent: a particular consequence is said to be have been intended by a person if that person acted for the purpose of causing that consequence—i.e., she desired or wanted the consequence to occur as a result of her conduct. The second type of “intent” does not refer to the purposes, desires or wants of the actor, but rather to the actor’s knowledge or belief, at the time she acted, that a specific consequence was bound to result from her conduct—a consequence that she may even have wished would not occur, but which she knew (or believed) was certain or almost certain to occur as a result of conduct of hers that was engaged in for some other purpose. Such knowledge of or belief regarding a nearly certain consequence of one’s conduct is treated in tort law (and many other areas of law) as being legally equivalent to intent in the sense of purpose. A person may have one of the two types of intent without the other, or she may have them both simultaneously. Either type of intent will satisfy the intent element in the prima facie case for an intentional tort. See Restatement Second § 8A; Restatement Third: Liability for Physical and Emotional Harm § 1.

3. The subjective nature of intent. Both of the two types of intent are subjective rather than objective in nature. The plaintiff must prove that the required purpose, knowledge or belief actually existed in the mind of the defendant. It is not sufficient that the ordinary person would have had the required purpose, knowledge or belief. However, not being able to actually peek into the defendant’s mind, the plaintiff generally must rely on external conduct and circumstances to infer the internal subjective state of the defendant’s mind.

4. Intent versus motive. It is important to distinguish intent from motive. The motive is the reason the person had for wanting the consequence to occur. For example, the desired consequence might be eating an apple, and the motive for that desired consequence might be to satisfy or avoid hunger. Intent (as purpose) refers to what was desired, while motive refers to why it was desired. It is intent, not motive, that is the essential element in establishing liability for an intentional tort. However, evidence of motive may be relevant in inferring the purpose type of intent. Moreover, motive may be highly relevant on other issues—for example, it may provide the basis for a justification or defense, on the one hand, or for an attribution of moral fault (and perhaps punitive damages), on the other.

5. “Substantial certainty” => nearly certain. The Restatement’s use of the phrase “substantial certainty” is unfortunate, since it erroneously suggests a mere substantial probability. However, as the Garratt I court notes, quoting from the Restatement, even a “very grave risk”—a serious one with a very high probability—is insufficient to establish the second type of intent. The risk must rise to the extremely high level of being certain or almost certain to happen—a near certainty. See Restatement Third: Intentional Torts § 102 comment a (approved May 2015). To avoid misinterpretation and error, this text uses the latter phrase, which you also should use.
6. Brian’s intent. Given the trial judge’s factual findings regarding the sequence of events in Garratt I, did Brian intend to cause Ruth to hit the ground? If so, by which type(s) of intent? If not, why did the supreme court remand the case rather than affirm the trial court’s judgment?

The supreme court stated that Brian would have the required intent for a battery if, when he moved the chair, he “knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been.” Do you agree? Would this knowledge without more be sufficient to establish the required intent for a battery? If not, what additional knowledge would need to be inferred? Is an inference of such additional knowledge reasonable or, as the supreme court may have thought, required if Brian knew that Ruth would attempt to sit down where the chair had been?

On remand, the trial judge stated that his initial findings in Garratt I “had been made in the light of his understanding of the law, i.e., that the doctrine of constructive intent does not apply to infants, who are not chargeable with knowledge of the normal consequences of their acts.” Walter Probert notes that, if on remand the trial court attributed to Brian knowledge that the ordinary (adult or child) person would have had, without any finding that Brian actually had such knowledge, then Garratt is a more remarkable case than it is commonly thought to be, since, rather than merely reiterating that intent can be satisfied by knowledge of a near certainty as well as by purpose, it replaced the subjective intent requirement with an objective “constructive intent” concept. See Walter Probert, A Case Study in Interpretation in Torts: Garratt v. Dailey, 19 U. Tol. L. Rev. 73, 81 n.51 (1987). But perhaps the trial judge merely meant that he was unaware that, for children as well as adults, a person’s internal subjective state of mind can be inferred from that person’s external conduct and the circumstances, as discussed in note 3 above. Would the trial judge’s revised description of the sequence of events in Garratt II reasonably support an inference that Brian had the intent required for a battery? Would the additional fact, as reported by Probert, id. at 81 n.51, that Brian had complained in kindergarten about having chairs pulled out from under him, support such an inference?

7. Is intent to cause a harmful or offensive contact required? Section 13 of the first Restatement, which is quoted in Garratt I, describes the required intent for a harmful battery as “the intention of bringing about a harmful or offensive contact.” (There is also additional language having to do with the doctrine of transferred intent, which will be discussed later in this chapter). Section 18 similarly describes the required intent for an “offensive battery.” Similar language appears in sections 13 and 18 of the Restatement Second. A literal reading of these provisions has led some courts to apply a “dual intent” requirement: the defendant must intend not only to cause a physical contact with the person of the plaintiff, which is all that is required under the “single intent” approach, but also intend that the physical contact be harmful or offensive. See, e.g., White v. Muniz, 999 P.2d 814, 816 (Colo. 2000), in which the Colorado Supreme Court claimed that this is the traditional approach with which courts and commentators “generally agree.”

Did the Garratt court require an intent to harm or offend? Did the Vosburg court? The sources cited in White v. Muniz do not support the dual-intent approach. The only cases cited by the court reject it. See Brzoska v. Olsen, 668 A.2d 1355, 1360 (Del. 1995); White
B.2. Intent

v. University of Idaho, 797 P.2d 108, 109, 111 (Idaho 1990). See also Wagner v. State, 122 P.3d 599, 603-06 (Utah 2005) (stating that a majority of the cases support the single-intent view and concluding that a full consideration of the Restatement’s comments supports the single-intent view). See, e.g., Restatement Second § 13 comment c (stating that the defendant need not be inspired by personal hostility or a desire to injure and that liability exists despite a mistaken belief that the plaintiff consented or a belief that the plaintiff would be benefitted); id. § 34 (an assault—causing the perception of an imminent battery—need not “be inspired by personal hostility or desire to offend”). The dual intent approach would be inconsistent with the rules and doctrines regarding liability of infants (as in Garrett) and the insane and the irrelevance of mistake (discussed in the next sections of this chapter).

The two treatises cited in White v. Muniz also fail to support the dual-intent approach. See Dobbs § 29 at 55-56 & n.8; Prosser & Keeton § 8 at 36-37, § 9 at 41-42. See also Prosser § 9 at 36; Osborne M. Reynolds, Jr., Tortious Battery: Is “I Didn’t Mean Any Harm” Relevant?, 37 Okla. L. Rev. 717, 718 (1984) (“[t]he clear majority of cases that have squarely faced the question” reject the dual-intent approach); Kenneth W. Simons, A Restatement (Third) of Intentional Torts?, 48 Ariz. L. Rev. 1061, 1067 (2006) (“the single-intent approach is much more defensible and indeed is the only plausible interpretation of the case law in this area”). The Restatement Third: Intentional Torts § 102 (Tentative Draft No. 1, 2015), approved by the members of the American Law Institute at its 2015 annual meeting, agrees: “The intent required for a battery is the intent to cause a contact with the person of another. The actor need not intend to cause harm or offense to the other.”

8. Discrete versus statistical near-certainty. It could be said of many activities that involve or otherwise affect large numbers of people, either concurrently or over time, that they are statistically nearly certain to result in a predictable number of injuries, even though there is a low level of risk associated with each discrete event encompassed by the activity. Contrary to arguments made by some legal economists, see, e.g., Richard A. Posner, Economic Analysis of Law 204 (7th ed. 2007), a person’s knowledge or belief regarding an abstract statistical probability that becomes a near certainty only when aggregated over a large number of instances does not, in ordinary thought or law, constitute conduct done with the intent to cause any specific injury. Rather, the requisite “near certainty” generally refers to a specific, discrete, geographically and temporally limited situation. For example, there is the required near certainty when you throw a bucket of water from a balcony down on top of a crowd on a sidewalk, or shoot into a crowded bar, but not when you simply know that eventually some person or property is bound to be injured by the operations on your work site, the ingestion of your drug, or your driving your car, due to unavoidable but low probability risks. See Restatement Third: Physical and Emotional Harm § 1 comment e.

9. Purpose versus knowledge/belief: varying legal effects. The criminal law’s Model Penal Code distinguishes purposeful conduct from conduct done with knowledge of or a belief regarding a nearly certain consequence. While often treating these two different states of mind similarly as grounds for criminal liability, it avoids lumping them together under the term “intent.” See Model Penal Code § 2.02. However, individual states’ criminal codes may lump them together. See, e.g., Wisc. Stat. 939.23(3): “‘Intentionally’ means that the actor either has the purpose to do the thing or cause the result specified, or is aware that his or her conduct is practically certain to cause that result.” Should tort law be as precise as the Model
Penal Code? Lumping the two distinct states of mind together as different types of intent may unduly stretch the common meaning of the word “intent,” which usually refers to the purpose of conduct rather than a knowledge or belief regarding the conduct’s undesired (albeit nearly certain) “side effects”. More importantly, it may obscure significant differences between the two states of mind that are highly relevant in certain legal contexts.

For example, under the doctrine of vicarious liability (also referred to as respondeat superior), an employer can be held strictly liable for the torts committed by her employee that occur within the scope of employment. However, intentional torts committed by employees are usually considered to be individual “frolics” outside the scope of employment, for which the employer is not liable. A number of courts have held that this rationale for rejecting the employer’s vicarious liability for employees’ intentional torts applies when the injury was purposely caused by the employee, but not when it merely was known to be a nearly certain consequence of the employee’s work. A similar distinction has been made with respect to the United States’ liability for the torts of its officers and employees under the Federal Torts Claims Act. See also Baldinger v. Banks, 222 N.Y.S.2d 736 (1961), in which the court held that an insurance policy’s exclusion of liability for intentional injuries did not apply to a battery by a six-year-old boy because the injury was not “intentionally” caused. The court apparently reasoned that the insurance exclusion was only meant to cover deliberate, purposeful injuries. Similarly, Professor Probert observes that, in Garratt, the Daileys’ insurance company paid the tort claim, although insurance policies usually exclude liability for intentional injuries. See 19 U. Tol. L. Rev. at 85 n.65.

The converse situation exists under workers’ compensation systems, which are statutorily created but employer financed administrative systems that provide limited compensation for accidental work-related injuries regardless of anyone’s fault. In the United States (unlike England) the state legislation creating a workers compensation system generally makes it the injured worker’s exclusive remedy against the employer; the injured worker cannot sue the employer in tort. However, it is usually held that the employer continues to be liable in tort for injuries that it purposefully causes to its employees. Fewer states are willing to allow the employee to sue the employer in tort if the injury was not caused purposely, but rather was merely known to be nearly certain to happen. There likely is a concern that, especially with the “substantially certain” (rather than “nearly certain” or “practically certain”) language, tort recovery would be allowed for accidental injuries whenever the risk of injury was high, contrary to the intent that the worker’s compensation scheme be the exclusive remedy for accidental injuries.

Recognizing the above points, the Restatement Third of Torts, while continuing to treat either purpose or “knowledge of a substantial [near] certainty” as normally sufficient to subject a defendant to liability for an intentional tort, explicitly distinguishes the two states of mind and notes that they may be treated differently in contexts such as those noted in the prior paragraph. Restatement Third: Physical and Emotional Harm § 1 comment a.

10. **Choosing the proper tort: intentional tort or negligence?** As we will discuss later, negligence is defined as conduct that creates an unreasonable foreseeable risk of injury. Much intentional conduct, including Brian’s conduct in Garratt, would literally fall under this definition of negligence. However, negligence liability generally applies only to
accidental (unintentional) injuries. If the defendant intentionally caused the plaintiff’s injury, the defendant cannot be held liable in a negligence action; the plaintiff must instead attempt to recover under the appropriate intentional tort action. E.g., Waters v. Blackshear, 591 N.E.2d 184 (Mass. 1992).

Classifying a particular situation as one involving intentionally or accidentally caused injury can be difficult, especially with respect to the knowledge or belief rather than purpose type of intent. For reasons such as those discussed in the prior note, plaintiffs sometimes have strategic reasons for preferring one characterization of the facts over the other. Another strategic consideration is the fact that statutes of limitation, which prevent actions from being brought after a certain number of years, often provide different limitation periods for different types of torts—often shorter periods for intentional torts. Yet another consideration, which may have been relevant in Garratt, is that in some jurisdictions negligence actions are not allowed against infants (typically defined as seven or less years old). When one or the other type of action—intentional or negligence—may be proper in the particular situation depending on what facts are found to have existed, the plaintiff may want (and usually will be allowed) to plead alternative causes of action—in negligence and for the appropriate intentional tort. See generally Restatement Third: Intentional Torts Scope Note at 3-6 (approved May 2015).

b. MENTAL CAPACITY

MCGUIRE v. ALMY
Supreme Judicial Court of Massachusetts
8 N.E.2d 760 (1937)

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

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

On April 19, 1932, the defendant, while locked in her room, had a violent attack. The plaintiff heard a crashing of furniture and then knew that the defendant was ugly, violent and dangerous. The defendant told the plaintiff and a Miss Maroney, “the maid,” who was with the plaintiff in the adjoining room, that if they came into the defendant’s room, she


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

The extent to which an insane person is liable for torts has not been fully defined in this Commonwealth. . . . Turning to authorities elsewhere, we find that courts in this country almost invariably say that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent, nor do the courts discuss the effect of different kinds of insanity or of varying degrees of capacity as bearing upon the ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it, although it is sometimes said that an insane person is not liable for torts requiring malice of which he is incapable. Defamation and malicious prosecution are the torts more commonly mentioned in this connection. A number of illustrative cases appear in the footnote [omitted]. These decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged. Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental capacity which it has been found impossible to avoid in the criminal field.

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal mediaeval conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault. Notwithstanding these criticisms, we think that as a practical matter, there is strong force in the reasons underlying these decisions. They are consistent with the general statements found in the cases dealing with the liability of infants for torts, . . . including a few cases in which the child was so young as to render his capacity for fault comparable to that of many insane persons . . . . Fault is by no means at the present day a universal prerequisite to liability, and the theory that it should be such has been obliged very recently to yield at several points to what have been thought to be paramount considerations of public good. Finally, it would be difficult not to recognize the persuasive weight of so much authority so widely extended.
But the present occasion does not require us either to accept or to reject the prevailing doctrine in its entirety. For this case it is enough to say that where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it.

We do not suggest that this is necessarily a logical stopping point. If public policy demands that a mentally affected person be subjected to the external standard for intentional wrongs, it may well be that public policy also demands that he should be subjected to the external standard for wrongs which are commonly classified as negligent, in accordance with what now seems to be the prevailing view. We stop here for the present, because we are not required to go further in order to decide this case, because of deference to the difficulty of the subject, because full and adequate discussion is lacking in most of the cases decided up to the present time, and because by far the greater number of those cases, however broad their statement of the principle, are in fact cases of intentional rather than of negligent injury.

Coming now to the application of the rule to the facts of this case, it is apparent that the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent. See American Law Institute Restatement, Torts, §§ 13, 14. We think this was enough.

Judgment for the plaintiff on the verdict.

NOTES

1. Intentional tort liability: legal fault, not moral fault. As the Garratt and Almy opinions indicate, the general rule is that the defendant’s infancy or insanity is not a defense to an intentional tort claim, and that it is relevant in the prima facie case only if it prevents the defendant from forming the required intent to cause the specific consequence that constitutes the legal injury for the particular intentional tort. The defendant need not have a subjectively wrongful or even rational motivation for that intent, but rather, as the Almy court states, is held to the objective “external standard” of not intentionally doing what a rational person should not intentionally do. Note, however, that the defendant must actually have the required subjective intent (purpose, knowledge, or belief).

2. Underlying principles. Why should defenses of infancy or insanity not be recognized in tort law, as they are in criminal law? What do you think of the reasons the Almy court gives, which it introduces as “rest[ing] more upon grounds of public policy and upon what might be called a popular view of the essential requirements of justice than upon any attempt to apply logically the underlying principles of civil liability”? What are the public policies, the popularly perceived requirements of justice, and the underlying principles of civil liability, as the court sees them and as you understand them? Do they point
in different directions, as the court seems to think? Are any or all of them based on utilitarian efficiency (efficient compensation or efficient deterrence)? On distributive justice or interactive justice (equal positive or negative freedom)?

3. **Strict liability? Absolute liability?** Would some of the arguments noted by the Almy court for rejecting the insanity defense also support liability in the absence of even legal fault, by eliminating the intent requirement or even the conduct (act or volitional omission) requirement? Did the court dispense with one or both of these requirements?

4. **Consent.** The defendant in Almy also claimed that the trial court should have directed a verdict for her on the ground that the plaintiff had consented to the (harmful) physical contact with her person. The court’s discussion of this claim appears in section B.3 below.

c. **MISTAKE**

**MAYE v. YAPPEN**  
Supreme Court of California  
23 Cal. 306 (1863)

CROCKER, J. This is an action [for trespass to land] to recover damages, in the sum of $2,000, which the plaintiffs allege they sustained, by reason of the acts of the defendants, in entering upon the mining claim of the plaintiffs, and taking away gold and gold-bearing earth of that value. The case was tried by a jury, who found for the plaintiffs damages in the sum of fifty dollars, for which amount judgment was rendered, and the plaintiffs appeal therefrom, and from an order refusing a new trial.

It appears that the plaintiffs and defendants are the owners of adjoining mining claims, which are worked by deep under-ground tunnels. The fact that the defendants mined over the dividing line between the claims, and worked out a portion of the mining ground of the plaintiffs, is not disputed; but they contend that it was not done willfully or intentionally, but in ignorance of the locality of the dividing line, between the claims, under the surface; and that they were led to work over the line, by the representations of one of the plaintiffs, as to its locality, in relation to the tunnels and the place they were working. On the trial, the plaintiffs objected to all evidence showing that the defendants were ignorant of the location of this dividing line; but the Court overruled the objection, and permitted several of the defendants to testify to those facts, and this is assigned as error. The plaintiffs, in this action, were not entitled to vindictive or exemplary damages, but could only recover the damages they had actually sustained by being deprived of the gold or gold-bearing earth taken by the defendants from their mining ground. It follows, that the question whether the defendants acted willfully and maliciously, or ignorantly and innocently, in digging up and taking away the gold-bearing earth, is entirely immaterial. The defendants took property belonging to the plaintiffs, and have thereby injured them to a certain amount; and that amount is made no greater nor less by the fact that the act was done without any malicious intent. The right of the plaintiff to recover damages, or the amount of the damages, is not affected by the fact that the trespass was not willfull in its character. The ruling of the Court upon this question was therefore erroneous.
Upon these points, the Court gave the jury the following instruction: “If the jury believe from the evidence that the defendants were ignorant of the boundary lines between the plaintiffs and defendants, and in such ignorance, if they entered upon the ground of the plaintiffs in good faith, believing it to be their own, and were induced to do so by the acts and representations of plaintiffs themselves, then they will find for the defendants.” This instruction was clearly erroneous. It does not correctly state the law upon this subject, as has already been shown.

[The court also held that there an error in the lower court’s statement of the rule regarding valuation of the loss.]

The judgment is reversed and the cause remanded.

NOTES

1. The Restatement formulation. Restatement Second § 164 states:

One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he (a) is in possession of the land or entitled to it, or (b) has the consent of the possessor or of a third person who has the power to give consent on the possessor’s behalf, or (c) has some other privilege to enter or remain on the land.

2. Tortious intent? It is sometimes stated (e.g., in some bar exam review materials) that cases like Maye dispense with the tortious intent requirement, and therefore that intent is not required for tort liability for trespass to land. Is that true? Is an intent to cause a specific consequence required in Maye? If so, what specific consequence must be intended?

3. The general irrelevance of mistake. The rule stated in Restatement Second § 164, that a defendant is not excused from tort liability by her reasonable, good-faith mistake regarding the identity or ownership of the property which she intentionally affects, or by her reasonable, good-faith mistaken belief that she has the owner’s consent, is not limited to actions for trespass to land but rather applies to all the trespassery intentional torts. See, e.g., Ranson v. Kitner, 31 Ill. App. 241 (1889) (trespass to chattel and conversion) (defendants liable for the value of plaintiff’s dog, which “had a striking resemblance to a wolf” and which they killed in the good-faith belief that it was a wolf). Similarly, the defendant is liable for a battery if she reasonably and in good faith mistakes some person for a close friend and walks up to him and pats him on the back, or in a drunken stupor mistakenly believes the leg sticking out from underneath the table at which she is sitting is hers and intentionally sticks a fork into it. See section C.1 below. In contrast, in criminal law, a reasonable good-faith mistake on such matters generally (but not always) is deemed to be a valid excuse that precludes liability.

4. Tortious intent. The mistake cases make it clear that the intent required for an intentional tort relates solely to the specific consequence that constitutes the required legal
injury for the particular intentional tort—e.g., for a battery, physical contact with a person
(or something so closely connected to a person as to implicate the sense of personal dignity)
or, for trespass to land, entering or remaining on a particular area of land—and not to the
particular identity of the person intended to be touched, the ownership of the property
intended to be affected, or a lack of consent by the person or owner of the property intended
to be affected. The intent required is merely the intent to affect, in the required specific
manner, a particular person, land, or chattel, regardless of whether the defendant reasonably
(but mistakenly) believes that the person, land or chattel is hers or that she has the consent
of the plaintiff whose person or property she intends to affect.

5. Consent. The defendants in Maye also claimed that defendants, by certain
statements and representations, had consented to or should be estopped from objecting to
their mining of the plaintiff’s gold. The court’s discussion of these claims appears in section
B.3 below.

6. Remedies. In cases involving a reasonable, good-faith mistake by the defendant
regarding identity, ownership or consent, there is no basis for punitive damages. On the other
hand, there is always at least the technical intentional trespassary tort, which supports an
award of nominal damages in the absence of any actual damages. Regardless of the
reasonableness or good faith of the defendant, the plaintiff is generally entitled to the return
of his property in its original condition, insofar as feasible, or alternatively to retake or retain
ownership of the property with any additions or “improvements” that were made by the
defendant. Some jurisdictions permit a good-faith trespasser to remove an improvement she
made to the property if she can do so without injuring the property. For further details, you
should consult a property law or remedies text.

7. Moral fault, legal fault, and strict liability. The mistake cases further emphasize
a point first made clear by the cases involving infants or insane defendants. The prima facie
case for the trespassary intentional torts is not based on moral fault, but rather is based, at
least, on a quite strict notion of legal fault: a failure to conform, regardless of one’s
subjective capacity or good faith, to an objectively specified standard of acceptable conduct,
which requires that one not intentionally cause certain specified consequences to the persons
or property of others. Indeed, liability despite an objectively reasonable, good-faith mistake
is strict liability—liability without moral or even legal fault. The defendant is held liable
even though we are not willing to say an ordinary person could and should have behaved
differently in the particular circumstances.

8. Underlying principles. What policy or principle justifies the strict tort liability that
exists for unconsented-to but mistaken intentional interferences with persons or property,
especially when the mistake is a reasonable, good faith mistake and no physical, economic,
or emotional harm results? Consider the rationales offered by Holmes below.
I must now recur to the conclusions drawn from innocent trespasses upon land, and conversions . . . Take first the case of trespass upon land attended by actual damage. When a man goes upon his neighbor’s land, thinking it is his own, he intends the very act or consequence complained of. He means to intermeddle with a certain thing in a certain way, and it is just that intended intermeddling for which he is sued. . . . It might be answered, to be sure, that it is not for intermeddling with property, but for intermeddling with the plaintiff’s property, that a man is sued; and that in the supposed cases, just as much as in that of the accidental blow, the defendant is ignorant of one of the facts making up the total environment, and which must be present to make his action wrong. He is ignorant, that is to say, that the true owner either has or claims any interest in the property in question, and therefore he does not intend a wrongful act, because he does not mean to deal with his neighbor’s property. But the answer to this is, that he does intend to do the damage complained of. One who diminishes the value of property by intentional damage knows it belongs to somebody. If he thinks it belongs to himself, he expects whatever harm he may do to come out of his own pocket. It would be odd if he were to get rid of the burden by discovering that it belonged to his neighbor. It is a very different thing to say that he who intentionally does harm must bear the loss, from saying that one from whose acts harm follows accidentally, as a consequence which could not have been foreseen, must bear it.

Next, suppose the act complained of is an exercise of dominion over the plaintiff’s property, such as a merely technical trespass or a conversion. If the defendant thought that the property belonged to himself, there seems to be no abstract injustice in requiring him to know the limits of his own titles, or, if he thought that it belonged to another, in holding him bound to get proof of title before acting. Consider, too, what the defendant’s liability amounts to, if the act, whether an entry upon land or a conversion of chattels, has been unattended by damage to the property, and the thing has come back to the hands of the true owner. The sum recovered is merely nominal, and the payment is nothing more than a formal acknowledgment of the owner’s title; which, considering the effect of prescription and statutes of limitation upon repeated acts of dominion, is no more than right. All semblance of injustice disappears when the defendant is allowed to avoid the costs of an action by tender or otherwise.

But suppose the property has not come back to the hands of the true owner. If the thing remains in the hands of the defendant, it is clearly right that he should surrender it. And if instead of the thing itself he holds the proceeds of a sale, it is as reasonable to make him pay over its value in trover or assumpsit as it would have been to compel a surrender of the thing. But the question whether the defendant has subsequently paid over the proceeds of the sale of a chattel to a third person, cannot affect the rights of the true owner of the chattel.

Another consideration . . . is that the defendant’s knowledge or ignorance of the plaintiff’s title is likely to lie wholly in his own breast, and therefore hardly admits of satisfactory proof. Indeed, in many cases it cannot have been open to evidence at all at the time when the law was settled, before parties were permitted to testify. . . . [This] suggests
that it would be sufficient to explain [the strict liability of] the law of trespass upon property historically, without attempting to justify it . . .

NOTES

1. How persuasive are the various rationales that Holmes offers for liability despite a good faith, reasonable mistake regarding ownership, identity or consent? What rationale, whether or not articulated by Holmes, do you think best explains and justifies such liability?

3. CONSENT OR AUTHORIZATION

A basic legal principle, in tort law and other areas of law, is *volenti non fit injuria*: “to one who is willing no legal wrong is done”. Thus, the plaintiff’s consent to the defendant’s intentional conduct, whether or not known to the defendant, negates the defendant’s legal liability.

