

Chapter I

TRIAL COURT PROCEDURE IN TORTS CASES

Almost all of the cases in this book were decided by appellate courts. It is necessary to study appellate decisions: The opinion of an appeals court is usually the earliest available written record of a tortious occurrence and its treatment by the legal system. But the appellate focus has its drawbacks. Reading the decision of an appellate court to determine what happened at the trial of a torts case—or trying to look even further back in time at what went wrong between the parties to cause them to become adversaries in the first place—is something like looking through the wrong end of a telescope: One can see, but mastering the relevant details demands a certain amount of determination and skill.

The proper starting point in studying an appellate decision is always to ask what the appellate court is telling the trial judge about the handling of this particular case. It is obvious that a torts case comes to an appellate court because at least one of the parties is dissatisfied with the way things turned out in the trial court. What may not be so obvious is that the appellant (the party who initially brings the case to the appellate court) must be complaining of some mistake that the trial *judge* has made. It is not enough to tell the appellate court that the result was unjust or that the jury got the wrong answer. The appellant must pinpoint an error of law committed by the trial judge; otherwise the appeal has no chance.

So when reading an appellate decision, the first thing to look for is, *what does the appellant claim the trial judge did wrong?* You should be able to find the answer to that question for all the lead cases in this book. But you need a rudimentary understanding of trial court procedure to do it. The following material outlines the principal stages at which a trial judge is likely to commit an appealable error while handling a torts case. It is loosely based on the model of a trial judge sitting with a jury and operating under the Federal Rules of Civil Procedure. Nowadays most state procedural systems are patterned closely enough after the federal rules that the model is reasonably instructive.

Note that the following discussion proceeds through the torts lawsuit in roughly chronological order, beginning with the filing of the plaintiff's complaint. You should bear in mind that most torts cases are settled (compromised) by agreement of the parties, either before the complaint is filed or at some stage thereafter. Settlements can occur at any stage of the litigation, including the appeal process.

A.

The plaintiff initiates the lawsuit by filing a complaint and causing it to be served on the defendant. The complaint sets forth the facts that plaintiff contends should mean the defendant is obliged to pay damages to the plaintiff.

The defendant's first response can be a motion to dismiss the complaint for failure to state a legally valid claim. What this response says, in effect, is this: Let us assume for purposes of argument that every fact alleged in the plaintiff's complaint is true; even so, it is clear that the law affords no relief, so that the complaint must simply be dismissed, without further ado. For example, suppose that my complaint against you alleges that, as I was jogging past your house, you caused me great emotional anguish by calling out, "You're too old to go out for track, Grandpa." Your motion to dismiss does not admit or deny the accuracy of my complaint, but contends that, even if it is true, it does not describe tortious conduct on your part; ordinary everyday insults are not torts. A trial judge who failed to grant your motion would be making a mistake about tort law.

B.

The defendant's motion for summary judgment is similar in content and intended effect to the motion to dismiss. The significant difference is that the motion to dismiss is directed solely at what the plaintiff has claimed in the complaint, whereas with the motion for summary judgment the defendant brings additional facts to the court's attention. For example, suppose that my complaint alleges that you deprived me of my liberty by keeping me locked for a period of three months in a room in premises owned and occupied by you. Suppose that your response is a summary judgment motion, accompanied by affidavits attesting that you are a duly accredited psychiatrist and the director of a sanitarium properly licensed by the state, and by a certified copy of the court order whereby I was judicially committed to your institution for three months of psychiatric care and observation. Unless I have further facts, your motion for summary judgment should be granted. (A motion to dismiss the complaint would not by itself have killed this lawsuit, because the key facts did not appear from the complaint I filed.)

Summary judgment is an important tool, and present-day courts use it much more frequently than in the past. When reviewing a trial judge's grant or denial of summary judgment, appellate courts usually begin their opinions by reciting a standard test for when summary judgment is

appropriate. (We have edited these out of the cases in this book.) A typical rendition is the following:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the non-moving party lacks evidence to support an essential element of its case. In response, the non-moving party must present significant probative evidence to show that there is more than some metaphysical doubt as to the material facts. Summary judgment will not lie if the dispute is about a material fact that is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party.

In evaluating a motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. The non-moving party, however, may not rest upon its mere allegations but must set forth specific facts showing that there is a genuine issue for trial. The existence of a scintilla of evidence in support of the non-moving party's position will not be sufficient; there must be evidence on which the jury could reasonably find for the non-moving party.¹

C.

If the case is not dismissed at a preliminary stage, the defendant must file an answer to the plaintiff's complaint. The answer is a fact pleading in which the defendant typically denies the plaintiff's version of the facts and sets forth the defendant's version. (If the case gets that far, eventually a jury will decide which version, if either, is accurate.) The complaint and answer are the only essential pleadings, and once they are on file the case is formally in a posture to be tried. The parties will doubtless spend a great deal of time investigating and negotiating, and they may generate disputes about discovery² that need sorting out by the trial judge, but (unless a summary judgment motion is filed after the defendant has answered, which frequently happens) the next major involvement of the trial judge will come when the trial begins.

D.

When the trial date arrives, the lawyers and the judge must first select a jury. If the judge permits it, the lawyers will begin trying to influence the potential jurors at this earliest opportunity, and occasionally an appellant in a torts case will urge that the trial judge erred by

1. Hunley v. DuPont Automotive, 341 F.3d 491, 495-96 (6th Cir. 2003) (citations and internal quotation marks omitted).

2. Discovery is the process of investigating a case that follows the initiation of a

lawsuit. It includes written interrogatories, depositions, and other formalized evidence-gathering procedures.

permitting improper and prejudicial remarks to be made during the jury selection process.

E.

When the jury selection process is finished, the lawyers for the parties may then make opening statements, each outlining a theory of the case and alerting the jury to what the evidence will show. A trial judge may commit reversible error at this stage by permitting counsel to make improper remarks (or by forbidding proper remarks) during opening statement. But again, this is relatively rare.

F.

Once the opening statements have been completed, the plaintiff's lawyer puts on the case in chief on behalf of the plaintiff. This involves questioning witnesses under oath and, often, introducing documents into evidence. During this phase of the case the lawyer for the defendant will have the opportunity to cross-examine each witness and to object to the admissibility of documents and other evidence offered by the plaintiff. The trial judge must rule on these objections, and may commit reversible error by allowing the introduction of evidence that should have been kept out or by excluding evidence that should have been let in. For example, the defendant/appellant in *South v. National R.R. Passenger Corp.*, 290 N.W.2d 819 (N.D.1980), urged that the jurors, who found the defendant railroad guilty of negligence in causing a grade crossing accident, had been prejudiced by being allowed to hear irrelevant testimony that the train's engineer refused to put his jacket over an injured man after the wreck because he did not want to soil it. The appellate court reasoned that such testimony would not be irrelevant if the engineer had a tort-law duty to render aid, and concluded that he did.

G.

Eventually the plaintiff's lawyer will complete the presentation of the case in chief on behalf of the plaintiff. At this point the defendant may file a motion for a directed verdict.³ This motion says, in effect: Now that we've heard all of the evidence the plaintiff has to offer, it is plain that the plaintiff has not shown a sufficient basis for holding defendant responsible under the law. (The plaintiff cannot file a motion for directed verdict at this point, because defendant has not yet put on its factual case.)

For example: My complaint alleges that you ran over me at the corner of 5th and Congress in Austin, Texas, on November 11, 2003. But all I can show at trial is that I was hit by a late-model green Ford sedan and that you own such a car. Your motion for directed verdict should

³ Rule 50 of the Federal Rules of Civil Procedure has been changed relatively recently to rename the motion for directed verdict and the motion for judgment notwithstanding the verdict. Both are now

called "motions for judgment as a matter of law" (JAML). For this book's purposes, the older terminology, which is still in use in many states, is preferable.

succeed; I have not produced facts from which a reasonable juror could conclude that, more probably than not, you were a cause of my injuries. (In most modern procedural systems, when a judge grants a directed verdict, there is nothing for the jury to do; the judge simply enters judgment for the prevailing party.)

H.

If the trial judge denies the defendant's motion for directed verdict at the conclusion of plaintiff's case in chief, the defendant will then put on its case in chief, with plaintiff's lawyer having the opportunity to cross-examine witnesses and object to the introduction of evidence. (Here again the trial judge may commit reversible error by letting in evidence that should be kept out or keeping out evidence that should be let in.)

When defendant's lawyer announces that the case in chief for defendant has been concluded, plaintiff may have the opportunity to offer certain rebuttal evidence. Once that is done, the trial judge (and jury) have heard all the evidence that the parties will present. At this stage either party may move for a directed verdict. If the trial judge believes that there is only one reasonable outcome, he will grant one of these motions.

For example: My complaint alleges that you ran over me at the corner of 5th and Congress in Austin on November 11, 2003. Suppose my trial evidence shows that I was struck and injured on that date by a recklessly driven yellow Bentley with Texas license plates; that in 2003 you owned a yellow Bentley with Texas plates; and that in 2003 there was only one Bentley automobile registered in the state of Texas. Probably your motion for a directed verdict at the close of my case in chief will fail, because the evidence produced at the trial creates a permissible inference that I have correctly identified the tortfeasor. So you put on your case in chief, proving that your Bentley was stolen from you on November 10, and also proving that you were in New York all day on November 11. Your motion for directed verdict should now succeed; clearly, on all the evidence in the case, I have not met my fundamental burden of proving that you caused me an injury.