The plaintiff’s consent is usually treated as a defense to a tort action. However, as the *Vosburg* case illustrates and as we will further discuss in section C below, the issue of consent is part of the prima facie case for the intentional torts that involve a trespass to the plaintiff’s person: assault, battery, and false imprisonment. For these three torts, the plaintiff’s lack of consent is an element of the prima facie case that must be alleged and proved by the plaintiff, and the defendant must contest the plaintiff’s alleged lack of consent through a general denial of the plaintiff’s prima facie case, rather than by pleading consent as a defense. See Ford v. Ford, 10 N.E. 474, 475 (Mass. 1887) (Holmes, J.) (“absence of lawful consent is part of the definition of an assault”); Christopherson v. Bare, 116 Eng. Rep. 554, 556 (Q.B. 1848) (Denman, L.) (“to say that the defendant assaulted the plaintiff by his permission . . . is a manifest contradiction in terms”); Restatement Second § 10 comment c; id. § 13 comment d; cf. Restatement Third: Intentional Torts § 111 comment d (March 2016 draft) (stating that, for the intentional torts to person, the burden of proof is on the plaintiff with respect to (lack of) actual consent and likely should also be on the plaintiff for the other types of consent.

Although the plaintiff must allege lack of consent as part of the prima facie case for these three torts, both primary and secondary statements of the law often are vague or waffle on the issue of who actually bears the burden of proving consent or its lack. Compare, e.g., Illinois Forms of Jury Instructions §§ 43.30(2) & 43.33 (Matthew Bender 1993) (in a battery action, the plaintiff has the burden of proving the defendant “made unauthorized physical contact with Plaintiff”) (“When I use the word ‘contact,’ I mean the touching, without permission, of another’s body”) (emphasis added), with id. § 43.50 (defendant has the burden of proving the defense of plaintiff’s consent to the contact).

For all torts other than the intentional torts of assault, battery, and false imprisonment, it usually is stated that the plaintiff’s consent is a defense that must be specifically pleaded and proved by the defendant. See Restatement Second § 10 comment c; Restatement Third: Intentional Torts § 111 comment d (March 2016 draft). Again, however, the precise placement of the burden of proof is murky in some sources. See, e.g., Prosser & Keeton § 18 at 112 & n.2.
**a. ACTUAL AND APPARENT CONSENT**

**MAYE V. YAPPEN**

Supreme Court of California  
23 Cal. 306 (1863)

CROCKER, J. [The facts and the court’s opinion on the relevance of the defendants’ mistake regarding ownership of the land appear in section B.2.c above.]

It appears, that when the defendants first commenced working in the vicinity of the ground belonging to the plaintiffs, one of the plaintiffs went into defendants’ tunnel, where they were working, and he was asked if he knew where the line was, to which he replied that he did not know exactly. Afterwards, on the same day, the same plaintiff, Maye, stated to defendants that they need not be uneasy; that they were not near the line, and had forty or fifty feet still to run before they would reach it; and showed them a map of the plaintiffs’ claim. The witness, who was one of the defendants, also stated that they only worked twenty-five feet further, and would not have done even that but for Maye’s statement that they had fifty feet to go. Soon after this conversation, the defendants employed a surveyor to run the line, and they then learned that they had worked over on the plaintiffs’ claim. This state of facts, the defendants claim, amounts to a license or permission from the plaintiffs to work the mining ground; or they estop the plaintiffs from recovering the damages caused by the working of the ground. It is clear that the facts do not show a license or permission to work the mining ground of the plaintiffs. They show mutual ignorance on the part of one of the plaintiffs, Maye, and the defendants, as to the location of the line in the tunnel; but they do not show any permission or consent, or even intention or willingness on his part, that the defendants might work the plaintiffs’ mining ground. Whether or not the permission of one of the plaintiffs would bind the others, it is unnecessary to determine.

The rules relating to the doctrine of estoppel with respect to the title of property . . . are as follows: 1st. That the party making the admission by his declarations or conduct was apprised of the true state of his own title. 2d. That he made the admission with express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud. 3d. That the other party was not only destitute of all knowledge, but of the means of acquiring such knowledge; and, 4th. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved. It is evident that the facts of the present case do not bring it within the rules thus laid down. Maye, who made the statements, expressly stated that he did not know where the line ran in the tunnel; thus showing that he was not apprised of the true location of the plaintiffs’ line under ground. His statements, therefore, were more in the nature of the expression of an opinion than an admission of facts.

**NOTES**

1. *The subjective nature of actual consent.* “Consent is willingness in fact for conduct to occur. It may be manifested by action or inaction and need not be communicated to the actor.” Restatement Second § 892(1). Compare Restatement Third: Intentional Torts § 112 (March 2016 draft):
(a) A person actually consents to an actor’s otherwise tortious intentional conduct if the person is subjectively willing for that conduct to occur. Such consent can be express or can be inferred from the facts. Actual consent ordinarily is, but need not be, communicated to the actor.

(b) In order to be legally effective, actual consent must satisfy the capacity, voluntariness, and knowledge conditions of § 113 and the scope conditions of § 114.

2. Consent to what? As with the defendant’s intent, which must be not merely an intent to engage in certain conduct, but rather an intent by engaging in such conduct to cause the specific consequence that constitutes the required legal injury for the relevant intentional tort, the plaintiff’s consent, to be effective in negating liability, must be not merely consent to the defendant’s conduct per se, unconnected to any consequence, but rather must be consent to the defendant’s engaging in that conduct with the intent to cause the specific consequence that constitutes the required legal injury for the relevant intentional tort. Conversely, although a plaintiff’s consent usually encompasses both the required specific consequence and the conduct done with the intent to cause that consequence, only the latter is required. For example, although a professional boxer may not be willing to be knocked out (or even to be hit!) and certainly would not be willing to be killed, he is willing for his opponent to attempt to knock him out, and his consent to the opponent’s attempts (within the rules of boxing) to knock him out prevent the opponent from being liable for battery if the opponent succeeds, even if such success results (unintentionally) in his death. However, if the defendant exceeds the scope of the plaintiff’s consent by engaging in conduct for which there was no consent, or which fails to adhere to conditions or restrictions attached to the consent, or with the intent to produce consequences to which the plaintiff did not consent, the defendant will be liable. See Restatement Second § 892A.

3. Consent in Maye? Do you agree with the appellate court’s ruling in Maye that none of the plaintiffs consented to the defendant’s trespass onto their land?

4. Estoppel or excusable mistake. The defendant’s mistake, if reasonable and in good faith, will excuse or exonerate the defendant from liability if it was deliberately and fraudulently induced by a plaintiff who was aware of the true state of the title to the property. It may also excuse or exonerate the defendant from liability if it was induced by statements or other conduct by the plaintiff which were highly negligent in misrepresenting the true state of the title, especially if the plaintiff was aware of the true state of the title to the property. See Maye and Restatement Second § 164. As is noted in Maye, in such circumstances, the equitable doctrine of estoppel may be invoked by the defendant, which, as a matter of fairness in particular circumstances, precludes a person from attempting to disprove what he or she has previously represented to be true through words or conduct. Was the doctrine of estoppel held to be applicable in Maye? Should it have been?
B.3. Consent or Authorization

**McGuire v. Almy**

Supreme Judicial Court of Massachusetts

8 N.E.2d 760 (1937)

QUA, Justice. [The facts and the court’s opinion on the relevance of the defendant’s insanity to the issue of intent appear in section B.2.b above.] The defendant further argues that she is not liable because the plaintiff, by undertaking to care for the defendant with knowledge of the defendant’s condition and by walking into the room in spite of the defendant’s threat under the circumstances shown, consented to the injury, or, as the defendant puts it, assumed the risk, both contractually and voluntarily. Without considering to what extent consent is in general a defence to an assault (see American Law Institute Restatement, Torts, § 13), we think that the defendant was not entitled to a directed verdict on this ground. Although the plaintiff knew when she was employed that the defendant was a mental case, and despite some show of hostility and some violent and unruly conduct, there was no evidence of any previous attack or even of any serious threat against anyone. The plaintiff had taken care of the defendant for “fourteen months or so.” We think that the danger of actual physical injury was not, as [a] matter of law, plain and obvious up to the time when the plaintiff entered the room on the occasion of the assault. But by that time an emergency had been created. The defendant was breaking up the furniture, and it could have been found that the plaintiff reasonably feared that the defendant would do harm to herself. Something had to be done about it. The plaintiff had assumed the duty of caring for the defendant. We think that a reasonable attempt on her part to perform that duty under the peculiar circumstances brought about by the defendant’s own act did not necessarily indicate a voluntary consent to be injured. Consent does not always follow from the intentional incurring of risk. “The degree of danger, the stress of circumstances, the expectation or hope that others will fully perform the duties resting on them, may all have to be considered.” [Citations omitted.]

**NOTES**

1. **The arguments on consent.** The defendant’s attorney in *Almy* argued that the plaintiff consented in two quite different ways, “contractually and voluntarily.” The first argument was that she understood and agreed as part of her contract of employment that one of the inherent risks of the job was that she might be physically attacked by the defendant. The second argument was that, independent of any contractual obligation, she consented to being attacked by knowingly and voluntarily exposing herself to the risk of being attacked in the particular instance. Do you think either argument was a strong one? If so, was the appellate court wrong to reject either or both arguments?

2. **The three elements of actual consent: knowledge, volitional exposure and “free and willing” assent.** Contrary to a common misunderstanding, actual consent is not established merely because the plaintiff chose to expose herself to the defendant’s ongoing or potential conduct with awareness of the intended consequence of that conduct. For example—and keep this example in mind to avoid falling into the common misunderstanding—a person confronted by a robber with a gun who states “Your money or your life” does not consent to the robber’s attempting to shoot her if she decides not to hand over her money. Consent requires not only that the person (1) be subjectively aware of the
particular intended consequence and (2) knowingly proceed to expose herself to the conduct intended to bring it about, but also (3) that she assents or agrees to (is okay with) the defendant’s conduct done with the intent to cause that consequence. Note that the assent is not to the consequence itself, but to the conduct done with the intent to cause that consequence. For example, a prize fighter does not consent to being knocked out, and perhaps even seriously injured or killed, but does consent to the other fighter’s attempting to hit him and knock him out, with possible consequences of serious injury or even death.

3. Fraudulently induced consent. Formal “consent” is invalid if it was induced by fraud, which includes intentional misrepresentation or failure to disclose facts known to be material to the plaintiff, that concerns the “essential nature” of the intentional conduct rather than merely the “collateral inducement” for agreeing to the intentional conduct. An example of a collateral inducement situation, in which there would be no civil action for a battery, is where the defendant induced the plaintiff to agree to sexual relations in return for money, but paid the plaintiff with money the defendant (but not the plaintiff) knew to be counterfeit. See Restatement Second § 18 comment f, § 892B & comment g; Dobbs § 100.

4. Consent to crimes. It is sometimes said that “no one may consent to a criminal act.” This is true for criminal prosecutions for such crimes as murder, prostitution, gambling, and breach of the peace (e.g., brawling). Consent by the participants in the crime will not bar a criminal prosecution for the public wrong caused by the participants’ wilful violation of the rules of social order. However, under the better (minority?) view, as set forth in Restatement Second §§ 60, 61 & 892C, consent negates a tort action although the conduct consented to is a crime, unless the conduct was made criminal in order to protect persons such as the plaintiff, regardless of their consent, from the activity made criminal. See, e.g., Hudson v. Craft, 204 P.2d 1 (Cal. 1949) (fight promoter, but not other fighter, liable in battery to injured fighter for injuries suffered during fight held without required license and accompanying safeguards).

**SCHROEDER V. LUFTHansa GERMAN AIRLINES**

United States Court of Appeals, Seventh Circuit
875 F.2d 613 (7th Cir. 1989)

ESCHBACH, Senior Circuit Judge. Christine K. Schroeder, the plaintiff-appellant, brought this diversity suit against Lufthansa German Airlines and unknown employees of Lufthansa (collectively “Lufthansa”), the defendants-appellees, under the Warsaw Convention for injuries sustained while she was a passenger on Lufthansa. . . .

On March 19, 1981, Schroeder was a passenger on Lufthansa flight 431, flying from Chicago to Frankfurt, West Germany. She was traveling with sixteen other students from Barrington High School and three adult chaperones. These students were members of the high school’s German classes, and they were participating in an educational tour of Germany.

After flight 431 had departed, Douglas Dillman, a classmate of Schroeder, telephoned the Air Traffic Control Center in Chicago and reported that Schroeder’s luggage contained a [25-pound] bomb. Dillman told the Chicago Air Traffic Control Center that
Schroeder did not place the bomb in her luggage and that she did not even know that it was there. The Chicago Air Traffic Control Center quickly notified Lufthansa in Frankfurt, the Federal Bureau of Investigation, the RCMP [Royal Canadian Mounted Police], and the Air Traffic Control Center in Moncton, Canada of the phone call. The Moncton control center then radioed flight 431, which was in Canadian airspace at this time, and informed the pilot that a bomb was in Schroeder’s luggage or on her person. The pilot requested and received permission to make an emergency landing at Gander, Canada. In order to keep the passengers calm, Lufthansa told them that the plane was landing in Gander due to technical problems.

The pilot had a flight attendant page Schroeder so that he could speak with her. After Schroeder walked to the front of the plane, she was met by the flight attendant who asked her to accompany him to the cockpit. The attendant then took Schroeder by the arm and led her into the cockpit. The pilot informed Schroeder about the phone call and inquired into whether she knew anything about it. Schroeder responded that she knew nothing about it and started to weep. Because he did not want the other passengers to be alarmed, the pilot requested that Schroeder remain in the cockpit. After she took an empty seat, the flight engineer fastened the four seat belts for her. Schroeder never stated that she wanted to leave the cockpit, and no one threatened her.

After the plane landed, all the passengers deplaned. Katherine Baer, one of the adult chaperones, was reluctant to leave the plane without Schroeder. A flight attendant, however, told her about the phone call and stated that Schroeder would be brought to the terminal. Eventually, Constable Parsons of the RCMP arrived, and he took custody of Schroeder. After searching her handbag, he transported Schroeder in a military car to the terminal building. At the terminal building, Constables Bourden and Smith questioned Schroeder about the bomb threat. During the course of their questioning, Officer Paulovics, a female officer of the Canadian Customs and Excise Department, conducted a personal search of Schroeder. She took Schroeder into another office and asked her to take her clothes off. Officer Paulovics then examined Schroeder’s clothes and her body, without touching her. When Officer Paulovics finished conducting the search, she escorted Schroeder back to Constables Bourden and Smith. Eventually, Baer joined Schroeder. At no time did Schroeder object to being searched or questioned, nor did she state that she wanted to leave. Indeed, Schroeder was always cooperative.

The entire questioning of Schroeder by the RCMP lasted more than five hours. During this period, Schroeder was visibly upset, crying much of the time. After the RCMP finished their investigation of the incident, all the passengers, including Schroeder, reboarded the plane and completed the flight to Frankfurt. As a result of this ordeal, however, Schroeder experienced severe anxiety. She sought psychiatric treatment, and her doctor diagnosed her as suffering from post-traumatic stress syndrome. On March 13, 1983, Schroeder filed her initial complaint in the district court.

In her first amended complaint, Schroeder sued Lufthansa under the Warsaw Convention for slander, battery, false arrest, false imprisonment, intentional infliction of emotional distress, and failure to warn. She alleged that the $75,000 liability cap contained in the Warsaw Convention did not apply because Lufthansa’s actions amounted to willful
Chapter Two. The Trespassery Intentional Torts

misconduct. The district court, applying Illinois law, dismissed her failure to warn claim for failing to state a claim upon which relief could be granted and subsequently granted Lufthansa’s summary judgment motion as to the rest of her tort claims. In granting Lufthansa’s summary judgment motion, the district court ruled: (1) that under the circumstances, Lufthansa’s actions were justified; (2) that even if Lufthansa were liable, the Warsaw Convention’s $75,000 liability cap would still apply because Lufthansa’s actions did not amount to willful misconduct; (3) that Lufthansa was not responsible for the actions of the RCMP; and (4) that the Warsaw Convention does not allow recovery for slander or for intentional infliction of emotional distress. We affirm rulings (1) and (3), and thus do not need to consider rulings (2) and (4). [The court’s discussion of the third ruling, in Part II of its opinion, is omitted.]

Schroeder challenges the district court’s granting of Lufthansa’s motion for summary judgment. She claims that summary judgment was improper because a factual dispute exists as to whether Lufthansa’s actions were justified under Illinois law. Therefore, she requests that our court reverse the district court and reinstate her causes of action for false arrest, false imprisonment, battery, and intentional infliction of emotional distress.

. . . We will now examine each of Schroeder’s tort claims. Because we have already held that Lufthansa is not liable for the actions taken by the RCMP, we review her tort claims based only on actions taken by Lufthansa. Of course, we review the evidence in the light most favorable to Schroeder, and we draw all reasonable inferences from the underlying facts in her favor. . . .

A. False Arrest and False Imprisonment

We will simultaneously examine Schroeder’s claims for false arrest and false imprisonment since they are factually interrelated. Under Illinois law, false arrest consists of a restraint or an arrest caused by another without reasonable grounds to believe that a crime is being committed. False imprisonment is the unlawful restraint of another’s personal liberty or freedom of movement. Although an action for false arrest is not identical to an action for false imprisonment, a false arrest is one way of committing a false imprisonment.

Both torts center on an unlawful restraint of another person. In this regard, actual force is not necessary. The unlawful restraint can be effected by words alone. The restrained individual’s submission, however, “must be to a threatened and reasonably apprehended force.” It is essential that the confinement be against the person’s will, otherwise there is no unlawful restraint.

1For example, in her first amended complaint, Schroeder bases her battery claim in part on the allegation that “the strip search by the [RCMP] of [Schroeder] whereby they physically removed her clothing piece by piece, was done without [Schroeder’s] consent and amounted to an unwarranted physical contact of an offensive and harmful nature....” Because this part of her battery claim derives from the RCMP’s search of Schroeder, Lufthansa cannot be held liable for it, and therefore, it is unnecessary for us to discuss it.
In her first amended complaint, Schroeder alleges that Lufthansa forcibly strapped and restrained her in a seat in the cockpit, which deprived her of her freedom. She further alleges that she was not allowed to speak to the tour chaperones, although she requested to do so. Finally, she claims that Lufthansa committed these acts without having “a reasonable belief that [she] was a terrorist with a twenty-five (25) pound bomb on her person.” Schroeder argues that under these circumstances, this treatment of her amounted to an unlawful restraint.

Lufthansa’s actions did not amount to an unlawful restraint of Schroeder. The evidence indicates that Schroeder voluntarily cooperated with the Lufthansa personnel, willingly answered all their questions, and never voiced any objection to their requests. For example, she has not presented any facts to show that she ever told Lufthansa personnel that she did not want to go to the cockpit or, after she was there, that she wanted to leave. Additionally, although Schroeder may not have wanted to sit down in the cockpit, she voluntarily complied with the pilot’s request without voicing an objection. Similarly, she apparently did not object when the flight engineer fastened her seat belts for her.

Moreover, Schroeder has failed to point out any threats that were made to her in order to keep her in the cockpit. The fact that Schroeder felt “compelled” to stay in the cockpit is not by itself unlawful restraint; she must present facts indicating that she submitted to a threat, express or implied, or yielded to physical force. Because Schroeder has failed to present specific facts indicating that she was even restrained by Lufthansa, the district court properly granted summary judgment in favor of Lufthansa on her false arrest and false imprisonment claims.

Additionally, even if we were to construe her stay in the cockpit as an “arrest,” Lufthansa’s actions were justified. . . . Illinois law gives an individual the right to arrest another person so long as he has reasonable grounds to believe that the other person is committing a crime. An arrest pursuant to this statute cannot form the basis for civil liability. Because the pilot had received a radio message that Schroeder had a bomb on her or in her luggage [and had not been told that, according to the informant, Schroeder knew nothing about the bomb], Lufthansa had reasonable grounds to believe that she was committing a crime; thus, Lufthansa was fully justified in detaining her until the bomb threat could be thoroughly investigated.

[The court also affirmed the summary judgment for the defendant on the plaintiff’s other claims.]

We realize that Christine Schroeder was an innocent victim of this malicious bomb threat. Our review of the record, however, compels us to agree with the district court that Lufthansa is not liable for any injury she may have suffered. Therefore, for all the reasons discussed above, the judgment of the district court is AFFIRMED.

NOTES

1. Result versus rationale. Note that, even if Schroeder established a good prima facie case of false imprisonment, Lufthansa had a complete justification and thus defense for
its actions. Lufthansa’s (employees’) reasonable belief that Christine might be involved in a bomb threat provided, as the court held, a sufficient justification or defense to any valid prima facie case of assault, battery, false imprisonment, or intentional infliction of emotional distress, whether or not Christine consented to what was done to her. Some of the (many) relevant defenses will be discussed in section E below. Did the clear justification for Lufthansa’s actions lead the court to deal too cavalierly with the required elements of the prima facie case?

2. **Confinement.** Was Christine restrained or confined by Lufthansa? What do you think would have happened if Christine had tried to leave the cockpit? What do you think Christine thought would happen if she tried to leave the cockpit? See Dobbs at 71 (“A threat may be implied in the fact that the plaintiff is isolated and outnumbered, confronted by figures of authority or power, or subjected to hostility and verbal abuse. Other evidence of a threat might include the relative ages, independence, education, and power of the parties.”).

3. **Actual consent.** Assuming Christine was confined in the cockpit, did she actually (subjectively) consent to such confinement? Do you agree with the court’s ruling that no reasonable person could find that Christine had not consented to her confinement, because she cooperated and failed to explicitly object—a rationale which would seem to apply, although it was not part of the court’s holding, to her detention and strip search by the RCMP, or to a person who, without explicit objection, hands over his money to a robber with a gun? Was she “willing in fact” to be confined? Was she explicitly or implicitly given a choice to leave the cockpit (e.g., to sit with or at least talk to her fellow students or chaperones)? Do you think that she thought she had a choice? What do you think she would have decided to do if she had been given a choice?

4. **Coercive environments.** Compare Florida v. Bostick, 111 S. Ct. 2382 (1991), in which a majority of the U.S. Supreme Court held that a criminal defendant’s alleged consent to police officers’ request to search his luggage during a suspicionless “drug sweep” of a bus, after he allegedly was advised of his right to refuse consent, was voluntary and thus valid only if the trial court, considering the totality of the circumstances, were to find that “a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.” Three justices dissented, finding that in circumstances such as those that existed in this case (the bus was in transit but temporarily stopped in a terminal to load and discharge passengers, and the “request” was made by armed officers who were blocking the aisle and standing over the defendant as he was seated in the back of the crowded bus) no reasonable person could refuse to find that the environment was so inherently coercive and intrusive as to invalidate the alleged consent.

5. **Apparent consent.** Even if the plaintiff did not actually consent to the defendant’s intentional conduct, the defendant will not be liable if there was “apparent consent”—that is, if the defendant reasonably thought that the plaintiff’s words or conduct in the particular situation indicated actual consent. See Restatement Second § 892(2): “If words or conduct are reasonably understood by another to be intended as consent, they constitute apparent consent and are as effective as consent in fact.” Compare Restatement Third: Intentional Torts § 115 (March 2016 draft): “An actor is not liable to another if a reasonable person in the position of the actor would believe that the other actually consents to the actor’s
B.3. Consent or Authorization

otherwise tortious intentional conduct.” Is there a significant change in the Restatement Third’s draft formulation? Consider id. comment c:

Although, in many cases, the actor’s belief that the plaintiff actually consented will not be reasonable unless his belief is based on the words or conduct of the plaintiff, in other cases, the actor’s belief is reasonable even if it is based on the words or conduct of someone other than the plaintiff, or on customary norms even if plaintiff has engaged in no affirmative conduct.

Does this “broader view” depart too far from the ordinary meaning and understanding of consent, and/or substantially overlap the category of “implied-in-law consent” that is to be covered in id. § 116, which “includes socially justifiable minor contacts, such as pushing against pedestrians or bus and subway passengers in crowded conditions, or requiring people evacuating a building during a fire alarm to move in such haste that they must touch each other while exiting”?

Apparent consent will exist if the defendant reasonably inferred the plaintiff’s actual consent, even if others (but not the defendant) were aware at the time of the plaintiff’s lack of actual consent, or even if it is subsequently proven that the plaintiff did not actually consent. For example, other participants in a game of football are entitled to rely upon your apparent consent to being tackled when you participate in the game, even if, unknown to the other participants, you are unaware that tackling is part of the game and you would not participate if you were aware of that fact.

Would it have been reasonable for Lufthansa to assume that Christine was willing to be confined? Did Lufthansa care whether she was willing to be confined? More to the point, given the procedural posture of the case, could a juror reasonably decide that it was not reasonable for Lufthansa to think that Christine was “freely and voluntarily” choosing, assenting and agreeing to be confined? If so, did the trial court incorrectly grant summary judgment on this issue? Did the appellate court, as it claimed, “review the evidence in the light most favorable to Schroeder”?

b. “CONSENT” (AUTHORIZATION) IMPLIED BY LAW

In some situations in which there is neither actual nor apparent consent to the defendant’s intentional conduct, the courts will find “consent” (better described as “authorization”) as a matter of law.

i. Medical Treatment

MOHR V. WILLIAMS

Supreme Court of Minnesota
95 Minn. 261, 104 N.W. 12 (1905)

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

The trial in the court below resulted in a verdict for plaintiff for $14,322.50. Defendant thereafter moved the court for judgment notwithstanding the verdict, on the ground that, on the evidence presented, plaintiff was not entitled to recover, or, if that relief was denied, for a new trial on the ground, among others, that the verdict was excessive; appearing to have been given under the influence of passion and prejudice. The trial court denied the motion for judgment, but granted a new trial on the ground, as stated in the order, that the damages were excessive. Defendant appealed from the order denying the motion for judgment, and plaintiff appealed from the order granting a new trial.

1. . . . [W]hether a new trial upon the ground of excessive or inadequate damages should be granted or refused, or whether the verdict should be reduced, rests in the sound judicial discretion of the trial court, in reviewing which this court will be guided by the general rule applicable to other discretionary orders. . . . Where the damages are susceptible of ascertainment by calculation, and the jury return either an inadequate or excessive amount, it is the duty of the court to grant unconditionally a new trial for the inadequacy of the verdict, or, if excessive, a new trial unless plaintiff will consent to a reduction of the amount given by the jury.