Defendants' motions for directed verdict are granted with some frequency, and the legal standard for when a directed verdict is appropriate is well established:

In ruling on the motion, the court must take the strongest legitimate view of the evidence in favor of the non-moving party. In other words, the court must remove any conflict in the evidence by construing it in the light most favorable to the non-movant and discarding all countervailing evidence. The court may grant the motion only if, after assessing the evidence according to the foregoing standards, it determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence.⁴

4. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994).

I.

Even if inclined to believe that there is only one reasonable outcome, the trial judge may well deny a directed verdict motion made at the conclusion of all the evidence. (For one thing, as will be seen in a moment, the judge will have another chance to rule for the party who should prevail.) If the trial judge does not grant a motion for directed verdict at the close of the evidence, the lawyers will then make their closing arguments.⁵ The judge may commit reversible error by permitting improper closing argument or, conceivably, by forbidding appropriate closing argument.

J.

After the lawyers' closing arguments, the trial judge instructs (or "charges") the jury on the law they are to apply. Here is perhaps the most fertile source of claims of trial court error. The jury may be told something that is inaccurate or misleading; they may be told too much; they may be told too little. Probably no one fully believes that human beings actually conform their actions and decisions to refined and prolix verbal formulations of the sort often used in jury instructions. Nevertheless, the system's traditions tend to insist on great precision and conformity. See, e.g., *Bengston v. Estes*, 260 Wis. 595, 51 N.W.2d 539 (1952), reversing because the instructions said "clear preponderance of the evidence" instead of "fair preponderance of the evidence."

K.

When closing arguments and instructions are done, the jury retires, deliberates, and returns with a verdict. At this point the winner moves for judgment on the verdict, and the disappointed litigant (there is guaranteed to be at least one) can move for judgment notwithstanding the verdict or for a new trial.⁶

The motion for judgment notwithstanding the verdict (often called judgment non obstante veredicto and abbreviated JNOV) has exactly the same theory and content as the motion for directed verdict at the conclusion of the evidence. So why would a trial judge ever deny a directed verdict motion and then turn around and grant JNOV? It is a purely pragmatic move. If the directed verdict motion is granted and the

5. In most systems, closing arguments by the lawyers precede the judge's instructions to the jury. A few states do it backward.

6. Other possible post-verdict motions include motions for remittitur or additur. The defendant's remittitur motion asserts that the damages awarded by the jury are unreasonably high. If the trial judge grants

the motion, the plaintiff is forced to choose between accepting a specified reduction or submitting to a new trial. The additur motion is just the opposite; the plaintiff claims that the jury's damage award is so low as to defy reason, and seeks to have the defendant forced to choose between agreeing to a specified addition or undergoing a new trial. The federal procedural system does not have the additur device, but most states do.

appellate court eventually disagrees, the case will have to be retried, because the jury never got to rule on it. But if the appellate court disagrees with JNOV, the jury verdict can simply be reinstated.

The motion for JNOV, like the directed verdict motions, asserts that there is only one reasonable and correct outcome and thus seeks a dispositive judgment in the movant's favor. The assertion of a motion for a new trial—whereby the movant seeks not a dispositive judgment in its favor but rather a second chance—is somewhat weaker; it claims in effect that the jury's verdict looks very peculiar and that errors of sufficient importance occurred during the trial to suggest rather strongly that the jurors were prejudiced or misled.

L.

In summary, here are the major stages at which trial judges make tort-law mistakes:

1. Granting or denying motions to dismiss the complaint.
2. Granting or denying motions for summary judgment.
3. Permitting improper statements by counsel (or squelching proper ones) during jury selection, opening statement, or closing argument.
4. Excluding relevant evidence or admitting improper evidence.
5. Granting or denying motions for directed verdict.
6. Erroneous jury instructions.
7. Granting or denying motions for judgment notwithstanding the verdict.
8. Granting or denying motions for new trial, additurs, or remittiturs.

Chapter II

INTENTIONAL HARMS TO PERSONS AND PROPERTY

A. INTRODUCTION

The cases in this chapter deal with several torts that share a similar analytical structure. They are battery, assault, false imprisonment, intentional infliction of emotional distress, trespass to land, trespass to chattels, and conversion. Each is an intentional tort, meaning that the plaintiff can recover only if the defendant intentionally invaded the specific interest that is protected by the tort. The torts differ from each other in that they protect different interests of the plaintiff.