Applying the rule stated to the case at bar, we are clear the trial court did not abuse its discretion in granting defendant’s motion for a new trial, and its order on plaintiff’s appeal is affirmed. . . .
2. . . . We shall consider first the question whether, under the circumstances shown in the record, the consent of plaintiff to the operation was necessary. If, under the particular facts of this case, such consent was unnecessary, no recovery can be had, for the evidence fairly shows that the operation complained of was skillfully performed and of a generally beneficial nature. But if the consent of plaintiff was necessary, then the further questions presented become important. This particular question is new in this state. At least, no case has been called to our attention wherein it has been discussed or decided, and very few cases are cited from other courts. We have given it very deliberate consideration, and are unable to concur with counsel for defendant in their contention that the consent of plaintiff was unnecessary.

The evidence tends to show that, upon the first examination of plaintiff, defendant pronounced the left ear in good condition, and that, at the time plaintiff repaired to the hospital to submit to the operation on her right ear, she was under the impression that no difficulty existed as to the left. In fact, she testified that she had not previously experienced any trouble with that organ. It cannot be doubted that ordinarily the patient must be consulted, and his consent given, before a physician may operate upon him.

It was said in the case of Pratt v. Davis, 37 Chicago Leg. News, 213: “Under a free government, at least, the free citizen’s first and greatest right, which underlies all others — the right to the inviolability of his person; in other words the right to himself — is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skilful or eminent, who has been asked to examine, diagnose, advise, and prescribe (which are at least necessary first steps in treatment and care), to violate, without permission, the bodily integrity of his patient by a major or capital operation, placing him under an anaesthetic for that purpose, and operating upon him without his consent or knowledge.”

1 Kinkead Torts, § 375, states the general rule on this subject as follows: “The patient must be the final arbiter as to whether he shall take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right. Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate.” There is logic in the principle thus stated, for, in all other trades, professions, or occupations, contracts are entered into by the mutual agreement of the interested parties, and are required to be performed in accordance with their letter and spirit. No reason occurs to us why the same rule should not apply between physician and patient. If the physician advises his patient to submit to a particular operation, and the patient weighs the dangers and risks incident to its performance, and finally consents, he thereby, in effect, enters into a contract authorizing his physician to operate to the extent of the consent given, but no further.

It is not, however, contended by defendant that under ordinary circumstances consent is unnecessary, but that, under the particular circumstances of this case, consent was implied; that it was an emergency case, such as to authorize the operation without express consent or permission. . . . If a person should be injured to the extent of rendering him unconscious, and his injuries were of such a nature as to require prompt surgical attention, a physician called to attend him would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb, and
consent on the part of the injured person would be implied. And again, if, in the course of an operation to which the patient consented, the physician should discover conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life or health of the patient, he would, though no express consent was obtained or given, be justified in extending the operation to remove and overcome them.

But such is not the case at bar. The diseased condition of plaintiff’s left ear was not discovered in the course of an operation on the right which was authorized, but upon an independent examination of that organ, made after the authorized operation was found unnecessary. Nor is the evidence such as to justify the court in holding, as a matter of law, that it was such an affection as would result immediately in the serious injury of plaintiff, or such an emergency as to justify proceeding without her consent. She had experienced no particular difficulty with that ear, and the questions as to when its diseased condition would become alarming or fatal, and whether there was an immediate necessity for an operation, were, under the evidence, questions of fact for the jury.

3. The contention of defendant that the operation was consented to by plaintiff is not sustained by the evidence. At least, the evidence was such as to take the question to the jury. This contention is based upon the fact that she was represented on the occasion in question by her family physician; that the condition of her left ear was made known to him, and the propriety of an operation thereon suggested, to which he made no objection. It is urged that by his conduct he assented to it, and that plaintiff was bound thereby. It is not claimed that he gave his express consent. It is not disputed but that the family physician of plaintiff was present on the occasion of the operation, and at her request. But the purpose of his presence was not that he might participate in the operation, nor does it appear that he was authorized to consent to any change in the one originally proposed to be made. Plaintiff was naturally nervous and fearful of the consequences of being placed under the influence of anesthetics, and the presence of her family physician was requested under the impression that it would allay and calm her fears. The evidence made the question one of fact for the jury to determine.

The amount of plaintiff’s recovery, if she is entitled to recover at all, must depend upon the character and extent of the injury inflicted upon her, in determining which the nature of the malady intended to be healed and the beneficial nature of the operation should be taken into consideration, as well as the good faith of the defendant.

Orders affirmed.

NOTES

1. Necessity of consent. If a doctor performs an operation on a patient without proper consent—actual, apparent, or implied by law—he has committed a battery, even if the operation was performed in good faith and competently for the plaintiff’s benefit, and indeed even if it was necessary to save the plaintiff’s life and effected a complete cure. A competent person has the right to refuse medical treatment. See Restatement Second § 13 comment c.
2. **The scope of consent.** In *Mohr* and each of the following cases in this section, the patient consented to being operated on by the defendant. The critical issue in each case is whether the doctor exceeded the scope of the patient’s consent. If so, a battery was committed. See Restatement Third: Intentional Torts § 118 (March 2016 draft) which states that an actor who intentionally causes a contact with the person of a patient in furtherance of medical treatment is liable for battery if the actor “fails to obtain the patient’s consent to the nature, type, or extent of physical contact that the actor causes.” Id. § 102 comment b at 53-54 (approved May 2015) states that liability exists even if the actor mistakenly exceeds the scope of consent. Was the operation performed by the defendant in *Mohr*, or the examination of the plaintiff’s left ear after she was anaesthetized, within the scope of the plaintiff’s actual or apparent consent?

3. **Consent implied by law: substituted consent for the incapacitated.** Parents, guardians, spouses, and others with appropriate authorization can give “substituted consent” for those who are incapable of giving consent themselves (e.g., children, the mentally incapacitated, or, in emergencies only, normal adults who are temporarily incapacitated). Substituted consent, being literally consent by someone other than the patient which is substituted for the patient’s normally required consent, is a form of consent implied by law. The substituted consent is assumed to reflect what the patient herself, if competent, would willingly have agreed to. It therefore ordinarily must be for the patient’s benefit. Some particularly difficult cases have arisen—e.g., parents’ refusing on religious grounds to obtain necessary medical treatment for their children (for which parents may be subject to criminal as well as tort liability), and a parent’s or a legal guardian’s authorizing organ transplants from one child to benefit another child. Was there a good argument for authorizing substituted consent in *Mohr*? If so, who was or should have been authorized to give such substituted consent?

See Restatement Third: Intentional Torts § 113(a) (March 2016 draft): “If a person lacks the capacity to consent, and if applicable law authorizes another to consent for him or her, the consent of the other is legally effective.”; id. § 117 (Emergency Doctrine):

If an actor engages in otherwise tortious intentional conduct for the purpose of preventing or reducing a risk to the life or health of another, the actor is not liable to the other, even if the other has not actually consented to the conduct, provided that:

(a) the actor reasonably believes that:

(i) his or her conduct is necessary in order to prevent or reduce a risk to the life or health of the other that [greatly] outweighs the other’s interest in avoiding the otherwise tortious conduct; and

(ii) it is necessary to act immediately, before it is practicable for the actor to obtain actual consent from the other or from a person empowered to consent for the other, in order to prevent or reduce the risk to life or health; and

(b) the actor has no reason to believe that the other would not have actually consented to the conduct if the other had had the opportunity to do so.
4. *Damages.* The Minnesota Supreme Court affirmed the trial court’s granting of an order for a new trial in *Mohr*, on the ground that the damages awarded were excessive. Indeed, the supreme court questioned whether the plaintiff had suffered any actual harm, considering “the nature of the malady intended to be healed and the beneficial nature of the operation.” If there was no actual harm, must the battery action fail? Conversely, should Mrs. Mohr be entitled to punitive damages?

5. *Underlying moral principles.* What interests or principles are served by allowing or disallowing a battery action in a case like this, assuming there has been no actual harm? What interests or principles were invoked, explicitly or implicitly, by the Minnesota Supreme Court?

**KENNEDY V. PARROTT**

Supreme Court of North Carolina
90 S.E.2d 754 (1956)

Civil action to recover damages for personal injuries resulting from an alleged unauthorized operation performed by the defendant, a surgeon.

The plaintiff consulted the defendant as a surgeon. He diagnosed her ailment as appendicitis and recommended an operation to which she agreed. During the operation the doctor discovered some enlarged follicle cysts on her left ovary, and he punctured them. After the operation the plaintiff developed phlebitis in her leg. She testified that Doctor Parrott told her “that while he was puncturing this cyst in my left ovary that he had cut a blood vessel and caused me to have phlebitis and that those blood clots were what was causing the trouble.” [The defendant denied making this and other alleged statements.] She also testified that defendant told Dr. Tyndall, who was called in to examine her for her leg condition, “that while he was operating he punctured some cysts on my ovaries, and while puncturing the cyst on my left ovary he cut a blood vessel which caused me to bleed,” to which Dr. Tyndall said, “Fountain, you have played hell.”

The defendant recommended that the plaintiff go to Duke Hospital, and there is evidence he promised he would pay the bill. She also saw Dr. I. Ridgeway Trimble at Johns Hopkins, Baltimore. Dr. Trimble operated on her left leg and side “to try to correct the damage that was done.”

Plaintiff had to undergo considerable pain and suffering on account of the phlebitis and still has some trouble with it.

At the conclusion of the testimony, the court, on motion of the defendant, entered judgment of involuntary nonsuit. Plaintiff excepted and appealed.

BARNHILL, Chief Justice. [After upholding the judgment of nonsuit on the negligence claim] [If plaintiff’s] cause of action is for damages for personal injuries proximately resulting from an assault or trespass [battery] on her person, as she now asserts, and such operation was neither expressly nor impliedly authorized, she is entitled at least to nominal damages. . . .
While the law of contracts is applied as between a patient and his physician or surgeon, when a person consults a physician or surgeon, seeking treatment for a physical ailment, real or apparent, and the physician or surgeon agrees to accept him as a patient, it does not create a contract in the sense that term is ordinarily used. Usually there is no specification or particularization as to what the physician shall do. The patient selects, and commits himself to the care of, the doctor because he is confident the doctor possesses the requisite skill and ability to treat—and will treat—his physical ailment and restore him to normal good health. The physician, after diagnosing the ailment, prescribes the treatment or the medicine to be administered; but the patient is under no legal obligation to follow the physician’s instructions. Thus it is apt and perhaps more exact to say it creates a status or relation rather than a contract. In any event, agreement imposes on the physician or surgeon the duty, in the treatment of the patient, to apply his skill and ability in a careful and prudent manner.

Prior to the advent of the modern hospital and before anesthesia had appeared on the horizon of the medical world, the courts formulated and applied a rule in respect to operations which may now be justly considered unreasonable and unrealistic. During the period when our common law was being formulated and applied, even a major operation was performed in the home of the patient, and the patient ordinarily was conscious, so that the physician could consult him in respect to conditions which required or made advisable an extension of the operation. And even if the shock of the operation rendered the patient unconscious, immediate members of his family were usually available. Hence the courts formulated the rule that any extension of the operation by the physician without the consent of the patient or someone authorized to speak for him constituted a battery or trespass upon the person of the patient for which the physician was liable in damages.

However, now that hospitals are available to most people in need of major surgery; anesthesia is in common use; operations are performed in the operating rooms of such hospitals while the patient is under the influence of an anesthetic; the surgeon is bedecked with operating gown, mask, and gloves; and the attending relatives, if any, are in some other part of the hospital, sometimes many floors away, the law is in a state of flux. More and more courts are beginning to realize that ordinarily a surgeon is employed to remedy conditions without any express limitation on his authority in respect thereto, and that in view of these conditions which make consent impractical, it is unreasonable to hold the physician to the exact operation—particularly when it is internal—that his preliminary examination indicated was necessary. We know that now complete diagnosis of an internal ailment is not effectuated until after the patient is under the influence of the anesthetic and the incision has been made.

These courts act upon the concept that the philosophy of the law is embodied in the ancient Latin maxim: Ratio est legis anima; mutata legis ratione mutatur et lex. Reason is the soul of the law; the reason of the law being changed, the law is also changed.

Some of the courts which realize that in view of modern conditions there should be some modification of the strict common law rule still limit the right of surgeons to extend an operation without the express consent of the patient to cases where an emergency arises.
calling for immediate action for the preservation of the life or health of the patient, and it is impracticable to obtain his consent or the consent of someone authorized to speak for him.

Other courts, though adhering to the fetish of consent, express or implied, realize that “The law should encourage self-reliant surgeons to whom patients may safely entrust their bodies, and not men who may be tempted to shirk from duty for fear of a law suit.” They recognize that “The law does not insist that a surgeon shall perform every operation according to plans and specifications approved in advance by the patient, and carefully tucked away in his office-safe for courtroom purposes.” [¶] [We subscribe to this view.]

. . . In major internal operations, both the patient and the surgeon know that the exact condition of the patient cannot be finally and definitely diagnosed until after the patient is completely anesthetized and the incision has been made. In such case the consent—in the absence of proof to the contrary—will be construed as general in nature and the surgeon may extend the operation to remedy any abnormal or diseased condition in the area of the original incision whenever he, in the exercise of his sound professional judgment, determines that correct surgical procedure dictates and requires such an extension of the operation originally contemplated. This rule applies when the patient is at the time incapable of giving consent, and no one with authority to consent for him is immediately available.

In short, where an internal operation is indicated, a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated, and for so doing he is not to be held in damages as for an unauthorized operation. . . .

Here plaintiff submitted her body to the care of the defendant for an appendectomy. When the defendant made the necessary incision he discovered some enlarged follicle cysts on her ovaries. He, as a skilled surgeon, knew that when a cyst on an ovary grows beyond the normal size, it may continue to grow until it is large enough to hold six to eight quarts of liquid and become dangerous by reason of its size. The plaintiff does not say that the defendant exercised bad judgment or that the extended operation was not dictated by sound surgical procedure. She now asserts only that it was unauthorized, and she makes no real showing of resulting injury or damage.

In this connection it is not amiss to note that the expert witnesses testified that the puncture of the cysts was in accord with sound surgical procedure, and that if they had performed the appendectomy they would have also punctured any enlarged cysts found on the ovaries. “That is the accepted practice in the course of general surgery.”

What was the surgeon to do when he found abnormal cysts on the ovaries of plaintiff that were potentially dangerous? Was it his duty to leave her unconscious on the operating table, doff his operating habiliments, and go forth to find someone with authority to consent to the extended operation, and then return, go through the process of disinfecting, don again his operating habiliments, and then puncture the cysts; or was he compelled, against his best judgment, to close the incision and then, after plaintiff had fully recovered from the effects of the anesthesia, inform her as to what he had found and advise her that these cysts might cause her serious trouble in the future? The operation was simple, the incision had been
made, the potential danger was evident to a skilled surgeon. Reason and sound common sense dictated that he should do just what he did do. So all the expert witnesses testified.

Therefore, we are constrained to hold that plaintiff’s testimony fails to make out a *prima facie* case for a jury on the theory she brings her appeal to this Court. The judgment entered in the court below is *Affirmed*.

**NOTES**

1. *Consent?* What type of consent was found to exist in *Kennedy*? Actual consent? Apparent consent? Substituted consent implied by law? If it was substituted consent implied by law, who was authorized to give the consent, subject to what conditions and limitations? Authorization due to an emergency situation involving a serious threat to life or health?

2. *Precedential reasoning.* Can the *holding* in *Kennedy* be reconciled with the holding in *Mohr*? Does it have to be? Can the *reasoning* in the two cases be reconciled?

3. *Underlying moral principles.* Did the North Carolina Supreme Court in *Kennedy* seem to emphasize the same interests and underlying moral principles that the Minnesota Supreme Court did in *Mohr*?

**IPOCK FOR HILL V. GILMORE**

Court of Appeals of North Carolina

85 N.C. App. 70, 354 S.E.2d 315 (1987)
cert. denied, 320 N.C. 169, 358 S.E.2d 52 (1987)

On 18 February 1981, Judith Hill was admitted to Lenoir Memorial Hospital for the purpose of undergoing a permanent sterilization procedure called laparoscopy. Laparoscopy, often referred to as “band-aid surgery,” is a minor operation where small incisions are made in the abdominal wall, a laparoscope is inserted in the incision, and the fallopian tubes are sealed by clips or an electric current. The patient generally is released from the hospital the same day.

Both Mrs. Hill and Mr. Hill signed a request for sterilization on 18 February 1981 which authorized Dr. Gilmore to perform the laparoscopy. Mrs. Hill also signed an operation consent form that same day.

On 19 February 1981, during the operation it was discovered that the patient’s tubes and ovaries were completely bound down bilaterally by adhesions. Dr. Gilmore also discovered a cystic mass and chronic infection. Dr. Gilmore determined that it would be in the patient’s best interest to perform a total abdominal hysterectomy. He left the operating room to consult with Mr. Hill. He then returned to the operating room and performed the hysterectomy.

Post-operatively, Mrs. Hill was noted to be confused. She was subsequently diagnosed as suffering from hypoxic brain damage (brain damage caused by a deprivation
of oxygen to the brain) which occurred either during or immediately following the surgery performed by Dr. Gilmore.

On 11 January 1982, Mrs. Hill, through her guardian ad litem, Barbara Ipock, Timothy W. Hill, her husband, and Timothy Jason Hill, her son, through his guardian ad litem, instituted this action against Dr. Gilmore and several others, including an anesthesiologist, a nurse anesthetist and Lenoir Memorial Hospital, Inc., to recover damages for the injuries to Mrs. Hill and her family’s loss of consortium.

[Defendant Gilmore’s motion for summary judgment was allowed. Plaintiffs excepted and the case proceeded, successfully, against the other defendants in negligence. Plaintiffs appealed the order granting doctor Gilmore’s motion for summary judgment. In a prior appeal, the order was vacated and the case was remanded. On remand, plaintiffs obtained leave to file an amended complaint adding a claim of battery by Gilmore and seeking punitive damages. Gilmore filed a motion for partial summary judgment on the battery and punitive damages claims, which was granted. Plaintiffs appealed.]

ARNOLD, Judge. . . . It has been established that only an unauthorized operation constitutes a battery. In fact, the N.C. Supreme Court stated that:

... where an internal operation is indicated, a surgeon may lawfully perform, and it is his duty to perform, such operation as good surgery demands, even when it means an extension of the operation further than was originally contemplated, and for so doing he is not to be held in damages as for an unauthorized operation. Kennedy v. Parrott.

The request for sterilization signed by both Judith and Timothy W. Hill authorized Dr. Gilmore to perform the laparoscopy and “to do any other procedure that his judgement may dictate during the above operation.” The operation consent form which was signed by Mrs. Hill stated that, “[i]f any conditions are revealed at the time of the operation that were not recognized before and which call for procedures in addition to those originally contemplated, I authorize the performance of such procedures.”

In light of the established case law above and the consent forms signed by Mrs. Hill, the trial court properly granted partial summary judgment dismissing plaintiffs’ claims for battery because the evidence presented did not support such claims.

PHILLIPS, Judge, dissenting . . . [I]n my opinion the battery claim of Judith I. Hill and Timothy W. Hill was erroneously dismissed, because whether Dr. Gilmore was authorized to do the operation that he did is not a question of law that judges can decide, but is a question of fact that a jury must resolve. An authorization for medical treatment, when the intention of the parties is disputed with good reason as in this case, derives its meaning, as do other disputed authorizations and contracts, not merely from the words used, but from the circumstances that caused the writing to be executed in the first place. The context in which Mrs. Hill signed the authorization permitting Dr. Gilmore to invade her body was not that her body had to be rendered sterile at all perils and costs as Dr. Gilmore’s conduct would seem to indicate. The evidence plainly shows that she and her husband merely wanted to
avoid another pregnancy by some convenient and safe means, and it is a matter of common knowledge that a number of such means were available to them, some of which required only minor surgery on the wife or husband, and others of which required no surgery at all, but merely the use of a birth control device, of which there are several kinds. It was in that setting that Dr. Gilmore obtained Mrs. Hill’s consent to do the band-aid procedure described and when he allegedly discovered that that simple little operation could not be completed as planned because of adhesions that did not jeopardize her health or life, he had no reason for assuming that she had consented, or would consent if given the chance, to the removal of her fallopian tubes, ovaries and uterus. Common decency and sense, as well as professional duty, required him to recognize, it seems to me, that drastic major surgery at that time was not justified, whether she had technically consented to it or not; for he knew that notwithstanding the boiler plate language in the authorization form, that Mrs. Hill did not expect to awaken with her ovaries, fallopian tubes and uterus gone and that he had done nothing whatever to prepare her for such a traumatic eventuality, the necessity for which, when possible, is a matter of common knowledge. Under the circumstances, therefore, his plain duty in my opinion was to terminate the operation, discuss the remaining alternatives with her, and let her decide whether to give up her bodily organs or not. That instead of doing these things Dr. Gilmore proceeded to conduct an undiscussed, unauthorized, unprepared for major operation and to remove her reproductive organs is evidence aplenty in my opinion that a battery was committed. The sweeping authority that the Court gave to surgeons by *Kennedy v. Parrott*, is not available to the defendant in this case; for *Kennedy* by its terms applies only to instances where the patient is operated on for some health threatening cause and during the operation the surgeon discovers another threat to the patient’s health and good surgical practice requires that the operation authorized be extended and it is not feasible to obtain the patient’s consent. None of which conditions existed in this case; for the evidence, viewed as we must view it, indicates that nothing was wrong with Mrs. Hill, the operation authorized was elective, and it was not necessary to extend it. Furthermore, even if it had been advisable or necessary to extend the operation the evidence indicates it did not have to be done then and could have been done just as well the next day after Mrs. Hill had given her consent and been prepared for its consequences.

### Notes

1. **Judicial gender.** The only female judge on the intermediate appellate court in *Ipock*, Sarah Elizabeth Parker, was part of the majority. She subsequently was elevated to the North Carolina Supreme Court.

2. **Consent.** Setting aside the consent forms, what type of consent was found to exist in *Ipock*? Actual consent? Apparent consent? Substituted consent implied by law? If it was substituted consent implied by law, who was authorized to give the consent, subject to what conditions and limitations?

3. **Consent forms.** What is or should be the effect on the consent issue of a signed consent form, as existed in *Ipock*, which contains broad boilerplate language authorizing the doctor to do whatever she deems necessary or appropriate, especially when (as in *Ipock*) such forms are given to the patient to sign immediately prior to the operation, when being
admitted to the hospital? Should it depend on the circumstances surrounding the signing of the consent form?

On the related issue of whether exculpatory clauses waiving liability for negligent or reckless conduct should be enforced, the courts generally hold that such clauses are not enforceable unless the “agreement is freely and fairly made, between parties who are in an equal bargaining position, and there is no social interest with which they interfere.” Restatement Second § 496B cmt. b. As always, the person who allegedly consented must have been aware of and understood the relevant terms. Proof of such knowledge and understanding is especially important when the contract language was drafted by the defendant and the plaintiff was a passive recipient, in which case the contract terms usually will be strictly construed against the defendant. Id. cmts. c & d. A disparity in bargaining power that will render the exculpatory clause unenforceable may arise from the defendant’s monopoly of a particular field of service, from the generality of use of contract clauses insisting upon assumption of risk by all those engaged in such a field, so that the plaintiff has no alternative possibility of obtaining the service without the clause; or it may arise from the exigencies of the needs of the plaintiff himself, which leave him no reasonable alternative to the acceptance of the offered terms. Id. cmt. j; see id. cmt. f (employer and employee); id. cmt. g (those charged with a duty of public service); id. cmt. e (agreements contrary to public policy); Tunkl v. Regents of University of California, 383 P.2d 441 (Cal. 1963); Madison v. Superior Court, 250 Cal. Rptr. 299 (Cal. App. 1988).

4. Precedential reasoning. Can the holding in Ipock be reconciled with the holding in Mohr? Does it have to be? Is the holding in Ipock mandated by the holding or the reasoning in Kennedy, or could the court in Ipock have reasonably distinguished the holding in Kennedy and held for the plaintiff in Ipock? Does Judge Phillips’ dissent demonstrate how this might be done? How persuasive is his dissent?

5. The male version. In Seaton v. Patterson, Phillip Patterson, suffering from inflammation and swelling of the foreskin of his penis, painful urination, and increased urinary frequency, was evaluated by Dr. John Patterson, who diagnosed balanitis (inflammation of the foreskin) and phimosis (inability to retract the foreskin due to tightness) and recommended a circumcision, to which Seaton agreed. Seaton, who has a limited ability to read or write (of which Dr. Patterson was not informed) signed a consent form which stated:

I recognize that, during the course of the procedure(s), unforeseen conditions may necessitate additional or different procedures than those set out in the paragraph. I, therefore, further authorize and request that my physician . . . perform such procedures as are in my physician’s professional judgment, necessary and desirable including, but not limited to procedures involving pathology and radiology. The authorization granted under this paragraph shall extend to remedying or repairing conditions that were not known to my physician at the time the procedures commenced.
When Dr. Patterson made an incision in the foreskin to begin the circumcision, while Seaton was unconscious due to a general anesthesia, he observed an invasive tumor which he identified as likely cancerous, which he later testified preventing him from inserting a catheter to drain urine from the bladder and would render Seaton unable to urinate without the insertion of a catheter, with possible serious complications and additional surgery if he did not insert the catheter. He amputated the head of the penis, which had been nearly totally infiltrated by the tumor and subsequently was found to be squamous cell carcinoma (skin cancer).

Seaton sued Dr. Patterson for performing the partial penectomy without his consent and thus depriving him of the opportunity to obtain a second opinion and possible treatments other than the penectomy, the anesthesiologist for giving him a general anesthesia without his consent and thereby rendering him unconscious and unable to prevent the penectomy, and the hospital where the surgery was performed. The anesthesiologist and hospital settled prior to the trial. Lisa King, The Sentinel News (Dec. 26 & 29, 2012) http://www.sentinelnews.com/content/penis-amputation-case-may-go-kentucky-supreme-court. Seaton sought a directed verdict, relying on Tabor v.Scobee, 254 S.W.2d 474 (Ky. 1953), in which a surgeon performing an appendectomy observed and removed swollen and infected fallopian tubes without obtaining consent from the patient or her parents. The Tabor court had held that doing so was a battery in the absence of a life-threatening emergency requiring immediate treatment: even though a “delay might have proved harmful, even fatal, there still was time to give the parent and the patient the opportunity to weigh that fateful question.” Id. at 477. Seaton’s motion for a directed verdict and post-trial motions for a judgment notwithstanding the verdict or a new trial were all denied. A 2-1 majority of the intermediate appellate court, relying on the signed consent form, affirmed the trial court. See http://apps.courts.ky.gov/Appeals/Minutes/MNT12212012.pdf (page 4, no. 1202) and http://www.leagle.com/decision/In%20KYCO%2020121221371. The Kentucky Supreme Court denied Seaton’s petition for discretionary review (Case # 2013-SC-00048, http://162.114.92.78/dockets/).

ii. Socially Accepted/Necessary Conduct

A major category of implied by law consent, addressed in Restatement Third: Intentional Torts § 116 (March 2016 draft) encompasses situations in which the defendant’s conduct conforms to ordinary social norms and practices and there was no known objection to such conduct by the plaintiff, or even if there was a known objection if complying with the objection would unreasonably interfere with the defendant’s legitimate activities or would be contrary to public policy. This category of consent implied by law is discussed further in sections C.1 and C.2 below, as part of our more detailed consideration of the intentional torts of battery and assault. As mentioned in the last note in the immediately preceding section, B.3.b, Restatement Third: Intentional Torts § 115 (March 2016 draft) confusingly treats these types of situations as involving apparent consent as well as implied by law consent if there was no known objection by the plaintiff.
C. TRESPASS TO THE PERSON

1. BATTERY

The various cases discussed so far in this chapter support the following definition of the intentional tort of battery:

A prima facie case of battery exists when the defendant engaged in conduct that was intended to cause and actually did cause a physical contact with the person of the plaintiff, for which there was no consent and for which responsibility is properly attributable to the defendant.

The last part of the above definition refers to the attributable responsibility (proximate cause) element of the prima facie case, which usually is trivially satisfied in a battery case but nevertheless must be included for a complete definition (and should not be overlooked in an exam question!). Detailed discussion of this element is postponed to chapter 7.

**SCHROEDER V. LUFTHANSA GERMAN AIRLINES**
United States Court of Appeals, Seventh Circuit
875 F.2d 613 (7th Cir. 1989)

ESCHBACH, Senior Circuit Judge. [The facts and the court’s discussion of the false imprisonment claim are included in section B.3 above.]

B. Battery

Under Illinois civil law, a battery is defined as the unauthorized touching of another person. See Gaskin v. Goldwasser, 520 N.E.2d 1085, 1094 (Ill. App.), appeal denied, 526 N.E.2d 830 (Ill. 1988); Parrish v. Donahue, 443 N.E.2d 786, 788 (Ill. App. 1982). “To be liable for battery, the defendant must have done some affirmative act, intended to cause an unpermitted contact.” Mink v. University of Chicago, 460 F. Supp. 713, 717 (N.D. Ill.1978); accord Gaskin, 520 N.E.2d at 1094. Not all unconsented contacts, however, are batteries. The contact must be of a harmful or offensive nature. See Welch v. Ro-Mark, Inc., 398 N.E.2d 901, 905 (Ill. App. 1979) (“A plaintiff may recover for civil assault and battery where the defendant intentionally acted to cause harmful or offensive contact with the plaintiff.”).

In her first amended complaint, Schroeder alleges that Lufthansa personnel physically removed her from her seat in the passenger cabin and forcibly strapped and restrained her in a seat in the cockpit. Schroeder claims that these acts were done without her consent and constituted physical contacts of “an offensive and harmful nature.”

A review of the record demonstrates that Lufthansa did not commit battery. First, Schroeder has failed to present any facts to support her allegation that she was physically removed from her seat in the passenger section of the airplane. A bare allegation, by itself, is insufficient to defeat a motion for summary judgment. Moreover, although there is some
C. Trespass to the Person

minimal evidence to suggest that a flight attendant took her by the arm and led her to the cockpit, this contact cannot be considered harmful or offensive. Schroeder voluntarily went with the flight attendant (which suggests consent) and apparently never indicated to the flight attendant that she was harmed or offended by this alleged touching. Additionally, we fail to see how Lufthansa tortiously injured Schroeder in the cockpit. Although the flight engineer may have fastened her seat belts for her, this contact cannot be interpreted as harmful or offensive.

The harmful or offensive nature of the unauthorized contact is readily evident in those cases in which Illinois courts have imposed civil liability for battery. See, e.g., Parrish, 443 N.E.2d at 788 (finding liability when the defendant hit the plaintiff with the butt of his handgun); Bernesak v. Catholic Bishop, 409 N.E.2d 287, 288-89 (Ill. App. 1980) (finding liability when, in the attempt to aid the plaintiff, she was hoisted onto a chair and her injured leg was pushed and pulled). If we were to construe either of the innocuous contacts of which Schroeder complains as harmful or offensive, we would essentially be excising this requirement from the tort of battery. Therefore, the district court properly granted summary judgment in favor of Lufthansa on this claim.

Moreover, even if we consider either of these contacts to be in some way harmful or offensive, we still find that Lufthansa’s actions were reasonable and justified. Under Lufthansa’s [Tariff], Lufthansa had the authority to remove enroute any passenger “when the conduct, age, status or mental or physical condition of the passenger is such as to ... involve any hazard or risk to himself or to other persons or to property.” Once the pilot received the radio message that a bomb was on Schroeder or in her luggage, her status changed from a normal passenger to a criminal suspect who posed a potential threat to all the passengers on the plane. In requesting that she come to the cockpit and remain there in a seat with the seatbelt fastened, Lufthansa acted reasonably and justifiably in accordance with its tariff.

NOTES

1. The required legal injury for a battery. The Schroeder court, a federal court applying its understanding of Illinois law, states that there will be no liability despite lack of consent if the physical contacts with the plaintiff’s person were neither harmful nor offensive. Did the courts in Vosburg, Garratt, Mohr, Kennedy or Ipock require that the physical contact be not merely without the consent of the plaintiff but also harmful or offensive? The Illinois statutes do state that, for a criminal battery, the physical contact must be harmful or offensive. 720 ILCS 5/12-3 (2008). However, they do not define a civil battery or assault, each of which instead has been defined by court decisions based on the common law.

The court’s assertion that a civil battery must be either harmful or offensive is based on dicta in Welch v. Ro-Mark, Inc., 398 N.E.2d 901, 905 (Ill. App. 1979) (quoting 3 Ill. L. & Prac. Assault & Battery, Sec. 11 (1953), a practice manual). The issue in Welch was whether the defendant had used excessive force in an admitted battering of the plaintiff while defending himself against an attack by the plaintiff. None of the other cases quoted or cited by the Schroeder court require that the physical contact be harmful or offensive. Instead,
they merely require an unauthorized or unpermitted physical contact. Indeed, the court in *Mink* emphasized that “[t]he gravamen of a battery action is the plaintiff’s lack of consent, not the form of the touching,” 460 F. Supp. at 717-18 & n.4, and the *Bernesak* court stated that “a battery in the context here pleaded carries with it neither malice, nor intent to commit bodily harm, but need contemplate only, as in the case *sub judice* [under consideration], an unauthorized attempt to render first aid by touching the victim’s body against her wishes or without her consent,” 409 N.E. 2d at 292 (citations omitted).

The focus on lack of consent or authorization, rather than harm or offensiveness, is also stressed in the principal torts treatises. See Dobbs § 29 at 55 (criticizing references to the “harmful” or “offensive” nature of a touching as distracting from the real issue: “The gist of the battery is that the plaintiff has been touched, in a way that she has not consented to and that is not justified by some generally recognized privilege”); Prosser § 9 at 36 (“The gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff.”).

2. *Offensiveness in Schroeder*? The *Schroeder* court concludes, as a matter of law, that none of the touchings of Christine could reasonably be considered either harmful or offensive, even if there was no consent. Were the touchings of Christine as “innocuous” and “inoffensive” as the court states? Beyond any reasonable disagreement, and hence properly dismissed by summary judgment? Did Christine’s reactions, at the time, to her treatment by Lufthansa indicate that she viewed that treatment as “innocuous” and “inoffensive”? Even if she did not consent to the various touchings?

The *Schroeder* court contrasts the touchings of Christine with those of the plaintiff in *Bernesak*, in which, the *Schroeder* court states, “[t]he harmful or offensive nature of the unauthorized contact is readily evident.” In *Bernesak*, the plaintiff flew off the end of a linked string of students playing “crack the whip” and hit the ground. She landed on her left leg and thigh and, half sitting and half lying on the ground, cried. Two teachers approached her and, when she could not get up by herself, attempted to help her up. When the weight was placed on her left leg, she experienced severe pain and collapsed to the ground, screaming. The teachers lifted her up onto a chair. One teacher, who stated that she was a nurse or had nursing experience, pulled the plaintiff’s leg outward and, when plaintiff screamed, pushed it back in. The teachers called her mother, who summoned an ambulance that took her to a hospital. The original fall fractured her hip; the parties disagreed on whether the teachers’ actions exacerbated her injury. The teachers were held liable for a battery. 409 N.E. 2d at 288-89. Is it “readily evident” that the touchings by the teachers were offensive? Physically harmful? Note that they clearly were not intended to be either harmful or offensive. Note also that the student, as with Christine in *Schroeder*, never objected to but rather cooperated with what the teachers were doing.

3. *The Restatement’s battery definitions*. The statement in the practice manual that was quoted in *Welch*, which is quoted in *Schroeder*, is based on the Restatement Second’s definitions of a battery, which are repeated in many secondary sources and by some courts. Restatement Second § 13 defines a harmful battery as follows:
Battery: Harmful Contact. An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other . . . , and (b) a harmful contact with the person of the other directly or indirectly results.

Restatement Second § 18 similarly defines an offensive battery by replacing “harmful contact” with “offensive contact” in clause (b) of the above definition.

A puzzling omission in the Restatement Second’s definitions of a battery is that they do not explicitly include the lack of consent requirement, which was included in the first Restatement and is insisted upon by the courts. The lack-of-consent requirement is acknowledged in the Restatement Second, but only in the comments and even then only obliquely. Comment d to section 13, on harmful batteries, is the most explicit. It introduces the lack-of-consent requirement as supposedly being implicit in the “subject to liability” language in the blackletter of section 13. The comments to section 18, on offensive batteries, merely refer to “unpermitted” touchings and to the effect of consent in precluding liability, without stating whether the consent issue arises as part of the prima facie case or as a defense. One must happen upon comment d to section 13, on harmful batteries, for an explicit statement that lack of consent is part of the prima facie case for an offensive battery, which the plaintiff must allege and prove. Comment c to section 10, on privilege, notes that lack of consent is part of the prima facie case for “invasions of the interests of personality.”

There are other problems with the Restatement Second’s definitions of a battery, some of which we have already discussed and some of which will be discussed in subsequent sections. One of the problems is the apparent requirement (from a literal reading of the definitions) that the defendant must not merely intend to cause a physical contact with the person of the plaintiff, but also must intend that the physical contact be harmful or offensive. As we discussed in section B.2.a above, this “dual” intent requirement is contrary to other sections and comments in the Restatement, the doctrines regarding liability of the insane and infants and liability despite a reasonable mistake regarding the identity of or consent by the person being intentionally touched, and statements and holdings by many courts, including courts like Garratt that quote the Restatement definitions.

A much better definition of a battery, which rejects the supposed “dual intent” requirement and explicitly includes the lack of consent requirement, is provided in Restatement Third: Intentional Torts § 101 (approved by the American Law Institute in May 2015):

An actor is subject to liability for battery if:
(a) the actor intends to cause a contact with the person of the other, as provided in § 102, or the actor’s intent is sufficient under § 110 (transferred intent);
(b) the actor’s affirmative conduct causes such a contact;
(c) the contact (i) causes bodily harm to the other or (ii) is offensive, as provided in § 103; and
(d) the other does not effectively consent to the otherwise tortious conduct of the actor, as provided in § 111 [which lists the various types of consent].
4. *Why require harm or offensiveness, in addition to lack of consent?* Would treating touchings such as Christine experienced, or all touchings done without the (actual, apparent or implied by law) consent of the person being touched, as offensive “be excising this requirement from the tort of battery,” as the *Schroeder* court states? If so, would that be a bad result? Isn’t an unconsented-to touching, by definition, offensive to the person being touched, so that requiring offensiveness in addition to lack of consent is redundant? If all touchings without consent are offensive, isn’t listing “harmful” as an alternative to “offensive” superfluous when there is a lack of consent? Is it possible to have a harmful battery which is not also an offensive battery, given that harmful batteries as well as offensive batteries require lack of consent by the plaintiff?

5. *Offensiveness versus implied consent based on prevalent social usages.* The Restatement Second defines offensiveness objectively rather than subjectively: “A bodily contact is offensive if it offends a reasonable sense of personal dignity.” Restatement Second § 19. Comment a to § 19 explains:

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

Recall the *Vosburg* court’s reference, in section B.1 above, to “the implied license of the play-grounds.” Generally, in the absence of some indication to the contrary by the plaintiff, there is implied consent to the usual friendly physical contacts among relatives and acquaintances, as well as to other contacts that constitute “social usages prevalent at the time and place.” (Might a similar notion apply to non-harmful physical entries by neighbors’ children or pets onto non-fenced lawns bordering a sidewalk or street?).

If the plaintiff is aware beforehand of an intended physical contact that is in accord with a prevalent social usage, his failure to object may reasonably be interpreted as actual consent to such contact and thus at least may constitute apparent consent. However, if the plaintiff is not aware beforehand of the intended contact and has not previously given blanket consent to all such contacts, there generally will be neither actual nor apparent consent to the contact, since actual consent requires that the plaintiff have actual knowledge of and assent to the intended contact and apparent consent requires that the defendant reasonably infer, from the plaintiff’s words or conduct on the particular occasion, that the plaintiff has knowledge of and assents to the intended contact. Instead, there is legally implied “consent” to (authorization of) such contacts in the absence of an objection by the plaintiff that is known to the defendant. Note that what is a prevalent social usage among friends often will not be a prevalent social usage among strangers. As mentioned in the last note in section B.3.b above, Restatement Third: Intentional Torts § 115 (March 2016 draft) muddies the distinction between apparent consent and consent implied by law for ordinary social usage contacts.

Given the existence of implied-by-law consent for ordinary social usage contacts, unless there is a known objection by the plaintiff, as well as the categories of actual and
apparent consent, is there any reason to have an offensiveness requirement in addition to the lack of consent requirement?

6. Consent, offensiveness and extrasensitive plaintiffs. What if the intentional contact with the plaintiff’s person is not one that “would offend the ordinary person” but would be subjectively offensive and objected to by the plaintiff, and the defendant knows this? Is it a “prevalent social usage” to touch a person in such circumstances? A caveat to Restatement Second § 19 states, “The Institute expresses no opinion as to whether the actor is liable [for a battery] if he inflicts upon another a contact which he knows will be offensive to another’s known but abnormally acute sense of personal dignity.” So, according to the Restatement, objective offensiveness perhaps may give way to subjective offensiveness if the defendant is aware of the subjective offensiveness of the intended physical contact.

While this would provide greater protection of persons’ bodily dignity and autonomy, would it sometimes be too protective? Consider a person in a packed elevator or subway who indicates verbally and by a sign, “DO NOT TOUCH ME,” who is purposely or knowingly touched by someone who must do so in order to get on the elevator or subway. Treating such inevitable, generally acceptable, minor, harmless intentional contacts as tortious would allow the extrasensitive to unjustly “hold up the rest of the world”—to unequally expand their freedom or autonomy beyond what is expected by others similarly situated, at the expense of a substantial limitation on the freedom of the great mass of “normal” people with whom they intentionally or inadvertently interact.

Should we then always stick to the objective definition of offensiveness? What if a defendant who is aware of the plaintiff’s extrasensitive aversion to being touched maliciously goes out of her way to position herself so that she will have to rub or push against the extrasensitive person in order to enter or exit the elevator or subway? These questions have been and continue to be the subject of vigorous debate in the drafting of the Restatement Third: Intentional Torts. A draft of § 3 (formerly § 103) presented at the ALI’s annual meeting in May 2017 stated:

A contact is offensive within the meaning of § 1(c)(ii) if:
(a) the contact is offensive to a reasonable sense of personal dignity; or
(b) the contact is highly offensive to the other’s unusually sensitive sense of personal dignity, and
   (i) the actor knows to a substantial certainty that the contact will be highly offensive to the other; or
   (ii) the actor contacts the other with the sole or principle purpose that the contact will be highly offensive.
Liability under Subsection (b) shall not be imposed if the court determines that avoiding the contact would have been unduly burdensome or that imposing liability would violate public policy.

By close votes, §3(b)(i) was rejected while § 3(b)(ii) was retained. There was insufficient time to address motions to have “highly” removed from §3. The reporters have returned to the drafting board once again. In July 2017, they asked for comments on the following version of section 3:
A contact is offensive within the meaning of § 1(c)(ii) if:
(a) the contact is offensive to the other’s reasonable sense of personal dignity; or
(b) the contact is highly offensive to the other’s unusually sensitive sense of personal dignity, and the actor contacts the other with the primary purpose that the contact will be highly offensive.

The shift from “a reasonable sense” to “the other’s reasonable sense” in §3(a) is intended to protect plaintiffs who reasonably object to contacts to which an ordinary person would not object—for example, religious objections to being served a certain food, or a female’s objection to usually accepted by others kisses or other physical contacts with her person.

Is the Restatement’s addition of the complex and highly debated offensiveness requirement to the lack of consent requirement helpful or instead a superfluous source of confusion? Consider the various categories of consent recognized in the Restatement Third. Is there any use for an offensiveness requirement if consent is implied by law, as intended by Restatement Third § 116, to contacts that are in accord with prevalent social usages, unless the defendant is aware of the plaintiff’s lack of consent to such contacts, and even then if acceding to the plaintiff’s extrasensitive desire not to be touched would unjustly interfere with others’ equal freedom in going about their lives in socially acceptable ways? If not, shouldn’t the ambiguous, controversial and complex offensiveness requirement be abandoned? See Dobbs § 29 at 56-57 (arguing for such an approach).

7. **Distinguishing the egg-shell-plaintiff doctrine.** The extrasensitivity issue discussed in note 6 is whether the plaintiff’s extrasensitivity makes the defendant’s conduct tortious even though it would not have been objectionable to an ordinary, non-extrasensitive person. Do not confuse this issue with the eggshell-plaintiff issue that arose in *Vosburg v. Putney*, in section B.1 above, which is an extent-of-responsibility issue (for tortiously caused harm that occurred only because of a plaintiff’s unforeseeable “eggshell” condition) that should be reached only after the tortious conduct and actual causation elements of the prima facie case have been established.

8. **The extended conception of the plaintiff’s person.** The plaintiff’s person includes anything so closely connected with the plaintiff’s body that intentional physical contact with it would be deemed to impinge on the plaintiff’s bodily dignity. Thus, intentionally touching clothing or ear rings that the plaintiff is wearing, a cigarette in his mouth, a hat on his head, a cane or camera or newspaper in his hand would constitute a prima facie battery if it were done without the plaintiff’s consent. What about a kite flying from the end of a string held by the plaintiff? A dog at the end of a leash held by the plaintiff? A horse on which the plaintiff is sitting? A chair on which the plaintiff is sitting? A car in which the plaintiff is sitting? Should, in these situations, it make a difference whether the defendant acted with the purpose of offending the plaintiff’s personality? See Restatement Second § 18 comment c (so arguing).

Do not confuse the extended conception of the plaintiff’s person with a supposed requirement that the physical contact with the plaintiff’s person must be made by the
defendant herself or some extension of the defendant’s person, such as a bat or knife in the
defendant’s hand. As the Garratt v. Dailey case demonstrates, there is no such requirement.
The defendant need merely intentionally cause some tangible thing to come into physical
contact with the plaintiff’s person; it does not matter how directly (e.g., by throwing a knife
or firing a gun) or indirectly (e.g., by removing the railing on a blind person’s porch, which
causes the blind person to fall off the porch and hit the ground) that intended physical
contact is accomplished.

9. Acts and omissions. It is usually stated that, for a battery action, the defendant’s
conduct must be an act rather than an omission. See, e.g., the requirement of an “affirmative
act” in the quoted statement from the Parrish case in Schroeder. Perhaps this is meant to
implement the general rule, in the common law, that there is no liability for mere
“nonfeasance”—a failure to intervene to block some known impending force for which the
defendant is not responsible—which will be discussed in chapter 5. As a practical matter,
battery situations in which there was no act done with the required intent to cause a physical
contact with the person of the plaintiff very rarely arise. Yet, it is far from clear why a
battery action should not be allowed when the defendant’s inaction was purposely intended
to result in a physical contact with the plaintiff’s person as a result of some force under
the plaintiff’s control. Suppose, for example, that a defendant who was using “cruise control”
to drive his car deliberately failed to apply his brakes to avoid running into someone, or that
a defendant deliberately failed to close the open gate to her fence when she saw the plaintiff
walking down the street toward her house, because she wanted her vicious dog to attack the
plaintiff. See Restatement Second § 14 comment c: “There is perhaps no essential reason
why, under the modern law, liability for battery might not be based on inaction . . . .
Apparently, however, no such case has arisen, and what little authority there is denies the
liability.” The Restatement Third includes an “affirmative conduct” requirement, while
noting that exceptions might be justifiable, especially if “the actor omits to act for the very
purpose of causing harm or offense.” Restatement Third: Intentional Torts § 101 comment
c (approved May 2015).

10. Physical contact: smoke, poisonous gas, bad breath? The legal injury required
for a battery is a physical contact with the plaintiff’s person. Traditionally, intangibles such
as smoke, odors, and gases have not been treated as sufficiently physical, so that contact by
them will not satisfy the legal injury requirement for a battery. Yet some courts have been
willing to allow a battery action against a defendant who allegedly purposefully (and
maliciously) blew smoke into the plaintiff’s face. See Richardson v. Hennly, 434 S.E.2d 772,
775 (Ga. App. 1993), rev’d on other grounds, 444 S.E.2d 317 (1994); Leichtman v. WLW
Jacor Communications, Inc., 634 N.E.2d 697, 699 (Ohio App. 1994). However, as of yet no
court has allowed a battery action against a defendant who had no such purpose, but knew
that his smoke would contact and bother (perhaps even harm) the plaintiff, even though such
knowledge is treated as a form of intent. The courts’ reasoning generally has not been that
such known-will-occur but not purposeful touchings are not sufficiently physical, but rather
that such touchings are the result of conduct that—at the time of the decision—was generally
accepted by society (thus treating the plaintiff as an extrasensitive plaintiff), that no action
should be allowed in the absence of actual harm, or that the defendants supposedly did not
know that their smoke would cause the harm that the plaintiff suffered. E.g., Pechan v.
Co. (1989), 565 A.2d 1170, 1172, 1178 (Pa. Super. 1989) (battery action allowed when the plaintiff alleged that the defendant company intentionally vented radioactive steam into the area in which it knew he was working); Degnan v. United States, 1988 U.S. Dist. LEXIS 16824 (E.D. Tenn) (the United States was not liable under the Federal Tort Claims Act for a postal employee’s spraying disinfectant on a customer who was smoking a cigarette, since such spraying was an assault and battery, and the Act excludes liability for intentional torts). The Restatement Third, citing minimal and conflicting authority, states that the contact requirement is satisfied in cases where the contact is by “substances, such as hazardous or toxic chemicals or pollutants, that contact the plaintiff in an offensive or harmful way.” Restatement Third: Intentional Torts § 101 comment e & reporters’ note (approved May 2015).

10. No physical contact: a proposed new tort. Restatement Third: Intentional Torts § 104 (approved May 2015) proposes a new tort of purposeful infliction of bodily harm, which does not require an intentional physical contact with the person of the plaintiff:

An actor is subject to liability to another for purposeful infliction of bodily harm if:
(a) the actor purposely causes bodily harm to the other, either by the actor’s affirmative conduct or by the actor’s failure to prevent bodily harm when the actor has a duty to prevent such harm; and
(b) the other does not effectively consent to the otherwise tortious conduct of the actor, as provided in § 111 [which lists the various types of consent].

2. ASSAULT

A prima facie case of assault exists when the defendant engaged in conduct that was intended to cause and actually did cause the plaintiff’s perception of an imminent physical contact with the plaintiff’s person, for which there was no consent and for which responsibility is properly attributable to the defendant.

The required legal injury for an assault is the plaintiff’s perception of an imminent physical contact with his person. “Imminent” means immediately about to happen. For example, courts have held that a threat made to the plaintiff over the phone to come to the plaintiff’s house and beat him up, or a threat made in the plaintiff’s presence to leave the room to get a gun and then return and shoot the plaintiff, is not sufficiently imminent.

The plaintiff need only perceive the imminent contact; he need not have any fear or anxiety. The most timid, puny, and ineffectual runt can be liable for an assault on the most courageous, strong, and skilled professional fighter.

The perception of an imminent contact is not negated merely because the plaintiff believes the contact can be avoided through flight, defensive measures, or the intervention of others. For example, if a member of the audience threatens to attack the speaker and charges the stage, but the speaker knows or believes the attack can be avoided by flight or will be blocked by the ushers, there nevertheless has been the perception of an imminent
C. Trespass to the Person

contact. Restatement Second § 24 & illus. 2. Nor is the perception of an imminent contact negated if the defendant, unbeknownst to the plaintiff, employs means (e.g., an unloaded gun) that are not sufficient to produce the threatened contact (e.g., wounding with a bullet). E.g., Allen v. Hannaford, 244 P.2d 700 (Wash. 1926). However, if the plaintiff knows or believes, correctly or incorrectly, that the means adopted by the defendant will be insufficient to produce any contact with the plaintiff’s person (e.g., if the only threatened contact is being shot and the plaintiff believes the defendant’s gun is unloaded), there is no perception of an imminent physical contact and thus no assault. Restatement Second § 24 comment a.