For each tort, the plaintiff must prove the “elements” of the tort in order to recover. (Some courts call these elements the plaintiff’s “prima facie case.”) The plaintiff has the burden of introducing evidence tending to prove every element in order to avoid suffering a directed verdict, that is, in order to have the case submitted to the jury. If the plaintiff does produce evidence on every element and the case is submitted to the jury, the plaintiff has the burden of persuading the jury that every element has been met. Even if the plaintiff proves every element of a tort, the defendant can nevertheless escape liability by establishing a defense. The defendant has the burden of producing evidence and persuading the jury on these defenses.

The material is organized to address the elements of each of the several torts and then to address defenses. Although the defenses applicable to each tort are not identical, considerable overlap exists among the available defenses. As you study the elements of each tort, keep in mind that proof of these elements does not guarantee recovery by the plaintiff. A defense, especially consent, may be available to the defendant.

Causation is an element of each of the torts covered in this chapter. Indeed, causation is an element of all tort actions. Issues concerning causation can be difficult. They are addressed in detail in Chapter IV.

Causation is not specifically addressed in this chapter, but you should nevertheless be aware that causation is an element of these torts, and the plaintiff must prove it.

B. BATTERY

GHASSEMIEH v. SCHAFER

Court of Special Appeals of Maryland, 1982.
52 Md.App. 31, 447 A.2d 84.

MOORE, JUDGE.

In this case, a 13-year-old girl in eighth grade pulled a chair away from her teacher who fell to the floor, hurting her back. Approximately one month less than three years later, the teacher filed a negligence action against her former pupil in the Circuit Court for Baltimore County (Sfekas, J.). From a judgment for the defendant, this appeal is taken. For the reasons stated herein, we shall affirm.

* * *

The appellant, Karen B. Ghassemieh, age 29 on February 24, 1977, was a teacher of art with the Baltimore County Schools, assigned to Old Court Junior High. On that date, she was teaching an 8th grade class of "above average" students, including the appellee, Elaine Schafer, then 13. While the teacher was about to sit down to assist another student, Elaine pulled the chair away. At trial the teacher described what happened:

I got to Terri's seat and because I am very tall it is my practice either to kneel down next to the children or to sit down. Terri got up very quickly and I went to sit in her seat. As I went to sit down, I tucked the chair underneath me as I usually do. As I relaxed to sit down, the chair was gone. It was pulled out and I fell to the floor hurting my back.

Elaine Schafer testified that she pulled the chair away "as a joke." She further testified on direct examination:

Q. When you pulled the chair, was there any doubt in your mind that she would miss the chair and fall to the floor?

A. I knew she was going to fall to the floor.

Q. Was that your intent?

A. Yes.

On cross-examination she repeated that, "I did it as a joke." She also said that she did not intend any injury. Thus:

Q. You mean you did not intend to have any harm done to her, is that right?

A. I intended for her to fall to the floor, not for her to be injured.

The declaration was not filed until January 24, 1980, although in answers to interrogatories, Mrs. Ghassemieh said she was treated for back problems throughout 1977 and 1978.²

* * * At the close of the evidence, each side moved for a directed verdict. * * * The appellee's (defendant's) motion was predicated on a claim that the evidence established a battery, an intentional tort, and not negligence, as alleged.

Both motions were denied. With respect to the defendant's motion, the court ruled:

As to the motion of the defendant, the Court will deny that motion, but I will include in the instructions the definition of a battery and let the jury make the determination whether this in fact was, if it was a negligent act on the part of the defendant or if in fact it was a battery, which would certainly not be encompassed in the action brought by the plaintiff in this case, but I would allow that to go to the jury by way of instruction.

Before the judge instructed the jury, the following exchange occurred:

MR. CASKEY (counsel for defendant/appellee): I would move that the Court present the question to the jury as a question as to the battery versus negligence issue. I would request that the jury be given the instructions as to what constitutes negligence and as to what constitutes battery and to have them answer the question—do you find that it was negligence, battery, or neither?

MR. HUESMAN (counsel for plaintiff/appellant): Well, I think, Your Honor, before I respond to that, I guess a lot would depend on exactly the way the questions are phrased.

In the instructions which immediately followed, the court began by saying: "The case before you is an action based on a claim of negligence." * * * The court then instructed on battery, as follows:

The Court has indicated that this is an action in negligence. A *battery is an intentional touching which is harmful or offensive*. Touching includes the intentional putting into motion of anything which touches another person or the intentional putting into motion of anything which touches something that is connected with or in contact with another person. A touching is harmful if it causes physical pain, injury or illness. A touching is offensive if it offends a person's reasonable sense of personal dignity.

If you find that the defendant acted with the intent to cause a harmful or offensive touching of the plaintiff and that that offensive

2. This action was brought almost three years after the incident. However, appellant began experiencing back pain in March 1977, a month or so later; she had a myelogram then and again in early 1978. In September 1978, she had a spinal fusion. We

observe that appellee did not plead the one-year statute of limitations, Md.Cts. & Jud. Proc.Code Ann., § 5-105 (1980 Repl.Vol.), governing battery, but she had no occasion to do so in light of the allegations in the declaration.

touching directly or indirectly resulted, then this constitutes a battery and your verdict must be for the defendant, as this suit has been brought in negligence and is not an action in battery. (Emphasis added.)

At the conclusion of the instructions, trial counsel for the plaintiffs (appellants) excepted as follows:

*Also, we except to the portion of the charge with regard to the definition of battery. * * * We believe that it is necessary to show that the defendant actually intended to harm the plaintiff and we believe on the basis of the defendant's own testimony that she did this as a joke, that she had no intention to commit bodily harm. (Emphasis added.)*

The trial court overruled all objections. With respect to the battery objection, the court did not address the definitional point raised, but said:

The battery instruction, the Court felt was appropriate in view of the fact that this is an action in negligence, and if the jury would find from hearing the testimony in the case that in fact there was a battery and not negligence, it may very well have the opportunity to make a determination in favor of the defendant.

Approximately 25 minutes after the jury retired, the court received a request that the definition of battery be given again. Counsel for the teacher objected. The court stated that, in the absence of agreement of counsel, it would decline to repeat the instruction. One-half hour later, the jury returned a verdict for the defendant.

* * *

The gravamen of the plaintiffs' appeal is that the trial court erred in giving the following portion of the instruction on battery quoted above:

If you find that the defendant acted with the intent to cause a harmful or offensive touching of the plaintiff and that that offensive touching directly or indirectly resulted, then this constitutes a battery and your verdict must be for the defendant, as this suit has been brought in negligence and is not an action in battery.

In support of this principal contention, appellants maintain that:

(1) The mere fact that the evidence adduced may have established that the defendant acted intentionally in pulling the chair out from under the appellant, Karen B. Ghassemieh, does not preclude recovery of damages for a cause of action in negligence.

* * *

(3) To permit the defendant to escape liability for her tortious conduct merely because she acted intentionally, rather than negligently, would be fundamentally unjust and contrary to public policy.

We are confronted with a threshold consideration not raised by the appellee and, therefore, neither briefed nor argued but essentially juris-

dictional: Was the appellants' objection to the battery instruction, quoted above, a sufficient predicate for their position on appeal? They now argue:

The instruction given by the trial judge was improper because if the jury had found that the defendant acted intentionally in pulling the chair out from under the appellant, Karen B. Ghassemieh, it could nevertheless have awarded damages for negligence.

And further:

Thus, a finding of gross negligence or of willful and wanton misconduct may impute a finding of intentional conduct. Consequently, a finding that the appellee had acted intentionally would have been fully consistent with the allegations of the declaration charging negligence. The trial court, therefore, erred in instructing the jury to the contrary. While it is clear that [appellee] intended to pull the chair out from under Mrs. Ghassemieh, it is equally clear that she did not intend to injure Mrs. Ghassemieh.

Our problem arises from Maryland Rule 554 (Instructions to the Jury) (1982 ed.), particularly subsections (d) and (e) concerning, respectively, "objection" and "appeal." Subsection (d) provides in part:

If a party has an objection to any portion of any instruction given, or to any omission therefrom, or the failure to give any instruction, *he shall before the jury retires to consider its verdict make such objection stating distinctly the portion, or omission, or failure to instruct to which he objects and the ground of his objection.* (Emphasis added.)

And subsection (e) provides in its entirety:

Upon appeal a party in assigning error in the instructions, *shall be restricted* to (1) the particular portion of the instructions given or the particular omission therefrom or the particular failure to instruct *distinctly objected to before the jury retired* and (2) *the grounds of objection distinctly stated at the time, and no other errors or assignments of error in the instructions shall be considered by the appellate court.* (Emphasis added.)

Trial counsel for the plaintiffs did not object, as appellate counsel now objects, to *any* instruction on battery, but only to "that portion of the charge with regard to the *definition* of battery." (Emphasis added.) Trial counsel was objecting to the court's definition of battery as an "intentional touching which is harmful or offensive" * * *.