It is often asserted that “mere words” unaccompanied by any overt act cannot constitute an assault. This is almost a purely academic assertion, since there is almost always some overt act, and a fact finder is likely to find even the most minimal gesture or movement to be sufficient. If the surrounding circumstances, together with the words, are sufficient to create a perception of an imminent battery, the fact that there is no overt act should be immaterial. For example, if, while standing on the sidewalk with his hand in his jacket pocket holding a gun (or a banana), the defendant suddenly decided to try to hold up an approaching person and, without moving anything but his lips, growled at the person, “Give me your money or I will shoot you with the gun I have in my pocket,” it would be “quite artificial and unreasonable” to hold that there had as yet been no assault because there was no overt act. Restatement Second § 31 & comment d & illus. 4. Otherwise, the plaintiff apparently would have to insist that the thief show him the gun, or wait for the bullet to rip through the fabric of the thief’s jacket and come toward him, before he could justifiably use force against the defendant in self-defense.

NOTES

1. Vosburg reprise. Given the above description of the assault action, did an assault as well as a battery exist in the Vosburg case, in which the court (in Vosburg II) referred to the action as one for “an assault and battery”? Was the Vosburg II court correct when it agreed that the rule for “mere assaults” is that “the intention to do harm is of the essence of an assault”? Were the courts in Mohr and Kennedy correct to describe those cases as involving actions for assault as well as battery?

2. Hypothetical threats and conditional threats. Is there an assault if the defendant raises her fist to the plaintiff and says, “If your mother weren’t here, I would beat you to a pulp”? What about “[Give me] your money or [I’ll take] your life!”?

3. Awareness: assault versus battery. The plaintiff’s contemporaneous perception or awareness of the imminent physical contact with his person is essential for an assault action, while the plaintiff in a battery action need not have any perception, contemporaneous or otherwise, of the physical contact with his person. For example, if the plaintiff was intentionally knocked unconscious from behind by the defendant before becoming aware of the defendant’s attack, the plaintiff has no assault action but has a valid battery action, whether or not he ever regains consciousness.
4. *Tort versus crime.* In some jurisdictions criminal assault is defined in terms similar to the civil (tort) action for assault. For example, the Illinois criminal code states: “A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery.” 720 ILCS 5/12-1(a) (note the failure to mention intent or even negligence!). Other jurisdictions, however, define criminal assault as an attempted battery. Under the latter definition, the defendant would be liable for the crime of assault but not for the tort if the defendant attempted to batter the victim but the victim was not at the time aware of the attempt. On the other hand, the defendant would be liable for the tort of assault but not for the crime if the defendant threatened to batter the victim and the defendant but not the victim knew that the defendant was incapable of actually causing the threatened physical contact. Some criminal statutes limit criminal battery actions (and hence criminal assault actions) to the more serious types of (attempted) batteries.

5. *The Restatements’ definitions.* Restatement Second § 21(1) defines an assault as follows:

An actor is subject to liability to another for assault if (a) he acts intending to cause . . . an imminent apprehension of a [harmful or offensive] contact [with the person of the other] and (b) the other is thereby put in such imminent apprehension.

There are several serious defects in this definition, which you should not use. First, as with the Restatement Second’s definitions of battery, its definition of assault does not contain any reference to the lack-of-consent requirement, which instead is obliquely referenced in the comments. Second, it uses the misleading word “apprehension” rather than “perception.” Although comment b to Restatement Second § 24 distinguishes “apprehension” from “fright” and makes it clear that the plaintiff need only be aware of (“apprehend”) the imminent contact, the most common meaning of the noun “apprehension” is “fear” or “anxiety,” which is not required for an assault. The word “perception” (or “awareness”) is less subject to misinterpretation. Third, as is stated in the comments to Restatement Second § 21 and several subsequent sections of the Restatement, the required legal injury for an assault is the plaintiff’s present perception of an imminent contact, rather than, as stated in the blackletter of § 21, the plaintiff’s “imminent apprehension” of some possible contact with his person in the near or distant future.

These defects are corrected in Restatement Third: Intentional Torts § 105 (approved May 2015), which states:

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2Comment e to § 21 discusses the definition in § 10 of the word “privilege,” which does not appear in the blackletter of § 21, and of consent as a type of privilege. The curious or baffled reader might turn to § 10 and learn from its comment c that the plaintiff bears the burden of proving lack of consent for intentional torts involving “invasions of the interests of personality,” which the reader might realize include actions for assault as well as battery and false imprisonment. For an explicit statement, the reader would have to discover § 13 comment d, on harmful batteries.
An actor is subject to liability to another for assault if:
(a) (i) the actor intends to cause the other to anticipate an imminent, and harmful or offensive, contact with his or her person, or (ii) the actor’s intent is sufficient under § 110 (transferred intent);
(b) the actor’s affirmative conduct causes the other to anticipate an imminent, and harmful or offensive, contact with his or her person; and
(c) the other does not effectively consent to the otherwise tortious conduct, as provided in § 111 [which lists the various types of consent].

Note, however, the inclusion of the dual rather than single intent requirement as well as the reference to anticipation of a “harmful or offensive” contact. As in the battery action, the reference to “harmful or offensive” seems superfluous and redundant, since if none of the various types of consent (including implied by law consent for ordinary social usages, etc.) exist, offensiveness should be clear. As the Restatement Third recognizes, the dual intent requirement in the assault action is inconsistent with its rejection in the battery action and in tension with the transferred intent doctrine. Id. § 105 comment f.

6. Extrasensitive plaintiffs. Although the Restatement takes no position on the known extrasensitive plaintiff in the battery action, it explicitly adopts the more subjective, plaintiff-protective position in the assault action. Restatement Second § 27 states: “If an act is intended to put another in apprehension of an immediate bodily contact and succeeds in so doing, the actor is subject to liability for an assault although his act would not have put a person of ordinary courage in such apprehension.” This language is repeated in Restatement Third: Intentional Torts § 105 [now §5] comment d (Tentative Draft No. 1, 2015), approved in May 2015, which however notes that the actor must intend to cause a harmful or offensive contact, thus incorporating the ongoing debate about offensiveness in §3(b) for non-harmful contacts.

3. FALSE IMPRISONMENT

A prima facie case of false imprisonment exists when the defendant engaged in conduct that was intended to cause and actually did cause the plaintiff’s complete confinement within boundaries fixed by the defendant, for which there was no consent and for which responsibility is properly attributable to the defendant, and the plaintiff was either contemporaneously aware of such confinement or was harmed by it.

See Restatement Second § 35, which, however, once again fails to mention the lack of consent requirement. Restatement Third: Intentional Torts § 7 corrects this omission:

An actor is subject to liability to another for false imprisonment if:
(a) the actor intends to confine the other within a limited area, or the actor’s intent is sufficient under § 110 (transferred intent);
(b) the actor’s affirmative conduct causes a confinement of the other, as provided in § 108 and § 109, or the actor breaches a duty to release the other from such a confinement;
(c) the other is conscious of the confinement or suffers bodily harm as a result of the confinement; and
(d) the other does not consent to the confinement, as provided in § 111 [which lists the various types of consent].

Any complete confinement qualifies, no matter how brief. The confinement may be by actual or apparent physical barriers, the use or threat of force, asserted legal authority, other forms of duress, or other means. Restatement Second §§ 38-41; Restatement Third: Intentional Torts §§ 8 & 9. The required injury is confinement within, rather than exclusion from, an area or direction of travel. The plaintiff is not completely confined if he is aware of a reasonable means of escape. Id. Comment a to Restatement Second § 36 elaborates on what constitutes a reasonable means of escape:

[The plaintiff] is not required to run any risk of harm to his person or to his chattels or of subjecting himself to any substantial liability to a third person . . . . So too, even though there may be a perfectly safe avenue of escape, the other is not required to take it if the circumstances are such as to make it offensive to a reasonable sense of decency or personal dignity.

On the other hand, it is unreasonable . . . to refuse to utilize a means of escape of which he himself is aware merely because it entails a slight inconvenience or requires him to commit a technical invasion of another’s possessory interest in land or chattels which subjects him at most to the risk of an action for nominal damages which in practice is seldom if ever sought.

NOTES

1. Schroeder reprise. Recall the Schroeder court’s statement that “actual force is not necessary. The unlawful restraint can be effected by words alone. The restrained individual’s submission, however, ‘must be to a threatened and reasonably apprehended force.’” Is this correct? What if the defendant locked the plaintiff in a room that the plaintiff had entered voluntarily? What if, in order to leave an area, the plaintiff had to go naked in public because the defendant had removed all his clothes and any other means of covering his nakedness?

2. Hypotheticals.

(a) Has the defendant falsely imprisoned the plaintiff if the defendant prevents the plaintiff from entering a particular room, house, neighborhood, city, state or country? What if the defendant confines the plaintiff to a particular room, house, neighborhood, city, state or country?

(b) Has the defendant falsely imprisoned a baby by locking it in a car for several hours? What if the baby suffers heat exhaustion or suffocates?
D. TRESPASS TO PROPERTY

1. TRESPASS TO LAND (REAL PROPERTY)

A prima facie case of trespass to land (real property) exists when the defendant engaged in conduct that was intended to cause and actually did cause a physical entry or remaining on plaintiff’s land, for which responsibility is properly attributable to the defendant.

JACQUE v STEENBERG HOMES, INC.
Supreme Court of Wisconsin
563 N.W.2d 154 (1997)

William A. Bablitch, J. Steenberg Homes had a mobile home to deliver. Unfortunately for Harvey and Lois Jacque (the Jacques), the easiest route of delivery was across their land. Despite adamant protests by the Jacques, Steenberg plowed a path through the Jacques' snow-covered field and via that path, delivered the mobile home. Consequently, the Jacques sued Steenberg Homes for intentional trespass. At trial, Steenberg Homes conceded the intentional trespass, but argued that no compensatory damages had been proved, and that punitive damages could not be awarded without compensatory damages. Although the jury awarded the Jacques $1 in nominal damages and $100,000 in punitive damages, the circuit court set aside the jury's award of $100,000. The court of appeals affirmed, reluctantly concluding that it could not reinstate the punitive damages because it was bound by precedent establishing that an award of nominal damages will not sustain a punitive damage award. We conclude that when nominal damages are awarded for an intentional trespass to land, punitive damages may, in the discretion of the jury, be awarded. We further conclude that the $100,000 awarded by the jury is not excessive. Accordingly, we reverse and remand for reinstatement of the punitive damage award.

NOTES

1. A dignitary-autonomy tort. A prima facie case of trespass to land exists if the defendant intentionally caused some person, animal or other tangible entity to enter or remain on the plaintiff’s land, regardless of whether the defendant caused any harm to or interference with the plaintiff’s use of the land, or even if the defendant improved the land. See Restatement Second §§ 158, 163, 163 comment d. If and only if there is no actual harm, nominal damages are awarded. If the intentional invasion is knowingly wrongful and sufficiently egregious, punitive damages may be awarded. The Jacque court (sensibly) rejects the commonly stated limitation that punitive damages can only be awarded in cases involving actual damages. Recall also the Alcorn case in section G of Chapter 1, in which punitive damages were awarded when the defendant spat on and thereby battered the plaintiff without causing any harm.

2. The required intended consequence and the irrelevance of mistaken ownership or consent. The required intent is merely the intent to enter (or remain on) land, which happens to belong to the defendant., rather than the intent to enter onto land that one knows or believes belongs to the plaintiff. A mistake about the ownership of the land or consent,
even if reasonable, does not prevent there being the required intent and does not prevent liability. Recall our discussion of *Maye v. Yappen* in section B of this chapter.

3. **Acts or omissions.** A defendant’s intentional failure to remove from the plaintiff’s land a person, animal or thing for which the defendant is responsible after the license or privilege for its being there has expired is an example of tortious intentional conduct involving an omission rather than an act. See, e.g., *Rogers v. Board of Road Comm’rs*, 30 N.W.2d 358 (Mich. 1948).

4. **Physical (tangible) entry or remaining.** If the defendant intentionally causes something intangible, such as gas, odors or smoke, to enter onto the plaintiff’s property, the proper cause of action is a private nuisance action rather than a trespass action, unless (perhaps) physical damage or occupation results. The trespass to land cause of action protects a land possessor’s interest in *exclusive possession* against a trespassery invasion by something tangible, while the private nuisance action protects a land possessor’s interest in the *use and enjoyment* of land against a non-trespassery invasion by odors, noise, dust, smoke, fumes, and other intangible entities. The private nuisance action and its relationship to the trespass to land action are discussed in chapter 8.

5. **To the sky and the depths.** The trespass to land action is available for entries on, under, or above the surface of the land. An ancient common law doctrine states, “Cujus est solum ejus est usque ad coelum” (“The owner of the soil owns to the sky and to the depths”). With the advent of modern aviation, this doctrine necessarily has been qualified with respect to intrusions by aircraft into the air space above the land. An overflying aircraft is considered to be trespassing only if “it enters into the immediate reaches of the air space [above] the land, and it interferes substantially with the [plaintiff’s] use and enjoyment of his land.” Restatement Second § 159; see *United States v. Causby*, 328 U.S. 256, 264-65 (1946) (“The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land. The fact that he does not occupy it in a physical sense—by the erection of buildings and the like—is not material.”).

6. **Fixtures as realty.** Fixtures, which are items of formerly personal property that have been permanently attached to the land (e.g., buildings and items permanently attached to buildings), are considered to be real property rather than personal property. Fixtures thus come within the scope of the action for trespass to land rather than the actions for trespass to chattel or conversion.

7. **Consent is a defense.** Unlike the intentional torts involving trespass to the person (assault, battery, and false imprisonment), the plaintiff need not plead or prove lack of consent as a required element of the prima facie case for the intentional torts involving trespass to property (trespass to land, trespass to chattel, or conversion). Instead, for these torts, the defendant bears the burden of alleging and proving consent as an affirmative defense. See Restatement Second § 10 comment c and section E.1 below.

8. **Hypotheticals.** What valid intentional tort actions, if any, exist in the following situations?
(a) Don, while standing on his own property, purposely fired a shot onto his neighbor’s property in order to damage (i) a window, (ii) a backyard pole light, (iii) nothing.

(b) When Mary announced that the party in her house was over, Don, who was laying down on the sofa and heard her announcement, refused to get up and leave.

(c) Same as (b), but Don was asleep or passed out from drinking too much alcohol and did not hear Mary’s announcement.

(d) While Mary was away, Don, an adult, went into Mary’s backyard to use her pool and her large outdoor brick-and-metal gas grill. Don was unaware that Mary had stated at a recent neighborhood block party that any resident of the block could use her pool, whether or not she was present, if at least one adult resident was present, but not her grill.

2. TRESPASS TO CHATTEL & CONVERSION (PERSONAL PROPERTY)

A prima facie case of trespass to chattel (personal property) exists when the defendant engaged in conduct that was intended to cause and actually did cause a dispossession or use of or intermeddling with the plaintiff’s personal property, for which responsibility is properly attributable to the defendant. However, there is liability for damages (at the remedies stage of the analysis) only if there is a significant interference with the intentionally affected personal property (a dispossession, deprivation of use for a substantial time, or impairment of condition, quality or value) or harm is caused to the person of the possessor or to a person, land or separate chattel in which the possessor of the intentionally affected personal property has a legally protected interest.

A prima facie case of conversion exists when the defendant engaged in conduct that was intended to cause and actually did cause a trespass to chattel, and the interference was sufficiently serious to make the defendant liable for the full value of the property.

In a strict technical sense, conversion is not a “trespassery” tort, since its origin lies in the writ of trover rather than the writ of trespass. See Prosser & Keeton § 15. However, given the abandonment of the writ pleading system and the development of the conversion action as the favored action for serious trespasses to chattel, there is little reason not to group it now with the other trespassery torts and to treat it similarly to them for all relevant purposes.

With this understanding, every conversion is also a trespass to chattel, but the reverse is not true. The paradigm case of conversion is theft: intentionally taking another’s property with no intent to return it. However, conversion also may occur without any dispossession, if there is damage to or interference with the chattel that is so substantial that it seriously diminishes the owner’s useful dominion and right of control over the chattel. See Restatement Second §§ 222 to 242.
The significance of treating a trespass to chattel as also being a conversion is that the plaintiff obtains an additional important remedy. He may require the defendant to purchase the chattel at a price equal to its full pre-conversion value, rather than being limited, as in the trespass to chattel action, to the physical return of the chattel (“replevin”) and damages for any reduction in value or loss of use. Thus, one useful way of determining whether a conversion has occurred is to work backwards: would it be fair in the particular circumstances to require the defendant to purchase the chattel? The Restatement adopts this approach in defining a conversion: “Conversion is an intentional exercise of dominion and control over a chattel which so seriously interferes with the right of another to control it that the actor may be required to pay the other the full value of the chattel.” Id. § 222A.

As with all torts, the proper definition and scope of the trespassery intentional torts are periodically reconsidered as new legal controversies arise as a result of social and technological developments. Recall the discussion in section D.1 above of trespass to land by overflying aircraft and the discussion in section C.1 of a possible battery action for purposefully inflicting cigarette smoke on someone.

The trespass to chattel and conversion actions are among the legal tools that plaintiffs have attempted to employ to deal with current controversies over proper and improper uses of the internet. In the Intel case below, the California Supreme Court employed the Restatement’s definition and elaboration of trespass to chattel when considering whether the trespass to chattel action should be available to prevent the receipt of unwanted email. As you read the majority and dissenting opinions, consider whether you agree with their respective interpretations of the Restatement’s provisions, which are described and quoted in note 1 following the case, and their respective positions on the proper scope of the trespass to chattel action, in general and as applied to the receipt and processing of unwanted email by one’s computer system.

**Intel Corporation v. Hamidi**

*Supreme Court of California*


WERDEGAR, J. 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. On six occasions over almost two years, Kourosh Kenneth Hamidi, a former Intel employee, sent e-mails criticizing Intel’s employment practices to numerous [up to 35,000] current employees on Intel’s electronic mail system. Hamidi breached no computer security barriers in order to communicate with Intel employees. He offered to, and did, remove from his mailing list any recipient who so wished. Hamidi’s communications to individual Intel employees caused neither physical damage nor functional disruption to the company’s computers, nor did they at any time deprive Intel of the use of its computers. The contents of the messages, however, caused discussion among employees and managers.

On these facts, Intel brought suit, claiming that by communicating with its employees over the company’s e-mail system Hamidi committed the tort of trespass to
chattels. The trial court granted Intel’s motion for summary judgment and enjoined Hamidi from any further mailings. A divided Court of Appeal affirmed . . .

I. Current California Tort Law

Dubbed by Prosser the “little brother of conversion,” the tort of trespass to chattels allows recovery for interferences with possession of personal property “not sufficiently important to be classed as conversion, [which requires] the defendant to pay the full value of the thing with which he has interfered.” (Prosser & Keeton, Torts (5th ed.1984) § 14, pp. 85-86.)

Though not amounting to conversion, the defendant’s interference must, to be actionable, have caused some injury to the chattel or to the plaintiff’s rights in it. Under California law, trespass to chattels “lies where an intentional interference with the possession of personal property has proximately caused injury.” (Citation omitted.) In cases of interference with possession of personal property not amounting to conversion, “the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.” (Citation omitted.) In modern American law generally, “[t]respass [to chattel] remains as an occasional remedy for minor interferences, resulting in some damage, but not sufficiently serious or sufficiently important to amount to the greater tort” of conversion. (Prosser & Keeton, Torts, supra, § 15, p. 90, 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), 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 ([d]). 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, italics added.)

The Court of Appeal (quoting 7 Speiser et al., American Law of Torts (1990) Trespass, § 23:23, p. 667) referred to “‘a number of very early cases [showing that] any unlawful interference, however slight, with the enjoyment by another of his personal property, is a trespass.’” But while a harmless use or touching of personal property may be a technical trespass (see Rest.2d Torts, § 217), an interference (not amounting to dispossession) is not actionable, under modern California and broader American law,
without a showing of harm. As already discussed, this is the rule embodied in the
Restatement (Rest.2d Torts, § 218) and adopted by California law.

In this respect, as Prosser explains, modern day trespass to chattels differs both from
the original English writ and from the action for trespass to land: “Another departure from
the original rule of the old writ of trespass concerns the necessity of some actual damage to
the chattel before the action can be maintained. Where the defendant merely interferes
without doing any harm—as where, for example, he merely lays hands upon the plaintiff’s
horse, or sits in his car—there has been a division of opinion among the writers, and a
surprising dearth of authority. By analogy to trespass to land there might be a technical tort
in such a case . . . . Such scanty authority as there is, however, has considered that the
dignitary interest in the inviolability of chattels, unlike that as to land, is not sufficiently
important to require any greater defense than the privilege of using reasonable force when
necessary to protect them. Accordingly it has been held that nominal damages will not be
awarded, and that in the absence of any actual damage the action will not lie.” (Prosser &
Keeton, Torts, supra, § 14, p. 87, italics added, fns. omitted.)

Intel suggests that the requirement of actual harm does not apply here because it
sought only injunctive relief, as protection from future injuries. But as Justice Kolkey,
dissenting below, observed, “[t]he fact the relief sought is injunctive does not excuse a
showing of injury, whether actual or threatened.” Indeed, in order to obtain injunctive relief
the plaintiff must ordinarily show that the defendant’s wrongful acts threaten to cause
irreparable injuries, ones that cannot be adequately compensated in damages. Even in an
action for trespass to real property, in which damage to the property is not an element of the
cause of action, “the extraordinary remedy of injunction” cannot be invoked without
showing the likelihood of irreparable harm. A fortiori, to issue an injunction without a
showing of likely irreparable injury in an action for trespass to chattels, in which injury to
the personal property or the possessor’s interest in it is an element of the action, would make
little legal sense. . . .

Relying on a line of decisions, most from federal district courts, applying the tort of
trespass to chattels to various types of unwanted electronic contact between computers, Intel
contends that, while its computers were not damaged by receiving Hamidi’s messages, its
interest in the “physical condition, quality or value” (Rest.2d Torts, § 218, com. e) of the
computers was harmed. We disagree. The cited line of decisions does not persuade us that
the mere sending of electronic communications that assertedly cause injury only because of
their contents constitutes an actionable trespass to a computer system through which the
messages are transmitted. Rather, the decisions finding electronic contact to be a trespass to
computer systems have generally involved some actual or threatened interference with the
computers’ functioning. . . .

. . . Intel has demonstrated neither any appreciable effect on the operation of its
computer system from Hamidi’s messages, nor any likelihood that Hamidi’s actions will be
replicated by others if found not to constitute a trespass. [¶] That Intel does not claim the
type of functional impact that spammers and robots have been alleged to cause is not
surprising in light of the differences between Hamidi’s activities and those of a commercial
enterprise that uses sheer quantity of messages as its communications strategy. Though
Hamidi sent thousands of copies of the same message on six occasions over 21 months, that number is minuscule compared to the amounts of mail sent by commercial operations. The individual advertisers sued in [two cases brought by America Online, Inc.] were alleged to have sent more than 60 million messages over 10 months and more than 92 million messages over seven months, respectively. . . .

II. Proposed Extension of California Tort Law

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. . . . The court is . . . 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. . . . [T]he metaphorical application of real property rules would not, by itself, transform a physically harmless electronic intrusion on a computer server into a trespass. That is because, under California law, intangible intrusions on land, including electromagnetic transmissions, are not actionable as trespasses (though they may be as nuisances) unless they cause physical damage to the real property. Since Intel does not claim Hamidi’s electronically transmitted messages physically damaged its servers, it could not prove a trespass to land even were we to treat the computers as a type of real property. . . .

The plain fact is that computers, even those making up the Internet, are—like such older communications equipment as telephones and fax machines—personal property, not realty. . . . Does this suggest that an unwelcome message delivered through a telephone or fax machine should be viewed as a trespass to a type of real property? We think not: As already discussed, the contents of a telephone communication may cause a variety of injuries and may be the basis for a variety of tort actions (e.g., defamation, intentional infliction of emotional distress, invasion of privacy), but the injuries are not to an interest in property, much less real property, and the appropriate tort is not trespass.7

. . . [U]nder 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

7The tort law discussion in Justice Brown’s dissenting opinion similarly suffers from an overreliance on metaphor and analogy. Attempting to find an actionable trespass, Justice Brown analyzes Intel’s e-mail system as comparable to the exterior of an automobile, a plot of land, the interior of an automobile, a toothbrush, a head of livestock, and a mooring buoy, while Hamidi is characterized as a vandal damaging a school building or a prankster unplugging and moving employees’ computers. These colorful analogies tend to obscure the plain fact that this case involves communications equipment, used by defendant to communicate. Intel’s e-mail system was equipment designed for speedy communication between employees and the outside world; Hamidi communicated with Intel employees over that system in a manner entirely consistent with its design; and Intel objected not because of an offense against the integrity or dignity of its computers, but because the communications themselves affected employee-recipients in a manner Intel found undesirable. The proposal that we extend trespass to chattels to cover any communication that the owner of the communications equipment considers annoying or distracting raises, moreover, concerns about control over the flow of information and views that would not be presented by, for example, an injunction against chasing another’s cattle or sleeping in her car.
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.

The Legislature has already adopted detailed regulations governing UCE [spam]. It may see fit in the future also to regulate noncommercial e-mail, such as that sent by Hamidi, or other kinds of unwanted contact between computers on the Internet, such as that alleged in eBay, supra. But we are not persuaded that these perceived problems call at present for judicial creation of a rigid property rule of computer server inviolability. We therefore decline to create an exception, covering Hamidi’s unwanted electronic messages to Intel employees, to the general rule that a trespass to chattels is not actionable if it does not involve actual or threatened injury to the personal property or to the possessor’s legally protected interest in the personal property. No such injury having been shown on the undisputed facts, Intel was not entitled to summary judgment in its favor.

We Concur: KENNARD, MORENO and PERREN, JJ.

KENNARD, J. I concur. . . . The majority concludes, and I agree, that using another's equipment to communicate with a third person who is an authorized user of the equipment and who does not object to the communication is trespass to chattels only if the communications damage the equipment or in some significant way impair its usefulness or availability. . . . [¶] This is not to say that Intel is helpless either practically or legally. As a practical matter, Intel need only instruct its employees to delete messages from Hamidi without reading them and to notify Hamidi to remove their workplace e-mail addresses from his mailing lists. Hamidi’s messages promised to remove recipients from the mailing list on request, and there is no evidence that Hamidi has ever failed to do so.