Trial counsel never stated as a basis for his objection that no instruction on battery should be given because this was an action in negligence. The objection at trial was simply that the definition of battery lacked an essential element, i.e., the defendant actually intended to harm the plaintiff. However, intent to do harm is not essential to a battery. The gist of the action is not hostile intent on the part of the defendant, but the absence of consent to the contact on the plaintiff's part. Thus, horseplay, pranks, or jokes can be a battery regardless of

whether the intent was to harm. *Garratt v. Dailey*, 46 Wash.2d 197, 279 P.2d 1091 (1955), *aff'd*, 49 Wash.2d 499, 304 P.2d 681 (1956).

Trial counsel never argued to the trial court that, as contended at oral argument before us, negligence and battery are not mutually exclusive, or that a single intentional act can be the basis for both battery and negligence, or that the jury could award damages for negligence even if a battery had also been proved. Only on appeal do appellants make clear their challenge to the instruction that “this suit has been brought in negligence and is not an action in battery” and if battery were found, “your verdict must be for the defendant.” The trial judge was not given to understand that the plaintiff really objected to any instruction on battery. The judge reiterated his negligence versus battery instruction in explaining why he felt the battery instruction was appropriate, and the plaintiff did not object.

Thus, the objection below did not reach the broader issue raised on appeal, and under Rule 554(e) it “may not be considered by the appellate court.”

* * *

[T]he presence of an intent to do an act does not preclude negligence. The concepts of negligence and battery are not mutually exclusive.

* * *

The plaintiffs in this case could properly have sought a negligence instruction * * *.

We see no reason why an intentional act that produces unintended consequences cannot be a foundation for a negligence action. Here, an intentional act—the pulling away of the chair—had two possible consequences: the intended one of embarrassment and the unintended one of injury. The battery—an indirect offensive touching, a technical invasion of the plaintiff’s personal integrity—was proved. However, a specific instruction on negligence—namely, that the defendant had a duty to refrain from conduct exposing the plaintiff to unreasonable risk of injury and breached that duty, resulting in her injury—was not requested. Nor was any exception made to the general negligence instruction that was given. Nor did the plaintiff at trial take the unequivocal position that she was proceeding on a theory of negligence, notwithstanding the co-existence of an intentional act, *i.e.*, a battery. In sum, appellants are asserting now the arguments they should have made at trial. Such hindsight can avail them nothing.

Judgment affirmed; appellants to pay the costs.

Note

Generally, a party can raise an issue on appeal only if counsel has “preserved” the issue by a timely and specific objection or request in the

trial court. As you read appellate opinions, you should look for the effect trial court procedure has on the posture of the case on appeal.

GARRATT v. DAILEY

Supreme Court of Washington, 1955.
46 Wash.2d 197, 279 P.2d 1091.

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 back yard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the back yard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial [judge, sitting without a jury], unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

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

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

(Italics ours, for a purpose hereinafter indicated.)

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

* * *

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. * * *

* * *

* * * In the comment [to section 13 of the Restatement of Torts] 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 * * * to a particular person, * * * the act must be done for the purpose of causing the contact * * * or with knowledge on the part of the actor that such contact * * * is substantially certain to be produced.

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 [to section 13 of the Restatement of Torts]:

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 * * *. Such realization may make the actor's conduct negligent or even reckless but unless he realizes that to a substantial certainty, the contact * * * 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. 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.

* * *

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

* * *

Remanded for clarification.

Notes

1. One of the issues in *Garratt* was whether a battery plaintiff is required to prove that the defendant intended injury. This is a legal issue that was also addressed by the court in *Ghassemieh*. Are the two cases in agreement?

2. You should distinguish the foregoing legal issue from the specific fact issue in *Garratt*, whether the defendant even intended that the plaintiff hit the ground.

On remand, the *Garratt* trial judge re-evaluated the facts in light of the Supreme Court's clarification of the law. He stated that in order to determine Brian's knowledge, "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.” He accordingly entered judgment in favor of the plaintiff, and on a second appeal the Supreme Court affirmed. 49 Wash.2d 499, 304 P.2d 681 (1956).

3. **Torts of young children.** Not all courts would impose battery liability upon a child of Brian Dailey’s age on facts like those of *Garratt*. The Supreme Court of Ohio, for example, held that a child under the age of seven cannot be held liable for an intentional tort, reasoning that “[o]ur laws and our moral concepts assume actors capable of legal and moral choices, of which a young child is incapable.” *DeLuca v. Bowden*, 42 Ohio St.2d 392, 329 N.E.2d 109, 111 (1975). Accord, *Queen Ins. Co. v. Hammond*, 374 Mich. 655, 132 N.W.2d 792 (1965). In a case involving defendants who were three and four years of age, the Supreme Court of Colorado rejected *Garratt*’s holding “that infants are liable for their intentional torts irrespective of intent to cause harm.” The infant need not intend or foresee the particular harm that resulted, but “must appreciate the fact that the contact may be harmful.” *Horton v. Reaves*, 186 Colo. 149, 526 P.2d 304, 307–08 (Colo. 1974).