BROWN, J. (dissenting). . . . Regardless of whether property is real or personal, it is beyond dispute that an individual has the right to have his personal property free from interference. There is some division among authorities regarding the available remedy, particularly whether a harmless trespass supports a claim for nominal damages. The North Carolina Court of Appeal has found there is no damage requirement for a trespass to chattel. (See Hawkins v. Hawkins, 400 S.E.2d 472, 475 (N.C. App. 1991).) “A trespass to chattels is actionable per se without any proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues.” (Salmond & Heuston, The Law of Torts (21st ed. 1996) Trespass to Goods, § 6.2, p. 95, fn.s. omitted. [English law]) Several authorities consider a harmless trespass to goods actionable per se only if it is intentional. (Winfield & Jolowicz on Torts (10th ed. 1975) Trespass to Goods, p. 403 (Winfield & Jolowicz); Clerk & Lindsell on Torts (17th ed.1995) ¶ 13-159, p. 703. [English and Canadian law]) The Restatement Second of Torts, section 218, which is less inclined to favor liability, likewise forbids unauthorized use and recognizes the inviolability of personal property. However, the Restatement permits the owner to prevent the injury beforehand, or receive compensation afterward, but not to profit from the trespass through the remedy of damages unrelated to actual harm, which could result in a windfall. “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. . . . 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.” (Rest.2d Torts, § 218, com. e, italics added.) Accordingly, the protection of land and chattels may differ on the question of nominal damages unrelated to actual injury. The authorities agree, however, that (1) the chattel is inviolable, (2) the trespasser need not tolerate even harmless interference, and (3) the possessor may use reasonable force to prevent it. Both California law and the Restatement authorize reasonable force regardless of whether the property in question is real or personal. (Civ.Code, § 51; Rest.2d Torts, § 77.)

. . . Notwithstanding the general rule that injunctive relief requires a showing of irreparable injury (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 782, p. 239), Witkin also observes there are exceptions to this rule where injunctive relief is appropriate; these include repetitive trespasses. (Id., § 784, p. 242.) [Judge Brown discusses a couple of cases involving repetitive non-harmful trespasses to land.] Although [these cases] concerned real property, the principles of safeguarding a party’s possessory interest in property and of not encouraging repetitive litigation apply no less to trespasses to chattels . . .

Hamidi concedes Intel’s legal entitlement to block the unwanted messages. The problem is that although Intel has resorted to the cyberspace version of reasonable force, it has so far been unsuccessful in determining how to resist the unwanted use of its system. Thus, while Intel has the legal right to exclude Hamidi from its system, it does not have the physical ability. It may forbid Hamidi’s use, but it cannot prevent it.

To the majority, Hamidi’s ability to outwit Intel’s cyber defenses justifies denial of Intel’s claim to exclusive use of its property. Under this reasoning, it is not right but might that determines the extent of a party’s possessory interest. Although the world often works this way, the legal system should not. . .

In Buchanan Marine Inc. v. McCormack Sand Co., 743 F. Supp. 139 (E.D.N.Y.1990), the plaintiff built and maintained mooring buoys for use by its own tugboats. Defendants’ barges used the buoy over plaintiff’s objection. The federal district court found such unlawful use could constitute a trespass to chattels (if the facts were proved), and thus denied the defendants’ motion for summary judgment. “[D]efendants’ meddling with [the buoy] is either a trespass to a chattel or perhaps a conversion for which [plaintiff] may seek relief in the form of damages and an injunction.” There was an allegation of damage (to plaintiff’s barge, not the buoy itself), which could support a claim for damages, but this was not a prerequisite for injunctive relief. Even if defendants did not injure the buoys in any way, they still had no right to expropriate plaintiff’s property for their own advantage.

The instant case involves a similar taking. Intel has paid for thousands of computers, as well as the costs of maintaining a server.9 Like the Buchanan defendants, Hamidi has

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9In fact, Intel pays to maintain a high capacity to ensure that the system does not crash (or slow down); if Intel had not preempted such harm, there is no dispute that Hamidi would be liable for damages. . . . Intel is thus being penalized for engaging in preemptive self-help. According to the majority, Intel would do better by saving its money and collecting damages after a crash/slowdown.
likewise acted as a free rider in enjoying the use of not only Intel’s computer system but the extra storage capacity needed to accommodate his messages. Furthermore, Intel’s claim, which does not object to Hamidi’s speaking independently, only to his use of Intel’s property, resembles that of the Buchanan plaintiff who “has not sought to prevent others from placing their own mooring buoys in the Harbor,” but only the use of the plaintiff’s property.

MOSK, J. (dissenting). . . In my view, the repeated transmission of bulk e-mails by [Hamidi] to the employees of [Intel] on its proprietary confidential e-mail 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.

The Restatement explains that the rationale for requiring harm for trespass to a chattel but not for trespass to land is the availability and effectiveness of self-help in the case of trespass to a chattel. “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.” (Rest.2d Torts, § 218, com. (e).) Obviously, “force” is not available to prevent electronic trespasses. As shown by Intel’s inability to prevent Hamidi’s intrusions, self-help is not an adequate alternative to injunctive relief.

Here, Hamidi’s deliberate and continued intermeddling, and threatened intermeddling, with Intel’s proprietary computer system for his own purposes that were hostile to Intel, certainly impaired the quality and value of the system as an internal business device for Intel and forced Intel to incur costs to try to maintain the security and integrity of its server—efforts that proved ineffective. These included costs incurred to mitigate injuries that had already occurred. It is not a matter of “bootstrap[ing]” (maj. opn., ante) to consider those costs a damage to Intel. Indeed, part of the value of the proprietary computer system is the ability to exclude intermeddlers from entering it for significant uses that are disruptive to its owner’s business operations.

Before the computer, a person could not easily cause significant disruption to another’s business or personal affairs through methods of communication without significant cost. With the computer, by a mass mailing, one person can at no cost disrupt, damage, and interfere with another’s property, business, and personal interests. Here, the law should allow Intel to protect its computer-related property from the unauthorized, harmful, free use by intruders.

GEORGE, C.J., concurs.
NOTES

1. Trespass to chattel: the Restatement provisions. The Hamidi court relies on the elaboration of trespass to chattel in the Restatement. A chattel is an item of personal (movable) property, as distinguished from real property (land and attached fixtures). According to Restatement Second § 217, a trespass to chattel occurs whenever a defendant intentionally dispossesses another of a chattel or uses or intermeddles with a chattel in the possession of another. Although it could and probably should have a broader meaning, “intermeddling” is defined in comment e as “intentionally bringing about a physical contact with the chattel,” directly or indirectly. Was there a trespass to chattel in Hamidi?

2. The “significant interference” requirement for an “actionable” trespass to chattel. “Actionable” refers to liability for damages. Unlike trespasses to one’s person (assault, battery, and false imprisonment) and trespasses to land, for which there is liability for nominal damages in the absence of any actual harm if there is any invasion of the relevant interest, no matter how minor, in the United States there generally is liability for damages (in the remedies stage of the analysis) in a trespass to chattel action only if there has been a significant interference with the plaintiff’s possessory rights in the chattel. The treatises note that there is scant authority either way and that English writers favor liability for any intermeddling or interference, whether or not it is “significant.” See Prosser & Keeton § 14 at 87; Fleming 8th at 53. The Restatement provides the following elaboration of what constitutes a significant interference:

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,
(a) he dispossesses the other of the chattel, or
(b) the chattel is impaired as to its condition, quality, or value, or
(c) the possessor is deprived of the use of the chattel for a substantial time, or
(d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

Restatement Second § 218.

An intermeddling with a chattel is not a dispossession unless the actor intends to exercise a dominion and control over it inconsistent with a possession in any person other than himself. Thus, a trivial removal of a chattel from one position to another with no intention to exercise further control over it or to deprive the possessor of its use is not a dispossession.

Id. § 221 comment b.

In the great majority of cases, the actor’s intermeddling with the chattel impairs the value of it to the possessor, as distinguished from the mere [non-actionable] affront to his dignity as possessor, only by some impairment of the physical condition of the chattel. There may, however, 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. Thus, the use of a toothbrush by someone else may lead a person of ordinary sensibilities to regard the article as utterly incapable of further use by him, and the wearing of an intimate article of clothing may reasonably destroy its value in his eyes. In such a case, the intermeddling is actionable even though the physical condition of the chattel is not impaired.

Id. § 218 comment h.

If a significant interference (as described in § 218) has occurred, the defendant is liable for any resulting loss (within the extent of the defendant’s legal responsibility), but is liable for nominal damages in the absence of any actual loss only if there has been a dispossession. See id. § 218 comment d, § 222 comment a. However, if there has been no significant interference, there is no liability. The Restatement uses as an illustration the facts and holding in Glidden v. Szybiak, 63 A.2d 233 (N.H. 1949), in which the court held that there was no liability for trespass to chattel when a four-year old child climbed on a large dog’s back and pulled its ears. “No harm is done to the dog, or to any other legally protected interest of [the dog’s owner].” Restatement Second § 218 illus. 2.

Subsection 218(d) is further explained in id. § 218 comment j:

If the actor has committed a trespass as defined in § 217 [by dispossession, use or intermeddling], he is subject to liability to the person in possession of the chattel if he thereby causes bodily harm to the possessor or to any other chattel or land in which the possessor has a legally protected interest, or if he thereby causes harm to any person in whom the possessor of the chattel has a legally protected interest. It is immaterial that the harm so caused was neither intended by the actor nor the result of his negligent or reckless conduct while trespassing.

Subsection 218(d) is an extended scope of liability provision, analogous to but with different effects than the broader version of the transferred intent doctrine (which encompasses transfers among all the trespassery intentional torts, rather than merely between assault and battery). Both result in the defendant being held liable for unintended consequences. The difference is that under subsection 218(d) the defendant is liable (i) in the initial trespass to chattel action (ii) to the possessor of the intentionally affected chattel (iii) for harm to a person, land or separate chattel (not intentionally affected) in whom the possessor has a legally protected interest, while under the broader transferred intent doctrine the defendant is liable (i) in a distinct battery, trespass to land, or trespass to chattel action (ii) to the person actually battered or the owner of the land or distinct chattel actually trespassed upon (iii) for the unintended trespass to that person, land or distinct chattel, harm to any person, land, or chattel, subject to the usual requirements (subjectively wrongful conduct and direct and immediate consequence) for transferring intent. All the injuries encompassed by subsection 218(d) would also be encompassed by the broader transferred intent doctrine, but not vice versa, at least if the direct and immediate consequence restriction on transferred intent also applies (as it should) under subsection 218(d). The plaintiff also generally would be the same: the possessor of the intentionally affected chattel, who also has
a legally protected interest in his own person, his land, and his other chattels (it is not clear, nowadays, how a person could have a legally protected interest in another person). Thus, given the broader version of transferred intent, subsection 218(d) not only seems complicated and strange, but also unnecessary. For simplicity’s sake, you may ignore it in this course.

Was there an actionable trespass to chattel in *Hamidi*?

3. Technical but not actionable trespasses. What, if any, purpose is served by recognizing that a technical trespass to chattel exists whenever there is any use of or intermeddling with the plaintiff’s chattel, but not allowing a legal action for damages unless such use or intermeddling constitutes a significant interference with the chattel, as defined in Restatement Second § 218?

4. Self-help as an adequate and exclusive remedy for technical but not actionable trespasses to chattel? The Restatement argues that “[s]ufficient 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.” Restatement Second § 218 comment e. Is resort to self-help, especially if it involves the use of force, usually preferred to resort to the civil authorities? If not, why should it be preferred (only) with respect to trespasses to chattel? Will self-help always or usually be adequate to prevent insignificant interferences with personal property? Was it adequate in *Hamidi*? The majority in *Hamidi* notes at several points that Hamidi offered to remove any recipient from his distribution list at the request of the recipient, and Justice Kennard, concurring, argues that Intel therefore could have prevented any more messages from Hamidi to its employees (at work) by requiring its employees “to notify Hamidi to remove their workplace e-mail addresses from his mailing lists.” But what if Hamidi did not offer to remove persons from his list at their request? Is there anything in the majority’s elaboration of liability for trespass to chattel that would require or induce him to do so?

5. Abating trespasses to chattel. Should the significant interference requirement for making a technical trespass to chattel actionable for damages also apply for making a trespass to chattel—especially if it is repetitive—abatable (enjoinable)? The Restatement does not explicitly impose this requirement for abating a trespass to chattel; indeed, it has little to say about injunctive relief in general. What reasons did the majority in *Hamidi* give for requiring a significant interference not merely for liability for damages but also for an injunction? Did the majority pull a sleight of hand by rephrasing the “irreparable injury” requirement for an injunction as an “irreparable harm” requirement? Must there be actual or threatened physical harm before an injunction can be obtained to prevent repetitive trespasses to land? Do you think the *Hamidi* majority, or courts in general, should or would refuse to grant an injunction to prevent repetitive pulling of the ears of another’s dog, chasing of another’s cattle, sleeping or sitting in another’s car, opening of another’s purse or backpack, and so forth? If not, is the real issue in this case not a proposed *extension* of prior California tort law but rather a *restriction* of that law in the special context of communications media?
6. **Policy.** Who has the better of the various policy arguments in *Hamidi*, the majority or the dissenters? In addition to the sources cited by the majority and the dissenters, see Richard Warner, *Border Disputes: Trespass To Chattels on the Internet*, 47 Vill. L. Rev. 117 (2002).

7. **Conversion.** In Kremen v. Cohen, 337 F.2d 1024 (9th Cir. 2003) (applying California law), the court held that domain names on the internet are a type of intangible property, that under modern law (unlike the early common law) the tort of conversion applies to intangible as well as tangible property, and that California law (unlike Restatement Second § 242) does not require that the intangible property be “merged” into or “represented” by a single document that is necessary for exercise of the property right. The court thus allowed the initial registrant of the coveted domain name “sex.com” to sue the domain-name registrar, Network Solutions, for conversion when, duped by a forged letter, Network Solutions transferred the domain name to a third party, a convicted felon, who earned $40 million dollars operating sex.com as a portal site for internet pornography.

8. **Future interests.** An owner of a chattel without either possession or a right to immediate possession—i.e., an owner who has only a future interest in the chattel—may bring a trespass to chattel action or a conversion action for diminution in the value of her future interest in the chattel. An owner of real property may bring a property action for waste in such circumstances. Future interests, and actions for interferences with them, are discussed in the Property course.

**E. TRANSFERRED INTENT**

Sometimes the defendant intends merely to assault the plaintiff—i.e., to cause the plaintiff to perceive that he is about to be hit, without actually hitting him—but ends up accidentally hitting the plaintiff. For example, the defendant may throw a rock at the plaintiff, intending that the rock miss the plaintiff but cause the plaintiff to perceive that he is about to be hit, yet through bad aim actually hit the plaintiff with the rock. Or, the defendant may intend to batter the plaintiff without the plaintiff being aware of the impending battery (e.g., because the plaintiff is asleep or otherwise not aware of the defendant’s approach), but the plaintiff wakes up or turns around in time to perceive the imminent battery. In the first instance, there is the legal injury required for a battery (the physical contact) but no intent to cause such physical contact. In the second instance, there is the legal injury required for an assault (the perception of an imminent physical contact) but no intent to cause such perception.

Similarly, the defendant may intend to assault or batter a third party, but end up also or instead causing an unauthorized physical contact with the person of the plaintiff or the plaintiff’s perception of an imminent physical contact, or both. Again, although the plaintiff has suffered the required legal injury for a battery or assault, respectively, the defendant did not intend to batter or assault the plaintiff.

Yet, in each of these situations, the defendant is held liable for the intentional tort that encompasses the plaintiff’s legal injury (assault or battery) even though the defendant did not intend to cause that legal injury to the plaintiff. See, e.g., Smith v. Moran, 193
N.E.2d 466 (Ill. App. 1963). This result is accomplished through the doctrine of “transferred intent.” The defendant’s actual tortious intent to commit an assault or battery is “transferred” — whether or not the intended assault or battery actually occurs — to substitute for the missing actual intent for the cause of action at issue.

The “transfer of intent” has the formal effect of (fictionally) satisfying the intent requirement in the plaintiff’s prima facie case. It satisfies only that requirement, so care must be taken to make sure that all the other required elements — the required legal injury, lack of consent, actual causation and attribution of responsibility (“proximate causation”) — are satisfied. In particular, care must be taken to make sure that the plaintiff’s legal injury was caused by the conduct of the defendant that was done with the tortious intent. For example, if D intentionally hit A with a stick and then tossed the stick over his shoulder or to the side, with no intent to hit anyone (or to cause any other trespassory intentional tort) by such tossing, but the tossed stick hit B, the stick’s hitting B was not the result of D’s intentionally hitting A with the stick, but rather was the result of D’s separate, subsequent conduct of tossing the stick, which was done without any tortious intent. So even if the intent were transferred, the actual-causation requirement — that the plaintiff’s legal injury must have been caused by the defendant’s tortious intentional conduct — would not be satisfied. However, in such a situation we do not even transfer the intent, since, in order for the tortious intent to be transferred, the unintended legal injury for which the transfer is being sought must be a consequence of the conduct done with the tortious intent (indeed, as will be discussed further below, it must be a literal “direct and immediate” consequence).

**Hypotheticals.** What intentional torts, if any, exist in the following situations, and what type of intent — direct or transferred — satisfies the intent requirement for each tort?

(a) Don shot at Joe’s back, intending to kill Joe without Joe’s being aware of the attack. Joe turned around just as Don was shooting and successfully leapt out of the way to avoid being hit.

(b) Same as (a), but Joe was unable to avoid being hit.

(c) Same as (a), with the added fact that Mary, Joe’s girlfriend, who had been hidden behind Joe and of whose presence Don was unaware, was hit by the bullet.

(d) Same as (a), except Mary also saw Don shooting and, fearing being hit, also leapt out of the way.

The use of the transferred intent doctrine to hold a defendant liable for legal injuries that resulted from her tortious intentional conduct but which she did not intend to cause is based on normative judgments regarding the proper extent of legal responsibility for the consequences of such tortious intentional conduct. It results in a defendant whose intent was tortious being held liable not only for the intended consequences of her tortious conduct but also for certain unintended consequences. However, for historical reasons the legal doctrine that is used to accomplish and regulate this extension of the defendant’s liability is not the
attributable-responsibility ("proximate cause") element of the prima facie case but rather the tortious-conduct element, through the transferred intent doctrine.

The Restatement Second incorporates the details of the transferred-intent doctrine directly into the blackletter definitions of the intent required for a battery or an assault. For example, the definition of a harmful battery in Restatement Second § 13 states:

Battery: Harmful Contact.
An actor is subject to liability to another for battery if
(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
(b) a harmful contact with the person of the other directly or indirectly results.

Id. (emphasis added); see id. § 18 (offensive battery); id. § 21(1) (assault). The italicized language incorporates the details of the transferred-intent doctrine, between parties and between the torts of assault, offensive battery, and harmful battery.

The Restatement Second's approach results in definitions of battery and assault that are needlessly complex and confusing and thereby obscure the basic nature of the battery and assault actions and the unifying general structure of the intentional tort actions—the focus on a particular type of legal injury and the defendant's intent to cause that particular type of injury to the plaintiff. It is better to follow the traditional approach of having the definitions of battery and assault clearly and simply state the basic elements for each action, as is done in this chapter, and to address the complexity introduced by the transferred-intent doctrine through a separate blackletter statement, as is separately (redundantly) done in Restatement Second §§ 16, 20 and 32. See also Dobbs § 40 at 76 (favoring the traditional approach).

The Restatement Third's definitions of battery and assault (and wrongful confinement) merely include a simple reference to the transferred intent doctrine, while leaving its elaboration for a separate section. See Restatement Third: Intentional Torts § 110 [now §10] (March 2016 draft).

The traditional approach is better not only as a matter of conceptual simplicity and clarity, but also because cases in which the plaintiff must rely on the transferred intent doctrine occur infrequently in practice. The doctrine should be considered only in those rare situations in which (1) the defendant engaged in conduct with the intent to affect another's person or property, (2) the plaintiff has suffered the legal injury required for some trespassory intentional tort, but (3) the defendant did not intend to cause that legal injury to the plaintiff—that is, only if the actual plaintiff or legal injury is not the same as the intended "victim" or legal injury.

There are two important qualifications to the transferred intent doctrine that often go unnoted by secondary sources, including the Restatements, and that make the Restatement Second's incorporation of the details of the doctrine into its definitions of assault and battery not only confusing and unnecessarily complex, but also inaccurate.
First, the defendant’s intent will not be transferred if the defendant’s intentional conduct either was justified by some privilege (for example, self-defense or known consent) or was due to a mistaken belief that it was privileged. Remember that the real issue is the proper extent of legal responsibility for the consequences of one’s tortious conduct. Although the courts are willing to use the transferred-intent doctrine to hold a defendant liable for an unintended trespass to person or property if the defendant’s intentional conduct was culpably wrongful—neither privileged nor mistakenly believed to be privileged—they are not willing to do so if the defendant mistakenly believed that her conduct was privileged or, obviously, if it actually was privileged. For example, assume the defendant, in justifiable self-defense, shot at an attacker and wounded a bystander. Assume further that the defendant neither desired to wound the bystander nor knew she was nearly certain to wound the bystander (otherwise, there would be no need for the transferred intent doctrine, since direct intent to batter the bystander would exist). Since the defendant’s intentional attempt to wound or scare the attacker is justified as self-defense, the intent cannot be transferred to satisfy the tortious intent requirement in a battery action by the plaintiff. The plaintiff will have to establish a negligence or strict-liability case for accidental (unintentional) injury. See Dobbs §§ 40 & 75.

Second, there is a literal physical and temporal “proximity” limitation on the transfer of intent, which applies in all situations but is especially important to keep in mind under the broader version of the doctrine, which encompasses all the trespassery intentional torts rather than only assault, battery, and false imprisonment. The requirement is that there must be a “direct and immediate” causal relationship between the defendant’s tortious intentional conduct and the plaintiff’s actual injury. While this limitation can be derived from the requirements for the original writ of trespass (see Prosser & Keeton § 8 at 38), it also makes good sense as a matter of policy. For example, assume the defendant stole a third party’s car and thereafter, while driving the car, accidentally ran into the plaintiff’s car. The injury to the plaintiff’s car is not a direct and immediate consequence of the defendant’s tortious intentional conduct (the unauthorized taking of the third party’s car), but rather occurs later and at some distance away. The plaintiff should not be able to use the defendant’s prior intent to steal a third party’s car, which is remote in time and space from the accidental injury to his own car, to turn what should be (at best) a negligence or strict liability action into an intentional tort action for trespass to chattel or conversion. (However, the defendant would be liable for any damage to the car that he intentionally stole from the third party, no matter how indirect, accidental or unforeseeable such damage might be. As is noted in section D.1 of Chapter 7 on Attributable Responsibility, a defendant is treated as an insurer with regard to harm that occurs to intentionally misappropriated property (or persons).)

The direct and immediate consequence requirement generally precludes transferring the tortious trespassery intent to satisfy the intent requirement for an unintended consequence that was not a direct result of the force intentionally set in motion by the defendant. For example, if C is accidentally shot by B who is defending herself from an attack by A, it is unlikely that A’s intent to batter B can be transferred to satisfy the intent required for a battery action by C against A: “It is not clear that [A] would be liable for battery by way of transferred intent, although he might be liable for negligence if foreseeable actual harm comes to [C].” Dobbs 76, citing as a criminal law analogy Erwin S. Barbre, Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by
defendant, 56 ALR 3d 239 (1974). A somewhat different situation was presented in the famous English case, Scott v. Shepherd, 96 Eng. Rep. 525 (1773), in which the original force or danger was redirected by intervening conduct. A firecracker was thrown into a crowd and picked up and thrown away from themselves by a couple of others before exploding in front of and injuring P’s face. The majority of the court held that the injury to P was a direct consequence, as was then required for the writ of trespass. Chief Judge De Gray stated: “I do not consider [the intermediaries] as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation.” Judge Nares stated that he would hold the defendant liable due to the wrongful nature of the conduct and the foreseeable result “be the injury mediate or immediate.”

**Hypotheticals.** What intentional torts, if any, exist in the following situations, and what type of intent—direct or transferred—satisfies the intent requirement for each tort? For each possible tort, make sure to consider (1) whether there is a need to transfer intent, (2) if so, whether the conditions for transferring intent are satisfied, and (3) whether all the other requirements for the particular tort are satisfied.

(e) Don, who saw his long-haired friend, Joe, sitting on a park bench, walked up behind Joe and gently slapped him on the back. While doing so, he accidentally hit Mary, who was sitting next to Joe on the bench.

(f) Same as (e), except the person Don thought was Joe was actually Sally, a stranger.

(g) Don walked up behind Sally, whom he did not know, and purposefully gently slapped her back. While doing so, he accidentally touched Mary, who was sitting next to Sally on the bench. Sally, who was in love with Don and knew he was approaching, secretly was hoping he would touch her.

(h) Same as (g), except Mary also secretly wanted to be touched by Don.

(i) Joe unjustifiably fired at Don with the purpose of killing Don, but none of his bullets hit Don. To defend himself, Don justifiably fired back at Joe, with the purpose of hitting him or scaring him off. His bullet missed Joe and accidentally hit Mary.

The transferred intent doctrine is explicitly recognized in the Restatement only for transfers of intent within and between the torts of assault and battery and within the tort of false imprisonment. See Restatement Second § 35(1)(a) (intent to confine plaintiff satisfied by intent to confine third party); Restatement Third: Intentional Torts § 110 [now §10] (March 2016) (same, but also allowing transfer of intent between persons only for the newly stated, in § 4, tort of purposeful infliction of bodily harm). Some authorities state that the doctrine may be applied more broadly to all the trespassory intentional torts, including those involving trespasses to property as well as trespasses to persons. See, e.g., Dobbs § 40 at 76; Prosser § 8 at 33-34. For example, in Vandenburgh v. Truax, 4 Denio 464, 465-66, 468
(N.Y. 1847), the court held the defendant liable for loss of the plaintiff’s wine that was caused by a third party’s knocking over the cask containing the wine while trying to escape the defendant’s deadly assault:

It is not necessary that [the defendant] should intend to do the particular injury which follows; nor indeed any injury at all. If a man without just cause aim a blow at his enemy, which, missing him, falls upon his friend, it is a trespass upon the friend . . . . Or if, in attempting to steal, or destroy the property of another, he unfortunately wound the owner, or a third person, he must answer for the consequences, although he did not intend that particular mischief. . . . [T]here is nearly as much reason for holding [the defendant] liable for driving the boy against the wine cask, and thus destroying the plaintiff’s property, as there would be if he had produced the same result by throwing the boy upon the cask, in which case his liability could not have been questioned.

When the intent sought to be transferred is the intent to trespass to land or chattel or to falsely imprison someone, the intent is unlikely to be transferred unless the relevant consequence is a direct and immediate result of the force intentionally used to accomplish the trespass or confinement, rather than an accidental result of a continued physical presence on the land, possession of the chattel, or confinement of the falsely imprisoned person, especially since any such accidental consequences that are harmful can be redressed as actual and attributable ("proximate") consequences of the original wrongful intentional trespass or confinement.

Hypotheticals. What intentional torts, if any, exist in the following situations, and what type of intent—direct or transferred—satisfies the intent requirement for each tort? Assume that a trespass to land (real property) requires an intentional entry onto the plaintiff’s land and that a trespass to chattel (personal property) requires an intentional physical interference with the plaintiff’s personal property.

(j) Don purposely threw a rock over a fence onto Mary’s land that accidentally hit Mary. He did not know she was there, nor did he cause any physical injury to her person or property. She did not perceive him or the rock prior to its hitting her.

(k) Same as (j), but, rather than hitting Mary, the rock hit and injured Mary’s dog.

(l) Don shot at Mary’s dog, which was walking ahead of Mary on a leash that was being held by Mary. The (extremely observant) dog saw the bullet coming and leapt out of the way, pulling Mary into the path of the bullet. Mary, who did not see or hear Don shoot the gun, was hit by the bullet.

(m) The “front” door to Mary’s house is actually on the side of her house, only three feet from Don’s property. Having just had a bitter argument with Mary, who had gone back into her house, Don placed his vicious dog on a
short chain at the edge of his property facing Mary’s door, so that the dog would snarl and leap onto Mary’s property toward her door when she opened it, but be (barely) prevented by the chain from actually reaching Mary’s door. When Mary opened her door and saw the snarling dog, still on Don’s property but apparently about to spring toward her, she quickly closed the door and stayed in her house. Don was not aware that the door was the only means of exit from Mary’s house.

Although all of this taken in at once may seem fairly complex, it can be succinctly summarized and is not that difficult to apply if you break it down and work carefully through it step by step. Consider the following blackletter summary.

A defendant’s tortious intent to trespass against the person or property of the plaintiff or a third party may be transferred to satisfy the tortious intent requirement in any trespassery intentional tort action by the plaintiff against the defendant, but only if:

(a) the plaintiff’s legal injury resulted directly and immediately from the defendant’s tortious intentional conduct.

(b) the defendant’s intentional conduct was neither privileged (e.g., by ownership, known consent, or justifiable defense of persons or property) nor due to a mistaken belief that it was privileged.

F. DEFENSES

A defendant who is alleged to have trespassed on the plaintiff’s person or property may, in addition to or instead of contesting the plaintiff’s prima facie case, plead a defense to justify or (rarely) excuse the alleged trespass, which if valid will prevent the defendant from being liable even if there is a good prima facie case. Recall, for example, the Schroeder case discussed in sections B.3 & C.1 of this chapter, in which the defendant Lufthansa Airlines not only contested the prima facie cases of battery and false imprisonment, but also pled as a defense that, even if the plaintiff had not consented, the airline properly exercised its authority to take necessary and reasonable steps to deal with the bomb threat that threatened the lives and property of the airline’s passengers and employees as well as the property of the airline itself.

The word “defense” should only be used to refer to defenses to the prima facie case; it should not be used to refer to arguments that the defendant raises about the alleged lack of one or more required elements in the prima facie case, such as the required injury to the plaintiff, intentional conduct by the defendant, or actual causation. Since students often fail to observe this distinction, defenses are often referred to as “affirmative defenses” to distinguish them from arguments that the defendant makes about the alleged failure of the prima facie case. The “affirmative” modifier reflects the fact that, while the plaintiff bears the burden of alleging and proving the prima facie case for any tort, the defendant bears the “affirmative” burden of alleging and proving any defense.
In this section, we will explore the principal defenses that may be raised by a defendant who is alleged to have intentionally trespassed against the person or property of the plaintiff.

1. CONSENT

As was discussed in section B.3 above, the plaintiff’s consent to the defendant’s intentional conduct technically is not a defense for the three actions involving a trespass to the plaintiff’s person: battery, assault, and false imprisonment. Rather, in such actions the plaintiff’s lack of consent is a necessary element of the prima facie case that must be alleged and (perhaps) proved by the plaintiff, and the defendant must raise the issue of plaintiff’s consent not as a defense but rather by a general denial of the plaintiff’s prima facie case. The proper treatment of consent is clouded in some jurisdictions by jury instructions that not only treat the lack of permission or authorization as a necessary element of the prima facie case, but also make the plaintiff’s consent a defense that must be pled and proved by the defendant.

Slightly less confusion exists for the three actions involving a trespass to the plaintiff’s property: trespass to land, trespass to chattel, and conversion. For these actions, the plaintiff’s consent generally is treated as a defense that must be pled and proved by the defendant, rather than treating the plaintiff’s lack of consent as a necessary element of the prima facie case. Again, however, some jury instructions and secondary sources treat the lack of authorization or consent as part of the prima facie case.

For the nontrespassory intentional torts, the plaintiff’s consent generally is treated as a defense that must be pled and proved by the defendant.

2. DEFENDING AGAINST THREATS BY THE PLAINTIFF OR PLAINTIFF’S PROPERTY

The defenses discussed in this section are based on the need for the defendant to be able to employ reasonable self-help to protect her or another’s person or property against an ongoing or imminent physical interference by the plaintiff or by property belonging to the plaintiff. The restrictions on these defenses reflect the general preference for requiring resort to the civil authorities rather than the use of self-help, especially when the self-help involves the use of force.

a. DEFENSE OF SELF OR OTHERS

A person has a privilege, which will be a complete defense to liability, to trespass against another’s person or property when doing so is necessary to defend against an actual or threatened, imminent or ongoing, and unprivileged physical interference by that person or property with herself or a third person and the means employed are reasonable. The defense of self-defense is distinct from the defense of defense of others. However, the two defenses are similar in every respect except (perhaps) one—the effect of mistake, which is discussed in subsection (c) below—so it will be convenient to discuss them together.
To qualify as a privileged defense of self or others, the defendant’s trespass on the plaintiff’s person or property must be undertaken in defense against an (actual or threatened) imminent or ongoing unprivileged physical interference by the plaintiff or the plaintiff’s property with the person of the defendant or a third person, rather than being a means of retaliation for some past interference or a defense against a physical interference by someone or something other than the plaintiff or the plaintiff’s property. To obtain public or private retribution, the defendant must resort to the judicial remedies provided by the criminal and civil law. See Restatement Second § 63 comment g. Defenses based on the necessity of taking action to avert or terminate physical interferences with persons or property by someone or something other than the plaintiff or the plaintiff’s property are discussed in section E.3 below.

The defendant’s defensive actions must be necessary and reasonable in the light of the consequences being defended against. Most importantly, the defendant may only use deadly force (force intended or likely to cause death or serious bodily injury) when the use of such deadly force is necessary to defend herself or a third person against imminent death, serious bodily injury or ravishment (rape, sodomy, etc.). Under the “civilized” view, adopted in the Restatement, if the defendant can avoid the necessity of using deadly force by taking a clearly safe avenue of retreat, other than retreat from her dwelling place, or by relinquishing some right or privilege other than the privilege of effecting a lawful arrest or preventing an unprivileged intrusion upon or dispossession of her dwelling place, she must do so. See id. §§ 65 & 76. However, a majority of states, augmented in recent years by legislative enactments, instead follow the “frontier” view, which allows persons to stand their ground and use deadly force in defense, without any obligation to retreat, in response to a deadly attack or the threat thereof. See Adam Liptak, 15 States Expand Right to Shoot in Self-Defense, New York Times, Aug. 7, 2006, A1.

The defendant may use nondeadly force to defend herself or another against aggression by the plaintiff without any obligation to retreat or to give up some right or privilege, unless she was the initial aggressor. However, as always, the force used must be necessary and reasonable in the light of the consequences being defended against. See id. §§ 63, 70 & 76. Such nondeadly force may include the threat to use (but not the actual use of) deadly force, unless the threat itself creates an unreasonable risk of causing death or serious bodily injury or is otherwise deemed excessive in the particular circumstances. See id. § 70(2). However, threatening the use of such deadly force in a situation where its actual use would be unjustified is risky; it would justify the initial aggressor’s use of nondeadly or even deadly force in self-defense, if the initial aggressor cannot safely withdraw or retreat.

If the defendant uses force in retaliation rather than in defense, or uses excessive force, she also has become an aggressor. The plaintiff (the initial aggressor) will have the right to defend himself against the defendant’s unjustified aggression if (and only if) there is no safe avenue of retreat, but will still be liable for his own initial aggression. See Restatement Second § 71.
NOTES

1. Hypotheticals. Is either John or Mark liable for an assault or battery in the following situations?

(a) John spat in Mark’s face. Mark, enraged, spat back in John’s face.

(b) John, trying to egg Mark into a fight, repeatedly slaps him while taunting him. Mark, to stop the slapping, pulls out a gun and shoots John.

(c) Same facts as (b) except Mark grabs and holds John’s arms, rather than shooting him.

(d) Same facts as (b) except Mark punches John in the face, attempting to knock him down, rather than shooting him. What if Mark is the heavyweight champion of the world? What if Mark uses a bat instead of his fist?

2. Spouse or child abuse. What are the implications of the imminent or ongoing physical interference limitation on the use of force in defense of oneself or another for the attempt of a wife or child to justify a deadly attack on the husband or father while he was sleeping or placidly watching television, based on the husband’s or father’s chronic serious physical or sexual abuse of the spouse or child? See Dobbs § 72 at 165-66; William R. LaFave, Criminal Law § 10.4(d) at 576 (5th ed. 2010); Developments in the Law—Legal Responses to Domestic Violence: V. Battered Women Who Kill Their Abusers, 106 Harv. L. Rev. 1574 (1993).

3. The privileges of self-defense or defense of others exist even if the imminent or ongoing physical interference by the plaintiff or the plaintiff’s property with the person of the defendant or another is known by the defendant to be unintentional and due to negligence. However, if it is due merely to negligence, the defendant even if using nondeadly force must take a safe avenue of retreat or relinquish a right or privilege when it would be reasonable to do so, rather than standing her ground. See id. §§ 64 & 66. The Restatement takes no position on whether there is a privilege of self-defense or defense of others against a physical interference which the defendant recognizes, or should recognize, to be entirely innocent (i.e., neither intentional nor due to negligence). See id. § 66 caveat. Others have argued that the privilege of self-defense should still apply. See generally Robert Nozick, Anarchy, State, and Utopia 34-35 (1974); Judith Jarvis Thomson, Rights, Restitution, and Risk (W. Parent ed. 1986); Larry Alexander, Self-Defense, Justification, and Excuse, 22 Phil. & Public Affairs 53 (1993); Michael Otsuka, Killing the Innocent in Self-Defense, 23 Phil. & Public Affairs 74 (1994).

b. DEFENSE OF PROPERTY

Defense of Property. A person has a privilege, which will be a complete defense to liability, to trespass against another’s person or property when doing so is necessary to defend against an actual or threatened, imminent or ongoing, and unprivileged physical interference by that person or property with her real or personal property and the means
employed are reasonable. As with the defenses of self-defense and defense of others, the defense of *defense of property* can only be used to defend against threats by the plaintiff or the plaintiff’s property to one’s property and only to defend against an (actual or threatened) *imminent or ongoing* physical interference with one’s property, rather than to retaliate for a past interference with one’s property or to attempt to recover possession of property after it has been wrongfully taken.

The defense of defense of property may also be available if the defendant is defending against an (actual or threatened) imminent or ongoing physical interference by the plaintiff or the plaintiff’s property with the property of a third person. The Restatement extends the privilege to encompass defense of property belonging to a third person if the third person is a member of the actor’s immediate family or household or a person whose possession of property the actor is under a legal duty to protect. It takes no position on whether the privilege should extend even further. See Restatement Second § 86 and caveat.

As always, the defendant’s use of force must be necessary and reasonable. Prior to using *any* force, the defendant must first request the person interfering with her property to “cease and desist” and must give him an opportunity to do so, unless the defendant “reasonably believes that a request will be useless or that substantial harm will be done before it can be made.” See id. §§ 77 & 87. Similarly, prior to using more vigorous force, the defendant must first “lay her hands on gently,” subject to the same qualifications. An excessive or otherwise unjustified use of force in defense of property entitles the person against whom the force is used to employ necessary and reasonable force in self-defense. See id. §§ 80-82.

Theoretically, deadly force cannot be used merely in defense of property, but only in defense of persons. However, the imminent or ongoing physical interference requirement for defense of persons is relaxed in the context of defense of property to allow the use of deadly force, when necessary and reasonable, if the defendant “reasonably believes that the intruder [upon real or personal property], unless expelled or excluded, is likely to cause death or serious bodily harm.” Id. § 79. In addition, deadly force may be used if necessary to prevent more serious felonies, with the level of seriousness varying depending on the jurisdiction but generally including at least those involving a significant possibility of the use or existence of deadly force (e.g., armed robberies, common law burglaries, kidnappings, and arson). See id. § 143(2) (felonies threatening death or serious bodily harm or involving the breaking and entry of a dwelling place); id. first caveat (taking no position on whether deadly force should also be allowed to prevent “breaking and entering of a building in which property of substantial value is stored if such breaking and entering is by statute made a burglary or tantamount thereto”); cf. Wayne LaFave, *Criminal Law* § 41 (5th ed. 2010). Legislation enacted in recent years in a number of states allows persons to use deadly force against a trespasser unlawfully and forcefully entering their occupied home or vehicle even if the trespasser is not using deadly force. See Adam Liptak, 15 States Expand Right to Shoot in Self-Defense, *New York Times*, Aug. 7, 2006, A1.

As with defense of persons against nondeadly attacks, the threat to use deadly force without actually using it may be justified, but is risky, in defense of property. Id. § 81(2).
Juries and judges sometimes are liberal in finding some threat to the person as well as property that would justify the use of deadly force.

**Recapture of chattels (personal property).** In addition to the privilege of defense of (real or personal) property, there is a limited privilege to use necessary and reasonable nondeadly force to *recapture chattels* (personal property) of which the defendant was recently wrongfully dispossessed through force or fraud by the plaintiff, if the attempted recapture occurs immediately after the chattel was taken or in the course of a fresh pursuit that began immediately after it was taken and after a demand (if feasible and reasonable) for its return has been made. See Restatement Second §§ 100-10.

**Recapture of land.** The use of force to retake possession of land through self-help, rather than through the judicial process, is now generally prohibited or severely restricted. For further discussion, consult the materials in your property course. Why do you think the privileges to recapture chattels or land are so severely limited?

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**KATKO V. BRINEY**

Supreme Court of Iowa

183 N.W.2d 657 (1971)

MOORE, Chief Justice. 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. After careful consideration of defendants’ motions for judgment notwithstanding the verdict and for new trial, the experienced and capable trial judge overruled them and entered judgment on the verdict. Thus we have this appeal by defendants. . . .

II. 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 no 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.

III. 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.
IV. 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”. They repeated this contention in their exceptions to the trial court’s instructions 2, 5 and 6. They took no exception to the trial court’s statement of the issues or to other instructions.

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. . . .
Restatement of Torts, section 85, page 180, states: “The value of human life and limb, not only to the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as is stated in § 79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises. * * * A possessor of land cannot do indirectly and by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present.”

. . . In Hooker v. Miller, 37 Iowa 613 [1873], 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. The State v. Vance, 17 Iowa, 138.” At page 617 this court said: “[Trespassers] and other inconsiderable violators of the law are not to be visited by barbarous punishments or prevented by inhuman inflictions of bodily injuries.” . . .

In addition to civil liability many jurisdictions hold a land owner criminally liable for serious injuries or homicide caused by spring guns or other set devices. . . . In Wisconsin, Oregon and England the use of spring guns and similar devices is specifically made unlawful by statute. . . .

The legal principles stated by the trial court in instructions 2, 5 and 6 are well established and supported by the authorities cited and quoted supra. 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.

V. 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. . . . The jury’s findings of fact including a finding defendants acted with malice and with wanton and reckless disregard, as required for an allowance of punitive or exemplary damages, are supported by substantial evidence. We are bound thereby. . . .

Affirmed.

LARSON, Justice. I respectfully dissent, first, because the majority wrongfully assumes that by installing a spring gun in the bedroom of their unoccupied house the defendants intended to shoot any intruder who attempted to enter the room. Under the record
presented here, that was a fact question. Unless it is held that these property owners are liable for any injury to an intruder from such a device regardless of the intent with which it is installed, liability under these pleadings must rest upon two definite issues of fact, i.e., did the defendants intend to shoot the invader, and if so, did they employ unnecessary and unreasonable force against him? . . .

Plaintiff’s petition at law asking damages alleged willful and malicious setting of a trap or device for the purpose of killing or inflicting great bodily harm upon any trespasser on defendants’ property. We are, therefore, factually concerned with how such force may be properly applied by the property owner and whether his intent is relevant to liability. Negligent installation of a dangerous device to frighten and ward off an intruder or thief is not alleged, so unless the proof submitted was sufficient to establish a willful setting of the trap with a purpose of killing or seriously injuring the intruder, no recovery could be had.

. . . At the trial of this case Mr. Briney, one of the defendants, testified that . . . he first aimed [the shotgun] straight at the door but later, at his wife’s suggestion, reconsidered the aim and pointed the gun down in a way he thought would only scare someone if it were discharged. On cross-examination he admitted that he did not want anyone to know it was there in order to preserve the element of surprise.

. . . I feel the better rule is that an owner of buildings housing valuable property may employ the use of spring guns or other devices intended to repel but not seriously injure an intruder who enters his secured premises with or without a criminal intent, but I do not advocate its general use, for there may also be liability for negligent installation of such a device. . . . [T]he mere setting of such a device with a resultant serious injury should not as a matter of law establish liability.

In the case of a mere trespassable authorities have reasoned that absolute liability may rightfully be fixed on the landowner for injuries to the trespasser because very little damage could be inflicted upon the property owner and the danger is great that a child or other innocent trespasser might be seriously injured by the device. In such matters they say no privilege to set up the device should be recognized by the courts regardless of the owner’s intent. I agree.

On the other hand, where the intruder may pose a danger to the inhabitants of a dwelling, the privilege of using such a device to repel has been recognized by most authorities, and the mere setting thereof in the dwelling has not been held to create liability for an injury as a matter of law. In such cases intent and the reasonableness of the force would seem relevant to liability.

Although I am aware of the often-repeated statement that personal rights are more important than property rights, where the owner has stored his valuables representing his life’s accumulations, his livelihood business, his tools and implements, and his treasured antiques as appears in the case at bar, and where the evidence is sufficient to sustain a finding that the installation was intended only as a warning to ward off thieves and criminals, I can see no compelling reason why the use of such a device alone would create liability as a matter of law. . . .
In the case at bar the plaintiff was guilty of serious criminal conduct, which event gave rise to his claim against defendants. Even so, he may be eligible for an award of compensatory damages which so far as the law is concerned redresses him and places him in the position he was prior to sustaining the injury. The windfall he would receive in the form of punitive damages is bothersome to the principle of damages, because it is a response to the conduct of the defendants rather than any reaction to the loss suffered by plaintiff or any measurement of his worthiness for the award.

When such a windfall comes to a criminal as a result of his indulgence in serious criminal conduct, the result is intolerable and indeed shocks the conscience. If we find the law upholds such a result, the criminal would be permitted by operation of law to profit from his own crime. Furthermore, if our civil courts are to sustain such a result, it would in principle interfere with the purposes and policies of the criminal law. This would certainly be ironic since punitive damages have been thought to assist and promote those purposes, at least so far as the conduct of the defendant is concerned. . . . The criminal law can take whatever action is appropriate in such cases, but the civil law should not compound the breach of proper social conduct by rewarding the plaintiff for his crime. . . .

The admonitory function of the tort law is adequately served where the compensatory damages claimed are high and the granted award itself may act as a severe punishment and a deterrence. In such a case as we have here there is no need to hold out the prospect of punitive damages as an incentive to sue and rectify a minor physical damage such as a redress for lost dignity. Certainly this is not a case where defendants might profit in excess of the amount of reparation they may have to pay. . . .

Being convinced that there was reversible error in the court’s instructions, that the issue of intent in placing the spring gun was not clearly presented to the jury, and that the issue as to punitive damages should not have been presented to the jury, I would reverse and remand the matter for a new trial.

NOTES

1. Subsequent history and community attitudes. After the above opinion was publicized (through press accounts which often erroneously stated that Katko was intruding in the Brineys’ “home”), hundreds of persons, including prison inmates, sent checks and cash totaling over $10,000 to the Brineys. When Katko initiated legal proceedings to auction the Brineys’ land to satisfy the judgment, a local “defense committee” that was organized to help the Brineys purchased the land for $10,000 and agreed to lease it back to the Brineys for a rent that covered the interest on the $10,000 and the real estate taxes. Subsequently, however, when the land appreciated in value, the defense committee forced the Brineys off the land and sold it to one of the original purchasers at a profit of $6500. Briney and Katko then jointly sued the neighbors, claiming in effect that the prior land transaction with them was a mortgage and not a sale (so that they, rather than the purchasers, were entitled to any appreciation in the value of the land). As for the original incident, Briney stuck to his guns, stating: “They used booby traps in Vietnam, didn’t they? Why can’t we use them here to protect our property in this country?” When asked if he would do it again, he replied, “There’s one thing I’d do different, though, I’d have aimed that gun a few feet higher.” See Chicago Tribune, April 25, 1975, at 1, col. 1. Cf. Paul H. Robinson & John M. Darley,
Justice, Liability, and Blame: Community Views and the Criminal Law 69-72 (1995) (reporting that about 80% of respondents in a study believed it was improper to use deadly force merely in defense of property, even when such force was necessary to defend the property, and would impose criminal liability for the use of such force; however, 75% would impose no or minimal criminal punishment—e.g., a prison term of less than one year).

2. **Intent.** Did the defendant have the required intent for a battery action? Were the instructions sufficiently clear on the intent requirement?

3. **Effect of notice.** Restatement § 85 comment a, quoted by the Katko majority, states that, just as an owner or possessor of land who is present cannot use deadly force against a nondeadly trespasser, even if the trespass cannot be prevented by any other means and the owner or possessor has warned the trespasser that he will use deadly force if the trespasser does not desist, a landowner who is not present “cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after [warning], inflict directly were he present.” Almost identical language appears in Restatement Second § 85 comment a. See also John Finnis, *Intention in Tort Law*, in Philosophical Foundations of Tort Law 229 (David Owen ed., 1995). Would the giving of such notice ordinarily be sufficient grounds for inferring consent by the trespasser to being shot, at least if the trespasser read and understood the notice? If so, why does it not prevent the trespasser from recovering?

3. “A defendant may not do indirectly . . .”? It is often stated that a defendant may not do indirectly, e.g., by mechanical means when not present, what she would not be allowed to do directly if she were present. See, e.g., Restatement § 85 comment a (quoted in Katko); Prosser & Keeton § 21 at 134. This maxim, while generally true, is not always true. For example, a person while away from her house can leave the door to her house locked, or set up a mechanical device that will close and lock the door whenever it senses someone approaching the house, even though, if present, she might be required in an emergency situation to unlock the door, or to leave it open rather than closing it, to allow someone who clearly posed no danger to her or her property to enter to phone for help. See the discussion of defendants’ failures to aid or rescue in chapter 5.

4. **Vicious dogs. High-voltage electric fences.** See Restatement Second §§ 84, 516.

5. **Constitutional limits on the use of deadly force to apprehend criminal suspects.** In Tennessee v. Garner, 471 U.S. 1 (1985), a six-to-three majority of the U.S. Supreme Court held that the Fourth Amendment of the U.S. Constitution (as applied to the states through the Fourteenth Amendment) prohibits, as an unreasonable “seizure” of a person, state authorization of the use of deadly force to prevent the escape of a suspected felon unless it is (a) necessary to prevent the escape, (b) a warning (if feasible) has been given, and (c) the police officer (or other authorized person) has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others (e.g., “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm”). These restrictions on the use of deadly force parallel those suggested in Model Penal
The Court stated that, although the common law originally permitted the use of deadly force when necessary to apprehend a fleeing felon, but not a misdemeanant, “sweeping change in the legal and technological context” rendered the common-law rule no longer constitutionally permissible. The Court noted the following changes: (1) When the common-law rule arose, felonies were limited to the most serious offenses and were almost all punishable by death, while in modern times felonies encompass many less serious offenses, including many formerly classified as misdemeanors or which did not exist at common law, and “almost all crimes formerly punishable by death no longer are or can be”, so that it can no longer be assumed that a felon is more dangerous than a misdemeanant or that the use of deadly force merely constitutes “a speedier execution [without trial or proof of guilt] of someone who has already forfeited his life.” (2) The technology and use of weaponry was much more limited at the time the common-law rule arose. Deadly force could be inflicted almost solely in hand-to-hand struggles, in which the officer’s safety necessarily was at risk, and officers did not carry handguns until the latter half of the nineteenth century, while now an officer not at risk can employ deadly force from a distance. (3) No or minimal enhanced penalties are imposed for attempts to flee arrest, while allowing the use of deadly force in essence allows imposition of capital punishment, without a trial or conviction, for attempting to flee. (4) While society has an important interest in securing the apprehension of criminals, the available evidence fails to demonstrate that allowing the use of deadly force against nonviolent suspects increases arrests, deters crime, or enhances protection of police officers or citizens. Thus, the dominant view among police organizations themselves, and the policy of a majority of police departments in the United States, is that deadly force may be used only when necessary to prevent death or serious bodily injury. (5) Therefore, the Court held that, balancing society’s interest in effective law enforcement against individual suspects’ interest in bodily security, the use of deadly force constitutes an unreasonable and hence unconstitutional seizure.