The liability of a young child for negligence is considered in Chapter III.

4. **Intent to touch vs. intent to injure or offend.** Cases involving adult defendants can present similar problems and similar judicial disagreements. In *White v. University of Idaho*, 118 Idaho 400, 797 P.2d 108 (1990), a music professor approached the seated plaintiff, a longtime acquaintance, from behind “and touched her back with both of his hands in a movement later described as one a pianist would make in striking and lifting the fingers from a keyboard. The resulting contact generated unexpectedly harmful injuries * * *.” The professor denied any intent to harm or offend. The Idaho Supreme Court affirmed a partial summary judgment that the act constituted a battery; “under Idaho law the intent required for the commission of a battery is simply the intent to cause an unpermitted contact not an intent that the contact be harmful or offensive.” 118 Idaho at 401, 797 P.2d at 109. In *White v. Muniz*, 999 P.2d 814 (Colo.2000), an 83-year-old Alzheimer’s patient struck the jaw of a caregiver who was attempting to change her diaper. In the ensuing battery action, the trial court, relying upon *Horton v. Reaves*, note 3, *supra*, instructed the jury that in order to possess the necessary intent, the patient must have appreciated the offensiveness of her conduct. The jury found against the plaintiff. The Supreme Court of Colorado affirmed, rejecting plaintiff’s argument that *Horton* was limited to children and rejecting the reasoning of the Idaho court in *White v. University of Idaho*.

5. **The Restatement.** The Restatement of Torts, which the *Garratt* court quoted, is a summary of the law of torts that was prepared by Professor Francis Bohlen and was published by the American Law Institute. A newer version, called the Restatement (Second) of Torts, was prepared by Professors William Prosser and John Wade and was also published by the ALI. The ALI, which is composed of lawyers, judges, and law professors, is

currently in the process of producing the Restatement (Third) of Torts. The ALI has published the Restatement (Third) of Torts: Products Liability and the Restatement (Third) of Torts: Apportionment of Liability. It is moving toward completion of the Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles).¹ The Restatement is not authoritative in the sense that precedent in the relevant jurisdiction would be authoritative. Nevertheless, courts often cite the Restatement and are influenced by it. See, e.g., *Webber v. Sobba*, 322 F.3d 1032, 1037 (8th Cir. 2003) (using the Second Restatement to fill a hiatus in Arkansas law only after ascertaining that “[t]he Arkansas Supreme Court frequently looks to the Restatement to answer unsettled questions of tort law”).

The Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 1 (Tent. Draft No. 1, March 2001), defines intent as follows:

A person acts with the intent to produce a consequence if: (a) the person has the purpose of producing that consequence, or (b) the person knows to a substantial certainty that the consequence will ensue from the person’s conduct.

6. **Transferred intent.** Sometimes actual contact occurs, but the defendant intended only apprehension of contact or confinement. Intentionally causing apprehension of imminent harmful or offensive contact constitutes an assault. See section C, *infra*. Intentionally causing confinement constitutes false imprisonment. See section D, *infra*. In a case in which contact occurs but the defendant intends only apprehension or confinement, the defendant is still liable for battery, as though the defendant had intended the contact. Similarly, if the defendant intends actual contact but causes only apprehension or confinement, the defendant is liable for assault or false imprisonment respectively, as though the defendant had intended the apprehension or confinement. See Restatement (Second) of Torts §§ 18, 21 (1965).

A similar principle governs cases in which the defendant intends contact, apprehension, or confinement to one person but unintentionally causes contact, apprehension, or confinement to another person. The person who actually suffers the invasion can recover for battery, assault, or false imprisonment, respectively, on the theory that the defendant’s intent toward the first person “transfers” to the plaintiff. See Restatement (Second) of Torts §§ 18, 20, 21, 32 (1965).² This principle is often called “transferred intent.”

FISHER v. CARROUSEL MOTOR HOTEL, INC.

Supreme Court of Texas, 1967.
424 S.W.2d 627.

GREENHILL, JUSTICE.

This is a suit for actual and exemplary damages growing out of an alleged assault and battery. The plaintiff Fisher was a mathematician

1. The Third Restatement is a work in progress. At this writing it replaces some sections of the Second Restatement but not all. In our own text and notes we generally refer to the Second Restatement only when the Third has not addressed the subject. In principal cases we have left references to the earlier Restatements unchanged.