6. Underlying principles. What principles seem to underlie the law’s refusal to allow deadly force to be used merely in defense of property, no matter how valuable that property may be, even when such force is the only feasible means of protecting the property and even when notice or warning has been given that such deadly force will be used?

c. Mistaken Perception of Plaintiff’s Aggression

**COURVOISIER v. RAYMOND**

Supreme Court of Colorado
47 P. 284 (Colo. 1896)

HAYT, C. J. It is admitted, or proven beyond controversy, that appellee received a gunshot wound at the hands of the appellant at the time and place designated in the complaint, and that, as the result of such wound, the appellee was seriously injured. It is further shown that the shooting occurred under the following circumstances: That Mr. Courvoisier, on the night in question, was asleep in his bed, in the second story of a brick building, situate at the corner of South Broadway and Dakota streets, in South Denver; that he occupied a portion of the lower floor of this building as a jewelry store. He was aroused...
from his bed, shortly after midnight, by parties [two persons] shaking or trying to open the
door of the jewelry store. These parties, when asked by him as to what they wanted, insisted
upon being admitted, and, upon his refusal to comply with this request, they used profane
and abusive epithets towards him. Being unable to gain admission, they broke some signs
upon the front of the building, and then entered the building by another entrance, and,
passing upstairs, commenced knocking upon the door of a room where defendant’s sister was
sleeping. Courvoisier partly dressed himself, and, taking his revolver, went upstairs, and
expelled the intruders from the building. In doing this he passed downstairs, and out on the
sidewalk, as far as the entrance to his store, which was at the corner of the building.

The [two] parties expelled from the building, upon reaching the rear of the store,
were joined by two or three others. In order to frighten these parties away, the defendant
fired a shot in the air; but, instead of retreating, they passed around to the street in front,
throwing stones and brickbats at the defendant, whereupon he fired a second, and perhaps
a third, shot. The first shot fired attracted the attention of plaintiff, Raymond [“a regularly
appointed and duly qualified acting special policeman in and for the city of Denver”], and
two deputy sheriffs, who were at the tramway depot across the street. These officers started
towards Mr. Courvoisier, who still continued to shoot; but two of them stopped, when they
reached the men in the street, for the purpose of arresting them, Mr. Raymond alone
proceeding towards the defendant, calling out to him that he was an officer, and to stop
shooting. Although the night was dark, the street was well lighted by electricity, and, when
the officer approached him, defendant shaded his eyes, and, taking deliberate aim, fired,
causing the injury complained of.

The plaintiff’s theory of the case is that he was a duly-authorized police officer, and
in the discharge of his duties at the time; that the defendant was committing a breach of the
peace; and that the defendant, knowing him to be a police officer, recklessly fired the shot
in question. The defendant claims that the plaintiff was approaching him at the time in a
threatening attitude, and that the surrounding circumstances were such as to cause a
reasonable man to believe that his life was in danger, and that it was necessary to shoot in
self-defense, and that defendant did so believe at the time of firing the shot. . . . [The jury
found that the defendant was liable].

The next error assigned relates to the instructions given by the court to the jury, and
to those requested by the defendant and refused by the court. The second instruction given
by the court was clearly erroneous. The instruction is as follows: “The court instructs you
that if you believe, from the evidence, that, at the time the defendant shot the plaintiff, the
plaintiff was not assaulting the defendant, then your verdict should be for the plaintiff.” The
vice of this instruction is that it excluded from the jury a full consideration of the
justification [rather, excuse] claimed by the defendant. The evidence for the plaintiff tends
to show that the shooting, if not malicious, was wanton and reckless; but the evidence for
the defendant tends to show that the circumstances surrounding him at the time of the
shooting were such as to lead a reasonable man to believe that his life was in danger, or that
he was in danger of receiving great bodily harm at the hands of the plaintiff, and the
defendant testified that he did so believe. He swears that his house was invaded, shortly after
midnight, by two men, whom he supposed to be burglars; that, when ejected, they were
joined on the outside by three or four others; that the crowd so formed assaulted him with
stones and other missiles, when, to frighten them away, he shot into the air; that, instead of
going away, some one approached him from the direction of the crowd; that he supposed this person to be one of the rioters, and did not ascertain that it was the plaintiff until after the shooting. He says that he had had no previous acquaintance with plaintiff; that he did not know that he was a police officer, or that there were any police officers in the town of South Denver; that he heard nothing said at the time, by the plaintiff or any one else, that caused him to think the plaintiff was an officer; that his eyesight was greatly impaired, so that he was obliged to use glasses; and that he was without glasses at the time of the shooting, and for this reason could not see distinctly. He then adds: “I saw a man come away from the bunch of men, and come up towards me, and as I looked around I saw this man put his hand to his hip pocket. I didn’t think I had time to jump aside, and therefore turned around and fired at him. I had no doubts but it was somebody that had come to rob me, because, some weeks before, Mr. Wilson’s store was robbed. It is next door to mine.”

By this evidence two phases of the transaction are presented for consideration: First. Was the plaintiff assaulting the defendant at the time plaintiff was shot? Second. If not, was there sufficient evidence of justification for the consideration of the jury? The first question was properly submitted, but the second was excluded by the instruction under review. The defendant’s justification did not rest entirely upon the proof of assault by the plaintiff. A riot was in progress, and the defendant swears that he was attacked with missiles, hit with stones, brickbats, etc.; that he shot plaintiff, supposing him to be one of the rioters. We must assume these facts as established in reviewing the instruction, as we cannot say what the jury might have found had this evidence been submitted to them under a proper charge. By the second instruction, the conduct of those who started the fracas was eliminated from the consideration of the jury. If the jury believed, from the evidence, that the defendant would have been justified in shooting one of the rioters, had such person advanced towards him, as did the plaintiff, then it became important to determine whether the defendant mistook plaintiff for one of the rioters; and, if such a mistake was in fact made, was it excusable, in the light of all the circumstances leading up to and surrounding the commission of the act?

If these issues had been resolved by the jury in favor of the defendant, he would have been entitled to a judgment. Morris v. Platt, 32 Conn. 75 (1864); Kent v. Cole, 48 N.W. 168 (Mich. 1891); Higgins v. Minagham, 45 N.W. 127 (Wis. 1890). The opinion in the first of the cases above cited contains an exhaustive review of the authorities, and is very instructive. The action was for damages resulting from a pistol-shot wound. The defendant justified under the plea of self-defense. The proof for the plaintiff tended to show that he was a mere bystander at a riot, when he received a shot aimed at another; and the court held that, if the defendant was justified in firing the shot at his antagonist, he was not liable to the plaintiff, for the reason that the act of shooting was lawful under the circumstances.

Where a defendant, in a civil action like the one before us, attempts to justify on a plea of necessary self-defense, he must satisfy the jury, not only that he acted honestly in using force, but that his fears were reasonable under the circumstances, and also as to the reasonableness of the means made use of. In this case, perhaps, the verdict would not have been different, had the jury been properly instructed; but it might have been, and therefore the judgment must be reversed.
NOTES

1. Precedents. Consider the cases relied on in Courvoisier. The facts in Morris are summarized in Courvoisier. In Kent, a verbal dispute between the parties escalated into a fist fight, each party claiming the other was the aggressor, and the issue on appeal was the correctness of a jury instruction giving great, but not conclusive, weight to the defendant’s perception of the force reasonably required to defend himself. In Higgins, the defendant wounded an armed member of a riotous crowd which, for the third successive night, was gathered on the road outside his home, firing guns, vandalizing his property, hurling missiles at his house, singing and yelling obscenities and threats of violence, and generally terrorizing his wife and children, one of whom suffered severe anxiety and could not sleep for weeks afterwards. On the third night, the defendant borrowed a loaded double-barreled shotgun from a neighbor, fired the round of shot in one barrel in the direction of the crowd to scare it off, and then, when he saw them loading up and feared they were about to fire at him, fired the other barrel containing a ball in the direction of the crowd, hitting the plaintiff. Did these cases involve the precise issue raised in Courvoisier, or were they different in one or more important respects?

2. The privilege of mistaken self-defense. Courvoisier states the rule that is accepted in most jurisdictions: the defendant has a complete privilege to defend herself against perceived aggression, which immunizes her from any liability to the intentionally injured plaintiff, even if her good faith perception was mistaken, if her mistake was objectively reasonable. A few jurisdictions have held otherwise, absolving the defendant of liability for actual damages only if the plaintiff intentionally or negligently caused the defendant’s mistake. See Chapman v. Hargrove, 204 S.W. 379 (Tex. Civ. App. 1918); cf. Crabtree v. Dawson, 83 S.W. 557 (Ky. 1904) (defendant required to exercise highest practicable degree of care, since the plaintiff was not the person defendant thought he was). Moreover, in every jurisdiction, the person reasonably but mistakenly believed to be attacking the defendant may use necessary and reasonable force against the defendant in self defense, even if he knows the defendant is acting under a mistaken belief, unless he intentionally or negligently caused the defendant’s mistaken belief. See Restatement Second § 72 and comment c.

3. An anomalous privilege. The complete privilege for mistaken self defense seems to be an anomaly in the law governing tort liability for intentional injury. Recall our discussion in section B.2.c above of the courts’ treatment of a defendant’s mistaken belief regarding the identity of, ownership of, or authorization to deal with some person or property. A reasonable good faith mistake on the latter issues will insulate the defendant from punitive damages, but will not prevent her from being held liable for actual (or nominal) damages, unless the plaintiff deliberately or negligently caused the defendant’s mistake. Although her conduct was excusable, and hence not morally faulty or deserving of punishment, it was done with the intent to interfere with some person or property, for which intentional interference there was no consent or authorization, and thus is deemed to justify the imposition of (strict) liability. Why should a defendant who intentionally injures an innocent plaintiff in the reasonable but mistaken belief that the plaintiff is aggressing against her not similarly be held strictly liable for any actual damages inflicted on the plaintiff, while being immunized from punitive or nominal damages?
Compare the courts’ treatment, discussed in notes 5 through 8 below, of a defendant’s reasonable but mistaken belief that the plaintiff was aggressing against some third person, or was trespassing against the defendant’s or some third person’s property, or was wrongfully in possession of the plaintiff’s property which the plaintiff was seeking to recapture. Compare also the defendant’s strict liability for intentionally but justifiably damaging an innocent plaintiff’s property, discussed in section E.5 below.

4. Rationales, policies, and principles. What rationales might underlie the complete privilege for objectively reasonable mistaken self-defense? Should recognition of and sympathy for the “first law of nature,” the defendant’s “primal instinct for self-preservation,” necessarily preclude recognition of and sympathy for the injury intentionally, albeit mistakenly, inflicted on the innocent plaintiff? Should tort law, which, unlike criminal law, is not primarily concerned with moral blame or punishment but rather with moral responsibility for unconsented-to interferences with the persons and property of others, require the defendant to compensate the plaintiff whom she has intentionally (albeit mistakenly) injured? Given the “primal instinct for self-preservation,” would shifting from a complete privilege to a qualified privilege, according to which the defendant could be held liable only for actual damages, deter persons from defending themselves when they reasonably (or unreasonably) believe they are being attacked?

5. Mistaken defense of others. In most jurisdictions, a defendant who comes to the defense of a third person whom she reasonably but mistakenly believes is being unjustifiably attacked by the plaintiff has at best only a qualified privilege. She will be liable for any actual harm she caused to the plaintiff, but not otherwise, and will not be liable at all if the plaintiff intentionally or negligently caused her mistake. See Prosser & Keeton § 20 at 130-31 & n.10. The Restatement and a substantial minority of states provide a complete privilege for a reasonable mistake. Restatement Second § 76. Is liability for mistaken defense of third parties more or less likely than in the case of mistaken self defense to deter persons from acting to halt or prevent unjustifiable aggression? If such liability will deter persons from coming to the defense of others, is it nevertheless justified by other considerations? Which?

6. Mistaken defense of property. A defendant who assaults or batters a plaintiff in the reasonable but mistaken belief that the plaintiff was committing or about to commit a trespass against the real or personal property of the defendant or some third person will be liable for at least actual damages if the plaintiff had a privilege to enter on, remain on, take, or use the property, unless the plaintiff intentionally or negligently caused the defendant’s mistaken belief. See Restatement Second § 77 and comment d. Otherwise, if the plaintiff had no such privilege but was not actually committing or about to commit a trespass on the property at issue, there is a split of authority on whether the defendant may be held liable for any actual damages. The defendant is probably more likely to be held liable if she was (reasonably but mistakenly) defending someone else’s property rather than her own. See Prosser & Keeton § 21 at 131-32.

7. Mistaken recapture of property. Since, in an attempted recapture of property, the defendant is the person who (re)initiates the use or threat of force, the defendant is liable for any mistake, no matter how reasonable, unless the plaintiff knowingly caused the defendant’s mistake. See Restatement Second § 100 and comments c & d; Prosser & Keeton § 22 at 138.
8. **Mistaken arrest.** A police officer who uses reasonable force to arrest someone in the reasonable good faith, but mistaken, belief that the person has committed a crime will not be liable for assault, battery, false arrest, or false imprisonment. However, a private citizen generally will be liable for a mistaken arrest, despite her reasonable good faith mistake. See Prosser & Keeton § 17 at 111.

### 3. DEFENDING AGAINST THREATS BY THIRD PARTIES OR NATURAL FORCES: PRIVATE OR PUBLIC NECESSITY

**VINCENT V. LAKE ERIE TRANSPORTATION CO.**  
Supreme Court of Minnesota  
109 Minn. 456, 124 N.W. 221 (1910)

O’BRIEN, J. The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiffs’ dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about ten o’clock p.m., when the unloading was completed, had so grown in violence that the wind was then moving at fifty 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 twenty ninth, 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 away from it. . . . [T]he 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. . . .

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 property 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 while 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, 111 N.W. 1 (Minn. 1907), 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 A. 188 (Vt. 1908), 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 plaintiffs, 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.

LEWIS, J. 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 respondents’ 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 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. I concur with Lewis, J.

NOTES

1. Trespass by the defendant? Justice Lewis’ dissent. Is Justice Lewis correct in
assuming that the defendant would not have been liable if the boat’s crew initially had used
stronger cables to tie the boat to the dock before the storm arose, rather than replacing or
supplementing the initial cables when they parted or chafed in the midst of the storm? Why
should the defendant’s use of additional cables after the storm arose make a crucial
difference in the plaintiff’s prima facie case or the nature or extent of the defendant’s
privilege? Does the majority agree, as assumed by the dissent, that the defendant would not
have been liable if the initial cables had held and were not replaced or supplemented?

Is Justice Lewis correct in assuming (and in assuming that the majority assumed)
that the boat was lawfully in position, pursuant to contract, at the time the additional cables
were fastened to the dock? If so, and assuming no contract terms explicitly contemplated or
governed the situation which arose, what contract terms might reasonably be implied? Is
there any indication in the facts as to whether the master of the boat believed that he was
entitled to remain tied up to the dock after the cargo had been unloaded, or after the storm
arose?

2. Distinguishing the defense of necessity from the defenses of self-defense, defense
of others, and defense of property. The privilege or defense of necessity applies when neither
the plaintiff nor the plaintiff’s property is the source of the current danger that has given rise
to the necessity for the defendant’s action. If the plaintiff’s person or property is the source
Chapter Two. The Trespassery Intentional Torts

of the current danger, the relevant defense should be defense of self, others, or property rather than necessity. (The courts, however, sometimes fail to make this distinction.)

3. “[T]he ordinary rules regulating property rights were suspended.” Would the dock owner in Vincent have been liable if he had cut or cast off the cables holding the boat to the dock, thereby setting it adrift in the storm? That was the issue raised in Ploof v. Putnam, 71 A. 188 (Vt. 1908), which was cited and discussed by the majority in Vincent. In Ploof, the defendant’s servant unmoored the plaintiff’s sloop, which was tied up without permission to the defendant’s dock to ride out a severe storm. The sloop, which contained the plaintiff’s family and the family’s goods, was driven upon the shore. The “sloop and its contents were thereby destroyed, and the plaintiff and his wife and [two minor] children cast into the lake and upon the shore, receiving injuries.” The plaintiff sued (1) in trespass, “charging that the defendant by his servant with force and arms wilfully and designedly unmoored the sloop,” and (2) in case (negligence), “alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest” and that the defendant negligently breached this duty. The defendant demurred generally to both counts, but the court held that the danger to the boat and its occupants created by the storm gave the plaintiff a privilege to tie up to the dock during the storm. In the absence of the privilege of private necessity, would the plaintiff have been able to recover any damages from the defendant? If the answer is yes, was the privilege of private necessity unnecessary and superfluous insofar as the plaintiff was concerned?

4. Limitations on the defense of necessity. The defense of necessity applies only in a temporary emergency when it is necessary to enter on, use, or damage the plaintiff’s property in order to save life or more valuable property. See Restatement Second § 197. The defense applies only to property damage or (perhaps) insubstantial personal injury. There is no privilege to intentionally cause substantial bodily harm to an innocent person in order to avoid even death to oneself or others. See Laidlaw v. Sage, 158 N.Y. 73 (1899); Restatement Second §§ 73, 74, 197 & 198; cf. The Queen v. Dudley & Stephens, 14 Q.B.D. 273 (1884); United States v. Holmes, 26 Fed. Cas. 360 (C.C. Pa. 1842). Several occupants of a lifeboat were thrown overboard in Holmes, and one occupant was killed and eaten in Dudley, in order to save the lives of the remaining occupants. The aggressors were indicted and convicted of manslaughter in Holmes (the grand jury refused to return an indictment for murder) and of wilful murder in Dudley. The initial death sentence in Dudley was commuted, and the defendants in each case only served six-month prison sentences. See generally A.W.B. Simpson, Cannibalism and the Common Law (1984). The Restatement leaves open the question of whether there may be a qualified privilege (subject to payment of any actual damages caused) to inflict “comparatively slight bodily harm” upon an innocent person for the purpose of protecting the defendant or a third person from “disproportionately greater bodily harm, as for instance, death.” See Restatement Second § 73 and caveat.

5. The qualified nature of the defense of private necessity. When it is only the defendant’s life or property that is in danger, or the life or property of some third person or limited group of third persons, the necessity is “private” and the defendant has only a qualified privilege. Although the defendant’s trespass is justified and thus is not a basis for either nominal or punitive damages, the defendant must compensate the plaintiff for any actual damages. See Restatement Second § 77 comment e. Since the defendant is liable even
though her trespass was reasonable and justified, this liability is strict liability—liability in
the absence of even legal fault. If the defendant acted to save some other person’s life or
property, the defendant might have a restitution action against that other person for
reimbursement for the actual damages paid to the plaintiff.

6. Underlying principles. Given that the defendant’s conduct is deemed to be
justified, and not merely excused, why should the defendant have only a qualified privilege
of private necessity, rather than a complete privilege? What underlying principles might
explain the qualified nature of the defendant’s privilege and the various limitations on the
availability of the privilege?

7. The defense of public necessity. When the danger is to the public as a whole or
some substantial portion of the public, the majority rule seems to be that the defendant has
a complete (rather than qualified) privilege and thus is not liable for any damages, even
actual damages. The rationale for this complete privilege is to avoid discouraging private
persons and, especially, public officials from acting justifiably on behalf of the greater public
good. However, this position has been heavily criticized, and some states by statute have
provided for compensation of the plaintiff for any actual damage. As the Vincent court noted,
compensation may also be required by the “takings” or “just compensation” clauses of the
federal or state constitutions. It has been argued that almost all public necessity cases in
which no compensation was required have involved situations where compensation would
not be appropriate anyway, since the plaintiff’s property either (1) would have been
destroyed anyway or (2) was itself a source of danger to others’ persons or property. Prosser
& Keeton § 24 at 146-47. In cases where compensation would be appropriate, the
disincentive (as a result of potential liability) for persons to act on behalf of the public
perhaps could be avoided or lessened by allowing an action against the governmental entity
rather than the public official, or by allowing a restitution action by the defendant, or directly
by the plaintiff with no liability on the defendant, against those who benefitted, as occurs
under admiralty law’s principle of “general average contribution.” See note 8 below.

8. The admiralty rule of “general average contribution.” In admiralty law, there is
a principle of “general average contribution,” according to which, if cargo must be thrown
overboard to prevent a ship from foundering in a storm, all those whose property was saved,
including the owner of the ship, compensate the person whose property was jettisoned in
proportion to the value of their property that was saved. Cf. Mouse’s Case, 66 Eng. Rep.
1341 (K.B. 1609).

9. Other qualified privileges to trespass on land. Restatement Second §§ 195, 198-
201.

4. PLAINTIFF’S CONTRIBUTORY NEGLIGENCE?

As will be discussed further in chapter 3, one of the principal defenses in a
negligence action is the defense of plaintiff’s contributory negligence. A plaintiff is deemed
contributorily negligent if his negligence (carelessness) contributed to his injury and the
injury is one for which he properly is held responsible. The plaintiff’s contributory
negligence at one time was a complete defense in a negligence action. However, it
traditionally was not available as a defense in an intentional tort action, on the theory that
there is a difference in kind, and not just in degree, between the defendant’s intentional conduct and the plaintiff’s negligence.

This remains generally true today, despite the shift to a doctrine of comparative responsibility in the negligence action, which treats the plaintiff’s contributory negligence as a partial rather than a complete defense that reduces rather than completely bars the plaintiff’s recovery from a negligent defendant. However, some jurisdictions now also permit the defense of contributory negligence as a partial rather than complete defense in at least some intentional tort actions. See, e.g., Comer v. Gregory, 365 So. 2d 1212 (Miss. 1978); Blazovic v. Andrich, 590 A.2d 222, 231 (N.J. 1991). Yet, even in these jurisdictions, the defense is construed very narrowly and rarely will be available in an intentional tort action. For example, a mugger or rapist will not be able to raise the plaintiff’s alleged contributory negligence of walking along a deserted street at night in a high crime area, or of getting drunk at a fraternity party, and George Putney would not be able to raise Andrew Vosburg’s alleged contributory negligence of failing to wear a shin guard on his injured leg. See Harper, James & Gray, The Law of Torts § 22.5 n.6 (2d ed. 1986). The defense seems more likely to be allowed when the defendant’s tortious intent was of the “knowledge of a near certainty” type rather than the purposeful type.

A controversial section in the Restatement Third on Apportionment takes no formal position on whether the defense of contributory negligence should be generally available in intentional tort actions in comparative responsibility jurisdictions. However, the comments seem to favor its being generally available, with exceptions for unspecified situations in which the plaintiff has “no duty to take care.” See Restatement Third: Apportionment § 1 comments b and c and related Reporters’ Notes. A proposed amendment to have the Restatement state that the contributory negligence defense should, as in the past, generally not be available in intentional tort actions failed by a narrow vote. American Law Institute, Proceedings of the Annual Meeting (May 1999).

5. IMMUNITIES

Sovereign immunity. Traditionally, the government as “sovereign” has been considered to be immune from tort (or any other form of) liability, except insofar as it consents to suit. This governmental immunity has been the subject of considerable criticism, and it has been legislatively or judicially limited in every jurisdiction in the United States, and eliminated or limited in other countries. The extent of the immunity is generally defined by statutes, which are often quite complex. The scope of the immunity has been broadened recently in a number of jurisdictions as part of the legislative reactions to the latest liability insurance “crises.” However, if the governmental conduct is a violation of some constitutionally guaranteed right, such as the right not to have property taken without payment of just compensation, or the right not to be deprived of life or liberty without due process of law, an action can be maintained—usually (except in cases of unconstitutional takings of property) against the official involved rather than the government itself—regardless of whether or not there has been a statutory waiver of sovereign immunity. See Restatement Second §§ 895A-D; Prosser & Keeton §§ 131-32.

Charitable immunity. Following an English opinion handed down in 1846 which was overruled two decades later, courts in the United States during the last half of the
nineteenth century held that charities were immune from tort liability. This immunity for charities has by now been abolished in all but a few jurisdictions, and where it is retained there usually is provision for liability to the extent of any liability insurance. See Restatement Second § 895E; Prosser & Keeton § 133 at 1069-71.

**Spousal immunity.** Until recently, there generally was immunity against tort liability for suits by one spouse (who usually was the wife) against the other, whether for negligence or intentional injury. The immunity between husband and wife originally was based on the common law conception that, upon marriage, their previously separate legal identities were merged into a single legal entity, under the sole control of the husband, for all or almost all legal purposes (contracting, ownership of property, filing of lawsuits, etc.). This rationale for nonliability foundered upon the passage of the Married Women’s Property Acts during the last half of the nineteenth century, which recognized a married woman’s separate legal identity and her concomitant rights to contract, own property, and sue and be sued. Courts generally held that these statutes abrogated the spousal immunity for tortious injuries to property, but they preserved the immunity for tortious injuries (whether negligent or intentional) to the person. The new rationales for such immunity were (1) fears of fraudulent and collusive claims (e.g., to collect on insurance policies) and (2) concerns that litigation of valid claims would disrupt the peace and harmony of the family. Both rationales were heavily criticized by legal scholars and attacked frequently in the courts, and the immunity has been abrogated in whole or part in most jurisdictions. See, e.g., Moran v. Beyer, 734 F.2d 1245 (7th Cir. 1984); Restatement Second § 895F; Prosser & Keeton, supra, § 122 at 901-04, 909-10.

**Parent-child immunity.** There was no similar legal fiction of the unity of parent and child. Minor children had their own separate legal identities and thus could own property and (as we have seen in cases like Vosburg and Garratt) could sue and be sued. Tort suits between parents and their minor children were allowed for injuries to or interference with property, and are thought to have also been allowed under the early common law for personal injuries. However, at the end of the nineteenth century courts in the United States began to hold that minor children could not sue their parents for personal injury, even if it was intentionally inflicted, and vice versa (the former situation arising much more frequently). The rationales given were similar to those for spousal immunity, and were similarly criticized, but also included concerns about protecting parental authority to discipline and parental discretion in providing necessities such as food, shelter, clothing, education and medical treatment. The immunity was never extended to suits among siblings, although some of the same rationales would seem to apply. The parent-child immunity for personal injury has given way more slowly than the spousal immunity, but it also has been abrogated in whole or part by most jurisdictions, especially for intentionally inflicted injury. However, legislatures and courts have been careful not to intrude on the reasonable exercise of parental authority to discipline or parental discretion to provide necessities. See Restatement Second §§ 895G & 895H; Prosser & Keeton § 122 at 904-09.