2. The Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles) § 5, cmt. *c* (Tent. Draft No. 1, March 2001) says “the Restatement Second remains largely authoritative in explaining the details of intentional-tort law.”

with the Data Processing Division of the Manned Spacecraft Center, an agency of the National Aeronautics and Space Agency, commonly called NASA, near Houston. The defendants were the Carrousel Motor Hotel, Inc., located in Houston, the Brass Ring Club, which is located in the Carrousel, and Robert W. Flynn, who as an employee of the Carrousel was the manager of the Brass Ring Club. Flynn died before the trial, and the suit proceeded as to the Carrousel and the Brass Ring. Trial was to a jury which found for the plaintiff Fisher. The trial court rendered judgment for the defendants notwithstanding the verdict. The Court of Civil Appeals affirmed. The question before this Court [is] whether there was evidence that an actionable battery was committed * * *.

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

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

The Court of Civil Appeals held that there was no assault because there was no physical contact and no evidence of fear or apprehension of physical contact. However, it has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.

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

from plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient." *Morgan v. Loyacomo*, 190 Miss. 656, 1 So.2d 510 (1941).

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

* * *

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

* * * Damages for mental suffering are recoverable without the necessity for showing actual physical injury in a case of willful battery because the basis of that action is the unpermitted and intentional invasion of the plaintiff's person and not the actual harm done to the plaintiff's body. Personal indignity is the essence of an action for battery; and consequently the defendant is liable not only for contacts which do actual physical harm, but also for those which are offensive and insulting. We hold, therefore, that plaintiff was entitled to actual damages for mental suffering due to the willful battery, even in the absence of any physical injury.

* * *

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

Notes

1. The court at some points describes the plaintiff's suit as one for "assault." Some courts, especially in older opinions, use the term "assault" to describe conduct that today would normally be called "battery."

2. Is it a battery to blow cigar smoke in the face of an anti-smoking activist during a radio talk show? Yes, according to *Leichtman v. WLW Jacor Communications, Inc.*, 92 Ohio App.3d 232, 634 N.E.2d 697 (1994).

3. Whether contact is offensive is judged by an "objective" standard, not a "subjective" standard. This means that a community norm defines offensiveness, not the idiosyncratic views of either the plaintiff or the defendant. Would you distinguish a defendant who actually knows that the plaintiff has an idiosyncratic objection to a touching that most people would consider to be innocuous? What arguments could a plaintiff make that a touching under such circumstances would be "objectively" offensive?

4. Note that the Carrousel Motor Hotel was liable on the basis of conduct of one of its employees. This is called "vicarious liability." General-

ly, an employer is liable for torts committed by employees within the scope of employment. Vicarious liability is addressed in Chapter VII.

C. ASSAULT

VETTER v. MORGAN

Court of Appeals of Kansas, 1995.
22 Kan.App.2d 1, 913 P.2d 1200.

BRISCOE, CHIEF JUDGE.

Laura Vetter appeals the summary judgment dismissal of her * * * assault * * * claim against Chad Morgan for injuries sustained in an automobile accident. * * *

Vetter was injured when her van ran off the road after an encounter with a car owned by Morgan's father and driven by Dana Gaither. Morgan and Jerrod Faulkner were passengers in the car. Vetter was alone at 1:30 or 1:45 a.m. when she stopped her van in the right-hand westbound lane of an intersection at a stoplight. Morgan and Gaither drove up beside Vetter. Morgan began screaming vile and threatening obscenities at Vetter, shaking his fist, and making obscene gestures in a violent manner. According to Vetter, Gaither revved the engine of the car and moved the car back and forth while Morgan was threatening Vetter. Vetter testified that Morgan threatened to remove her from her van and spat on her van door when the traffic light turned green. Vetter stated she was very frightened and thought Morgan was under the influence of drugs or alcohol. She was able to write down the license tag number of the car. Morgan stated he did not intend to scare, upset, or harm Vetter, but "didn't really care" how she felt. He was trying to amuse his friends, who were laughing at his antics.

When the traffic light changed to green, both vehicles drove forward. According to Vetter, after they had driven approximately 10 feet, the car driven by Gaither veered suddenly into her lane, and she reacted by steering her van sharply to the right. Vetter's van struck the curb, causing her head to hit the steering wheel and snap back against the seat, after which she fell to the floor of the van. Morgan and Gaither denied that the car veered into Vetter's lane, stating they drove straight away from the intersection and did not see Vetter's collision with the curb.

* * *

Vetter argues the trial court erred in dismissing her assault claim against Morgan. Assault is defined as "an intentional threat or attempt, coupled with apparent ability, to do bodily harm to another, resulting in immediate apprehension of bodily harm. No bodily contact is necessary." *Taiwo v. Vu*, 249 Kan. [585,] 596, 822 P.2d 1024 [(1991)] (quoting *PIK Civ.2d 14.01*).